Vol. I

TRANSCRIPT OF RECORD

(Pages 1 to 562)

Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 481

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, ET AL.,

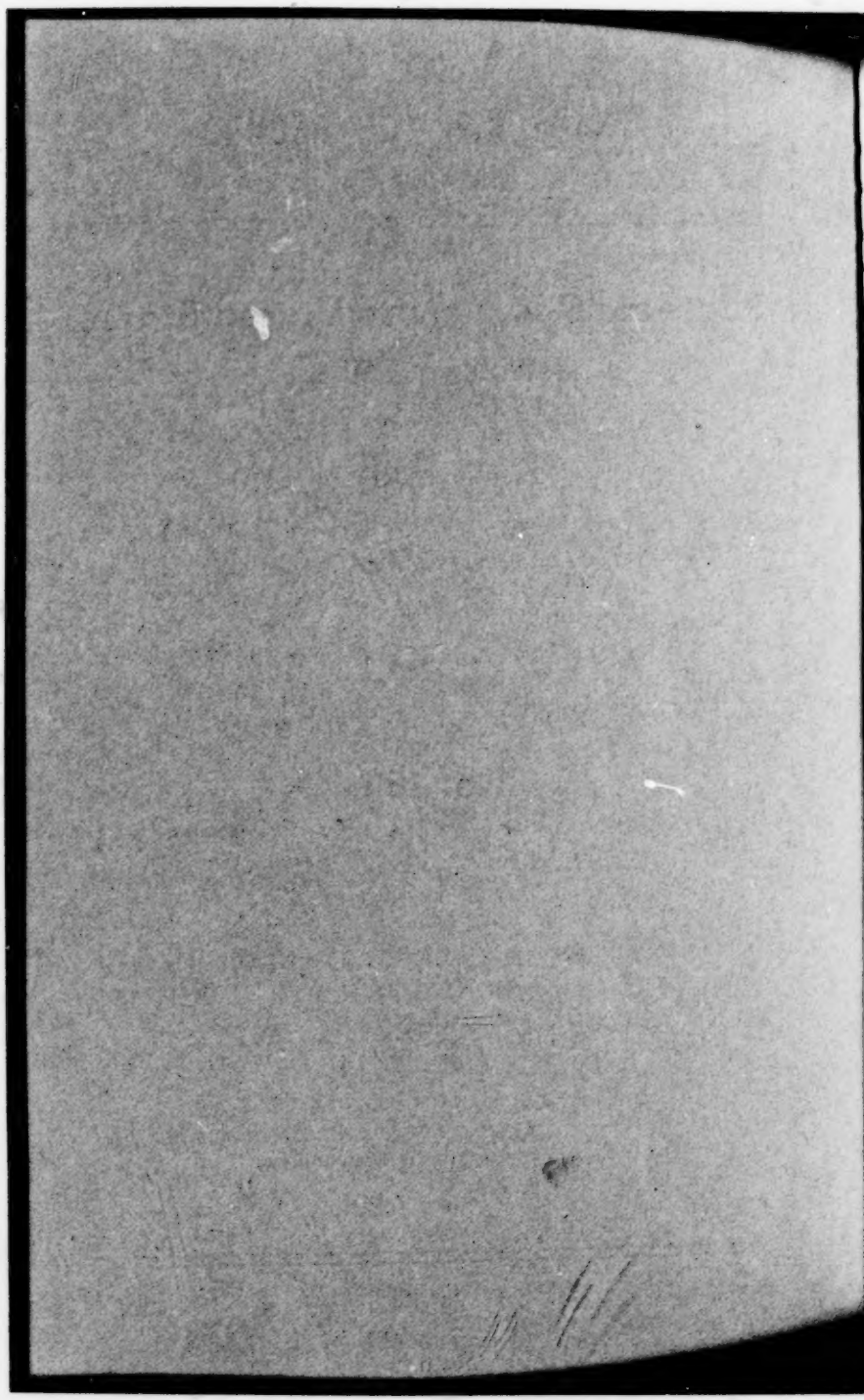
vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED NOVEMBER 27, 1953

Probable jurisdiction noted February 1, 1954



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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

No. 597, Orl.—Civ.

[fol. a]

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, Chase and Company, Nevins Fruit Company, Dr. P. Phillips Cooperative, The City of New York, The Port of New York Authority, California Citrus League, California Grape and Tree Fruit League, Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, B. M. Young, New York Fruit Auction Corporation, United Fruit Buyers' Association, Inc., United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and The Secretary of Agriculture of the United States, Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company, and Reading Company, Appellees

IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF FLORIDA

ORLANDO DIVISION

No. ——, Orl.-Civ.

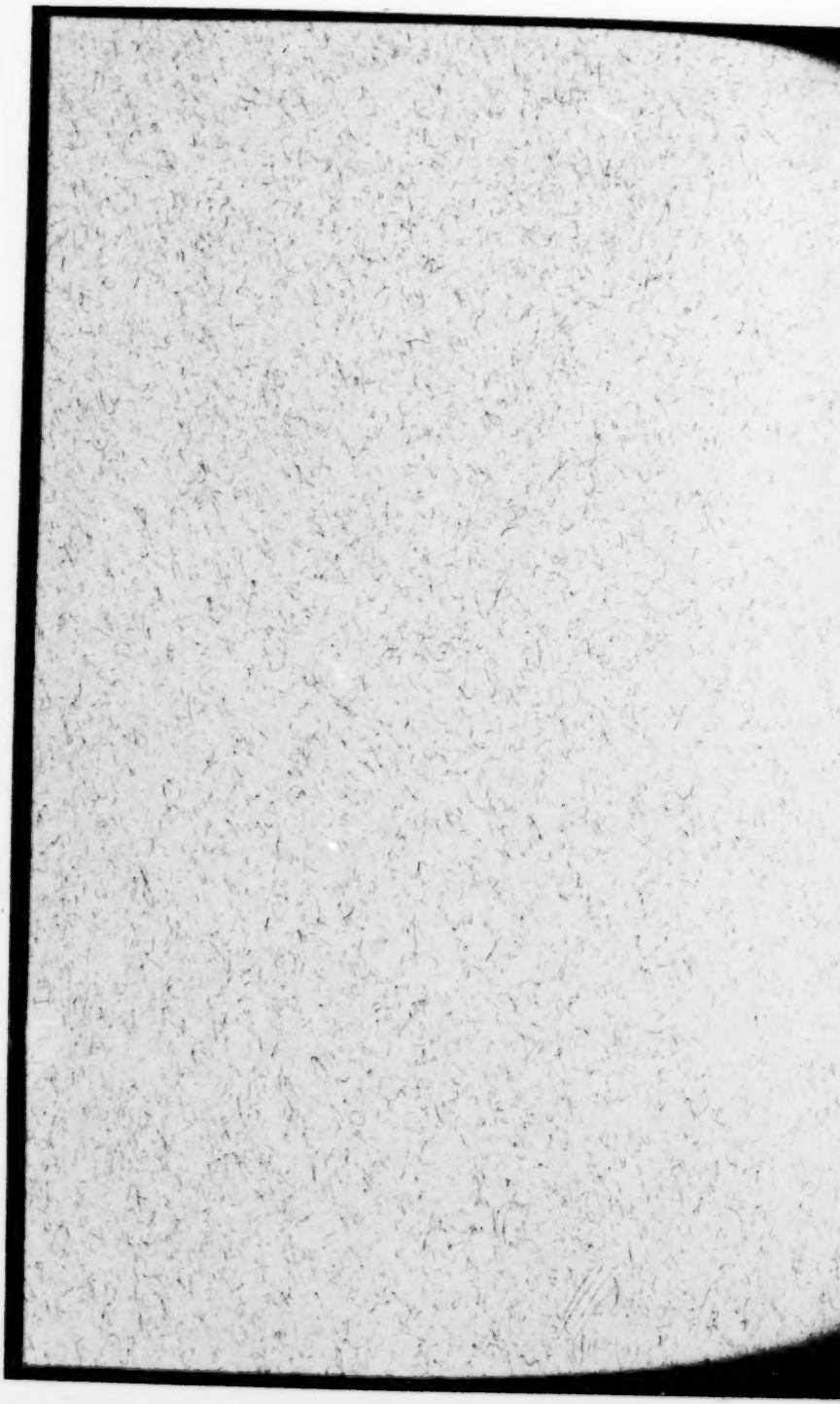
FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY, and DR. P. PHILLIPS COOPERATIVE, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants*.

COMPLAINT.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.



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IN THE

District Court of the United States

FOR THE SOUTHERN DISTRICT OF FLORIDA

ORLANDO DIVISION

No. ——, Orl.-Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY, and DR. P. PHILLIPS COOPERATIVE, *Plaintiffs*,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, *Defendants*.

COMPLAINT.

Florida Citrus Commission, Growers and Shippers League of Florida, Chase and Company, Nevins Fruit Company, and Dr. P. Phillips Cooperative, bring this complaint against United States of America and Interstate Commerce Commission, and for their complaint say:

1. Jurisdictional Allegations.

This action is one to enjoin, annul and set aside orders of the Interstate Commerce Commission as hereinafter more fully appears. This action is brought under the provisions of Title 28, United States Code, Sections 1336, 1337, 1398, 2321, 2322, 2323, 2324, 2325, and 2284.

2. Plaintiffs.

(a) Florida Citrus Commission was established and created by duly enacted statute of the State of Florida and is a body corporate and is the regulatory agency of the State of Florida charged under the Florida Citrus Code with the enforcement and administration of said laws of Florida, and it is authorized by said law, and particularly Section 601.14 Florida Statutes, to participate in any proceedings or hearings concerning the lawfulness of freight rates and charges affecting the Florida citrus industry, to the end that the Florida citrus industry may be fully protected in obtaining and enjoying just, reasonable and otherwise lawful transportation rates and charges. Its principal office is in Lakeland, Florida. It is interested in the controversy or question before the Interstate Commerce Commission in Investigation and Suspension Docket No. 5500, Unloading Charges on Fruits and Vegetables at New York and Philadelphia, and was a party in said proceedings and participated therein from the commencement thereof to the final order therein by the Interstate Commerce Commission. It is interested in the controversy or question before the Interstate Commerce Commission and was a complainant in Docket No. 31105, Florida Citrus Commission et al. vs. The Baltimore & Ohio Railroad Company et al., and in Docket No. 31106, Florida Citrus Commission et al. vs. The Baltimore & Ohio Railroad Company et al., before the Interstate Commerce Commission as hereafter more fully appears.

(b) Growers and Shippers League of Florida is a voluntary non-profit corporation organized and existing under the laws of the State of Florida. Its principal office is at 45 West Central Avenue, Orlando, Florida. Its members are growers and shippers of fresh citrus fruits and vegetables in and from Florida to New York, N. Y., and Philadelphia, Pa., and elsewhere in interstate commerce. It is the duly appointed transportation agency of the said Florida Citrus

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Commission. It and its members are interested in the controversy or question before the Interstate Commerce Commission in the aforesaid proceedings, viz: I. & S. Docket No. 5500, Docket No. 31105, and Docket No. 31106. It was a party in each of said proceedings and participated throughout said proceedings before the Interstate Commerce Commission.

(c) Chase and Company is a corporation organized and existing under the laws of Florida, with its principal office in Sanford, Florida. It grows and ships fresh citrus fruits and vegetables in and from Florida to New York, N. Y., and Philadelphia, Pa. It is a member of Growers and Shippers League of Florida, and through it participated in the said proceedings before the Interstate Commerce Commission, and is interested in the controversy or question before the said Interstate Commerce Commission in said proceedings, viz: I. & S. Docket No. 5500, Docket No. 31105, and Docket No. 31106.

(d) Nevins Fruit Company is a corporation organized and existing under the laws of Florida with its principal office in Titusville, Florida. It grows and ships fresh citrus fruit in and from Florida to New York, N. Y., and Philadelphia, Pa. It is a member of Growers and Shippers League of Florida, and through it participated in the said proceedings before the Interstate Commerce Commission, and is interested in the controversy or question before the said Interstate Commerce Commission, in said proceedings, viz: I. & S. Docket No. 5500, Docket No. 31105, and Docket No. 31106.

(e) Dr. P. Phillips Cooperative is a corporation organized and existing under the laws of Florida, with its principal office in Orlando, Florida. It grows and ships citrus fruit in and from Florida to New York, N. Y., and Philadelphia, Pa. It is a member of Growers and Shippers League of Florida, and through it participated in the said proceed-

ings before the Interstate Commerce Commission, and is interested in the controversy or question before the said Interstate Commerce Commission in said proceedings, viz: I. & S. Docket No. 5500, Docket No. 31105, and Docket No. 31106.

(f) The parties plaintiff named in the above sub-paragraphs (c), (d) and (e) are representative of the many members of the said Growers and Shippers League of Florida who grow and ship citrus fruit and vegetables in and from Florida to New York, N. Y., and Philadelphia, Pa. They are compelled to pay and bear the unloading charges herein specified on their shipments unloaded by the delivering railroads at New York, N. Y., and Philadelphia, Pa., prior to the time when said shipments are made available to them by said railroads for delivery.

3. Defendants.

(a) The United States of America is made defendant herein pursuant to Title 28, United States Code, Section 2322.

(b) The Interstate Commerce Commission is a commission and agency of the government of the United States of America, created and established by Act of Congress, February 4, 1887, Interstate Commerce Act as amended, Title 49, United States Code.

4. Purpose of Action.

(a) The purpose of this action is to enjoin, annul and set aside the Report of the Commission on Rehearing and Further Hearing (286 ICC 119) decided May 7, 1952, and the order of the Interstate Commerce Commission thereon dated May 7, 1952, in the proceeding entitled Investigation and Suspension Docket No. 5500, Unloading Charges on Fruits and Vegetables at New York and Philadelphia, and the final order of the said Commission dated December 15,

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1952, in Docket No. 31105, Florida Citrus Commission et al. v. The Baltimore and Ohio Railroad Company et al., and in Docket No. 31106, Florida Citrus Commission et al. v. The Baltimore and Ohio Railroad Company et al.

(b) A copy of the said Report of the Commission on Rehearing and Further Hearing, decided May 7, 1952, in said I. & S. Docket No. 5500, is hereto attached as Exhibit A and made a part hereof.

(c) The said Report (Exhibit A, 286 ICC 119) refers to "the prior report herein," and a copy of said prior report, 272 ICC 648, decided October 4, 1948, is hereto attached as Exhibit B and made a part hereof.

(d) A copy of the aforesaid order of May 7, 1952, in said I. & S. Docket No. 5500 is hereto attached as Exhibit C and made a part hereof.

(e) A copy of the said Order of the Interstate Commerce Commission in said Dockets Nos. 31105 and 31106, dated December 15, 1952, is hereto attached as Exhibit D and made a part hereof.

5. Record Before Interstate Commerce Commission.

(a) A certified copy of all pleadings and proceedings, transcript of testimony and all exhibits presented in evidence before the Interstate Commerce Commission in said I. & S. Docket No. 5500 will be presented to the Court and offered in evidence at the hearing in this action.

(b) A certified copy of the complaint, defendant railroads' motion to dismiss, petitions for leave to intervene and orders thereon, complainants' reply to the defendants' said motion to dismiss, and the aforesaid Order of the Commission dated December 15, 1952, in said Dockets Nos. 31105 and 31106, will be presented to the Court and offered in evidence at the hearing in this action.

6. Controversy or Question Before the Interstate Commerce Commission.

(a) From the time of first delivery of fruits and vegetables on Manhattan Island, New York, carload shipments of fresh fruits and vegetables originating in various parts of the country, such as Florida and California, consigned to New York, N. Y., and Philadelphia, Pa., have been transported in interstate commerce by the railroad common carriers from said origins to New York, N. Y., and Philadelphia, Pa., and there delivered upon payment of the lawfully assessed transportation charges in accordance with freight tariffs duly filed with the Interstate Commerce Commission as provided by law. The through line-haul freight rates include the entire service of transportation from origin to and including delivery at destination.

(b) At no time prior to November 1, 1948, as hereafter set forth, were any separate charges for unloading at New York, N. Y., or at Philadelphia, Pa., assessed in addition to the transportation or line-haul charges. The compensation received by the railroads for delivery (including unloading by the railroads) was included in the amounts paid for transportation or line-haul freight charges.

(c) In 1947, for the first time, the terminal or delivering rail carriers at New York, N. Y., and Philadelphia, Pa., proposed by tariff schedules filed with the Interstate Commerce Commission to become effective June 1, 1947, to establish charges for unloading carload shipments of fresh fruits and vegetables at New York, N. Y., and Philadelphia, Pa. Upon protests of the plaintiffs herein, Florida Citrus Commission and Growers and Shippers League of Florida and of numerous other shippers and shipper organizations, the Port of New York Authority, and other interests, the operation of the schedules was suspended by Order of the Interstate Commerce Commission to and including December 31, 1947. Said Order instituted the

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investigation entitled Investigation and Suspension Docket No. 5500, Unloading Charges on Fruits and Vegetables at New York and Philadelphia. Neither the origin railroads as a whole nor the intermediate connecting carriers were parties to said tariffs nor to the proceedings before the Interstate Commerce Commission as hereafter set forth. The delivering rail carrier respondents voluntarily deferred the effective date of the said unloading charges pending determination of the Investigation and Suspension proceeding.

(d) The said tariff schedules so proposed to become effective for the first time on June 1, 1947, stated unloading charges as follows for addition to the line-haul rates:

	Per net ton
Citrus fruits	$1.50
Fresh fruits (other than citrus)	1.75
Melons (including cantaloupes)	2.00
Vegetables, fresh or green, not cold pack or frozen	1.50
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.00

(e) It is stated on page 649 of 272 ICC that the delivering railroads' "proposals reflect an effort on the part of the delivering lines to secure increased revenues from the fruit and vegetable traffic terminated at New York and Philadelphia. No charges such as those proposed have applied on this traffic in the past. These charges would accrue solely to the delivering lines. Other carriers have taken no interest in this proceeding. The principal lines that would benefit from the proposals are the Baltimore & Ohio, Erie, New York Central, Pennsylvania, and the Reading."

(f) From the beginning of rail transportation of citrus fruits, other fruits and fresh vegetables from Florida, California, and other States of origin, to New York, N. Y., the

movement by rail has been to the Jersey Shore, thence by car floats (on which rail tracks are fixed, upon which the cars are placed) across the Hudson River to the Produce Terminals or railroad stations on the piers on the Manhattan Island side of the Hudson River. The railroad cars, containing the carloads of citrus fruits, other fruits or fresh vegetables, remain on the car floats while the latter are alongside the pier stations, and the cars are not moved onto the piers. The New York, N. Y., pier stations involved include: The Baltimore & Ohio Railroad Company Pier 22, North River; Erie Railroad Company Duane St. Station (Piers 19, 20 and 21); and Pennsylvania Railroad Company Produce Terminal (Piers 27 and 28, North River). Practically all of the carload shipments of fresh friuts and vegetables consigned to New York, N. Y., and delivered at railroad stations on Manhattan Island are delivered at the above named Pier stations of the Baltimore & Ohio, Erie, and Pennsylvania Railroad Companies. Generally, fresh fruits and fresh vegetables shipped from origins in Florida are delivered at the Pennsylvania pier station, viz: Piers 27 and 28; and fresh fruits shipped from origins in California are delivered at said Pennsylvania pier station and at the Erie pier station, viz: Duane St. Station (Piers 19, 20 and 21). Said delivering railroads do not have adequate team tracks on Manhattan Island to make delivery thereon of all fresh fruits and vegetables shipped respectively from Florida and California to Manhattan Island, New York. The delivering rail carriers can make delivery of such carload shipments consigned to New York, N. Y., only by delivery at said pier stations. When the car floats are placed by the railroads alongside the said piers, the railroads then unload the commodity from the cars as the latter continue to rest on the car floats. The railroads cause the lading or commodity from the cars to be placed on the floor of the pier station, where it is then available for the first time to the consignee to take delivery. The railroads do not permit the consignee to unload the commodity from the car on the

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car float, and the commodity is not available to the consignee until after it is unloaded by the railroads from the cars and placed on the floor of the pier station. It is not until after the commodity is placed by the railroad on the floor of the pier station that delivery is or can be made. The line-haul freight rates are for the entire service of transportation from origin to and including delivery at destination. The unloading by the railroads is merely a part of delivery, a service established by long custom and practice by the railroads to enable them to perform their transportation duty, a requirement necessary and antecedent to delivery occasioned by the delivering railroads' disabiltiy and lack of sufficient team track facilities on Manhattan Island, and it is a mere substitute for team track delivery.

(g) Prior to 1925, the movement by rail of carload shipments of fresh fruits and vegetables from Florida and California origins to Philadelphia, Pa., was similar to that at New York, N. Y., viz: the cars were moved across the River on car floats by the railroads, and the commodity unloaded from the cars onto the floor of the rail station by the railroads. The through line-haul rates include the entire service of transportation from origin to and including delivery at destination; and the line haul freight rates have been accepted by carriers and shippers alike as including compensation for delivery, including unloading by the railroads. Since about 1925, practically all of the carlot shipments of fresh fruits and fresh vegetables delivered by railroad at Philadelphia, Pa., have been delivered at the Pennsylvania Produce Terminal or at the Philadelphia Perishable Products Terminal of the Baltimore & Ohio Railroad Company. When delivered at the terminal platform, the cars are placed alongside the platform and are unloaded by the railroads, who place the commodity on the floor of the station platform. The railroads do not permit the consignees to unload the cars orto the station platform, and delivery of the commodity cannot be obtained by the consignee from cars alongside the station platform nor until

after it has been unloaded by the railroads onto the floor of the platform. Such method of delivery by the railroads is a substitute for and an alternative to team track delivery. The terminal and team track facilities of the delivering railroads at Philadelphia are adequate for deliveries of carlot fruits for sale at auction and for carlot vegetables only because cars of citrus and deciduous fruits delivered for sale at auction are immediately unloaded by the railroads, thereby assuring immediate release of empty cars and permitting immediate removal of the empty cars from the tracks alongside the station platforms; and but for such practice of unloading by the railroads for sale at auction the railroads' facilities at team tracks would be inadequate.

(h) The Report of the Commission in said I. & S. Docket No. 5500, 272 ICC 648, decided October 4, 1948, found "that the schedules under investigation are just and reasonable. An order will be entered vacating the order of suspension and discontinuing this proceeding" (272 ICC 663). The said unloading charges, originally published to become effective on June 1, 1947, went into effect on November 1, 1948.

(i) Thereafter, the said proceeding was reopened for further hearing and reconsideration. The final order of the Interstate Commerce Commission in said Investigatoin and Suspension Docket No. 5500, Unloading Charges on Fruits and Vegetables at New York and Philadelphia, dated May 7, 1952, notified and required the respondents (delivering railroads) to cancel the schedules naming the unloading charges under investigation. However, the Report of the Commission further provided (286 ICC 142):

> "Upon rehearing and further hearing, we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, and the schedules naming the assailed unloading charges will be ordered canceled and the proceeding discontinued WITHOUT

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PREJUDICE TO THE ESTABLISHMENT OF CHARGES IN CONFORMITY WITH THE VIEWS EXPRESSED HEREIN. The ultimate finding in the prior report is modified accordingly." (Emphasis ours)

Thereby, the said Interstate Commerce Commission approved the assessment of unloading charges at New York, N. Y., and Philadelphia, Pa., the statement thereon on page 141 of 286 ICC being:

"Upon consideration of these and other circumstances of record we conclude that the shippers should not be forced to pay more than $1.05, $1.35 and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect."

By tariff schedules filed in accordance with the said finding of the Interstate Commerce Commission by the delivering railroads, the revised unloading charges in the amounts of $1.05, $1.35 and $1.65 at New York, N. Y., and at Philadelphia, Pa., went into effect in 1952.

(j) Thereafter, the said Florida Citrus Commission and Growers and Shippers League of Florida, together with California Citrus League, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association and the Port of New York Authority, as complainants, filed with the Interstate Commerce Commission their formal complaint against the Baltimore & Ohio Railroad Company, Erie Railroad Company, the Pennsylvania Railroad Company, and other delivering carriers, parties to the said tariff schedules alleging that "the said unloading charges (at New York, N. Y.) are unjust and unreasonable in violation of Section 1 of the Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid." Said complaint was docketed by the Interstate Commerce Commission as Docket No. 31105, and a copy of said complaint is attached hereto as Exhibit E and made a part hereof.

(k) Thereafter, the said Florida Citrus Commission and Growers and Shippers League of Florida, together with California Citrus League, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association, Philadelphia Terminals Marketing Association, and the Auction Receivers of Philadelphia, as complainants, filed with the Interstate Commerce Commission their formal complaint against the Baltimore & Ohio Railroad Company, the Pennsylvania Railroad Company and Reading Company, alleging that "the said unloading charges (at Philadelphia, Pa.) are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid." Said complaint was docketed by the Interstate Commerce Commission as Docket No. 31106, and a copy of said complaint is attached hereto as Exhibit F and made a part hereof.

(l) After the service of complaints in said Dockets Nos. 31105 and 31106 upon the defendants named therein, the said defendants filed with the Interstate Commerce Commission a motion to dismiss each of said complaints. The said motions to dismiss set forth that:

> "8. Since the issue raised by the complaint herein was in all respects specifically ruled upon by the entire Commission in I. & S. Docket No. 5500, and since all the complainants in the complaint herein were parties to I. & S. Docket No. 5500, and since the complaint herein alleges nothing that was not fully considered and disposed of by the entire Commission in I. & S. Docket No. 5500, it would be contrary to the public interest for the Commission to waste its resources in hearing the complaint herein, and it would be vexatious and burdensome to subject defendants herein to further hearing and argument.
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> * * * * *

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"11. The dispute raised by the complaint herein has already been heard and disposed of in I. & S. Docket No. 5500. No useful purpose would be served by burdening the Commission and defendants with further hearings and argument."

The said motions to dismiss filed by the defendant railroads in said complaints further specifically stated:

"5. The Commission's report dated May 7, 1952, contains this sentence (286 ICC 119, 142): 'The ultimate finding in the prior report is modified accordingly.' Said ultimate finding in the prior report was (272 ICC 648, 663): 'We find that the schedules under investigation are just and reasonable.' In other words, the entire Commission on May 7, 1952, made a specific finding that the lower unloading charges, now alleged by the complaint herein to be unjust and unreasonable, are 'just and reasonable.' "

(m) The complainants in said Dockets Nos. 31105 and 31106 filed their Reply to Motion to Dismiss Complaint, the same being identical in both cases except for the docket number and the names of the respective parties. A copy of the said Reply in Docket No. 31105 is appended hereto as Exhibit G and made a part hereof. The said Replies expressly set forth that:

"At no time in the said proceeding (I. & S. Docket No. 5500) during the nearly five full years between the filing of protests and requests for suspension prior to the order of May 28, 1947 instituting the said investigation and suspending the schedules, and the time of the last report, May 7, 1952, was there any mention by any respondent of unloading charges of '$1.05, $1.35 and $1.65 per ton.' Certainly, no protestant suggested any unloading charge whatever, separate from the line-haul rate. Indeed, the first and only mention of said unloading charges of '$1.05, $1.35 and $1.65 per ton' was on mimeographed sheet 36 (286 ICC 141) of the said report of May 7, 1952. The order of May 7, 1952, entered by the Commission in I. & S. No. 5500 did not discontinue the proceeding *without prejudice to the*

publication of new unloading charges of $1.05, $1.35 and $1.65."

(n) As heretofore shown, Exhibit D, the Interstate Commerce Commission by its order of December 15, 1952, dismissed the complaints in Dockets Nos. 31105 and 31106.

7. Proceedings Before Interstate Commerce Commission.

(a) Tariff schedules proposing originally unloading charges on fruits and vegetables at New York, N. Y., and at Philadelphia, Pa., were filed with Interstate Commerce Commission to become effective June 1, 1947.

(b) Upon the filing of numerous protests and requests for suspension of the said schedules, the Interstate Commerce Commission by its order dated May 28, 1947, entered upon investigation of such unloading charges so published in said schedules for addition to the line-haul rates, said Investigation being designated as Investigation and Suspension Docket No. 5500, Unloading Charges on Fruits and Vegetables at New York and Philadelphia. The same order suspended the operation of the said schedules to and including December 31, 1947. The railroad respondents in said proceeding voluntarily deferred the effective date of the schedules pending determination of the proceeding.

(c) Testimony in said I. & S. Docket No. 5500 was presented before Examiner R. M. Brown at hearings in New York, N. Y., on July 29, 30 and 31 and August 1, 1947. Brief date was then fixed as September 30, 1947, and briefs therein were duly filed by respondents and protestants.

(d) On October 3, 1947, oral argument by counsel for the parties was heard in Washington, D. C., by Division 3 of the Interstate Commerce Commission.

(e) An additional oral argument was assigned for May 5, 1948, and was heard by the full Commission.

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(f) The Report of the Commission (272 ICC 648—Exhibit B attached hereto) was decided October 4, 1948, wherein the Commission found "that the schedules under investigation are just and reasonable." The unloading charges went into effect on November 1, 1948.

(g) In December 1948, various petitions for rehearing and for reconsideration were filed; and by its order of June 9, 1949, the Interstate Commerce Commission reopened said proceeding for rehearing.

(h) Additional testimony in said I. & S. Docket No. 5500 was taken before Examiner R. M. Brown in Brooklyn, N. Y., on September 27, 28 and 29, 1949. Briefs on Rehearing were duly filed on December 1, 1949. In May 1950 a Report on Rehearing, proposed by Russell M. Brown and M. J. Walsh, Examiners, was served on the parties with notice thereon that "exceptions must be filed with the Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before June 5, 1950." Such proposed report recommended that:

> "On rehearing the Commission should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed. The schedules naming the unloading charges assailed should be ordered cancelled and the proceeding discontinued."

A copy of said Proposed Report is attached hereto as Exhibit H and made a part hereof.

(i) Additional oral argument in said I. & S. Docket No. 5500 was heard by the full Commission in Washington, D. C., on July 24, 1950. No report was issued at that time; and on October 10, 1950, a "Notice" was issued "By the Commission" as follows:

> "Upon further consideration of the record in the above-entitled proceeding, it appears that the record

is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing.

"At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team-tracks on Manhattan Island and in Jersey City, N. J. Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate.

"The above-entitled proceeding will be assigned for further hearing at times and places hereafter to be announced."

(j) Following the issuance of said Notice of October 10, 1950, protestants therein filed petitions and motions for entry of order cancelling the schedules. The petitions and motion were denied by the Commission by order dated November 16, 1950.

(k) A pre-trial conference was held by Examiner M. J. Walsh in New York, N. Y., on November 8, 1950. Further testimony was presented before the said Examiner in Brooklyn, N. Y., on June 4 and 5, 1951. Briefs were fully filed on August 1, 1951; and in August 1951 the "Second Report on Further Hearing Proposed by M. J. Walsh, Examiner" was served on the parties, bearing notice that "Exceptions must be filed with Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before September

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11, 1951." Said Second Proposed Report on Further Hearing recommended that:

> "Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of Section 3(1) of the Act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered cancelled and the proceeding discontinued."

A copy of said Second Report on Further Hearing is attached hereto as Exhibit I and made a part hereof.

(l) On September 11, 1951, Exceptions to said Second Proposed Report were filed by the railroad respondents. Replies to Exceptions were filed by Protestants. Oral argument was heard by the full Commission in Washington, D. C., on September 26, 1951. The "Report of the Commission on Rehearing and Further Hearing" was decided May 7, 1952—Exhibit A attached hereto.

(m) The formal complaint in Docket No. 31105, dated September 16, 1952, was filed attacking the justness and reasonableness of the unloading charges at New York, N. Y.—Exhibit E attached hereto. The Motion to Dismiss the Complaint was filed by Defendant Railroads, dated October 21, 1952. The City of New York filed its petition for leave to intervene, dated November 6, 1952; and the Secretary of Agriculture of the United States filed his petition for leave to intervene, dated November 7, 1952; both attacking the unloading charges as being unjust and unreasonable in violation of section 1(5) of the Interstate Commerce Act. Those petitions were granted by order of the Commission, dated November 12, 1952. The complainants' reply to defendants' motion to dismiss the complaint was dated November 4, 1952. The Commission's order dismissing the complaint was dated December 15, 1952 —Exhibit D attached hereto.

(n) The formal complaint in Docket No. 31106, dated September 23, 1952, was filed attacking the justness and reasonableness of the unloading charges at Philadelphia, Pa.,—Exhibit F attached hereto. The Motion to Dismiss the complaint was filed by defendant railroads, dated October 21, 1952. The complainants' Reply to the motion to dismiss was dated November 4, 1952. The Commission's Order dismissing the complaint was dated December 15, 1952—Exhibit D attached hereto.

8. Orders and Reports Are Illegal and Invalid.

Plaintiffs allege that the said Orders of the Interstate Commerce Commission dated May 7, 1952 and December 15, 1952, and the Reports of the said Commission referred to and made part of said order of May 7, 1952, are illegal and invalid for the following reasons:

(a) That the said Interstate Commerce Commission acted arbitrarily, unreasonably and unlawfully in authorizing and approving unloading charges on fruits and vegetables at New York, N.Y., and at Philadelphia, Pa., to be added to the line-haul rates.

(b) That the said unloading charges are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid.

(c) That the said Interstate Commerce Commission acted arbitrarily, unreasonably and unlawfully in authorizing and approving unloading charges of $1.05, $1.35 and $1.65 in its Report and Order of May 7, 1952, in said I. & S. Docket No. 5500 and in its Order of December 15, 1952, dismissing the complaints in Dockets Nos. 31105 and 31106, and thereby denied the protestants in I. & S. 5500 and the complainants in Dockets 31105 and 31106 the full hearings to which they were and are entitled.

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(d) That no opportunity to be heard on the unloading charges of $1.05, $1.35 and $1.65 was allowed.

(e) That the said Interstate Commerce Commission disregarded and failed to apply the provisions of Sec. 15(7) of the Interstate Commerce Act that:

> "At any hearing involving a change in rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, * * *"

(f) That the said Interstate Commerce Commission having found in its Notice of October 10, 1950, "that the record is deficient in respect of certain evidence which seems to be important," failed to give effect to and apply the law which requires the cancellation of tariff schedules when the carriers have failed to carry the burden of proof to show that the new charges are just and reasonable.

(g) That the said Interstate Commerce Commission did not, and on the record before it could not, find that the aggregate charges consisting of the unloading charges added to the line-haul rates were just and reasonable.

(h) That there is no evidence sufficient to justify a finding that the assailed unloading charges are just and reasonable.

(i) That the finding in the Report and Order of May 7, 1952, that the railroads be permitted to establish unloading charges of $1.05, $1.35 and $1.65 is contrary to the evidence in the record of said hearing and there is no evidence in said record to support such finding.

(j) That the finding in the Order of December 15, 1952, that the railroads be permitted and authorized to establish unloading charges of $1.05, $1.35 and $1.65 per ton is not

supported by any evidence and was made without any hearing in Dockets Nos. 31105 and 31106.

(k) That the said Commission acted unlawfully, arbitrarily and unreasonably in failing to make findings, supported by evidence, to show that the approved unloading charges are just and reasonable.

(l) That the said Commission failed to give any legal effect to the facts of record and the finding that (272 ICC 654):

> "A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. It is clearly indicated that it is impracticable for the shippers to perform the actual unloading operations."

(m) That the said Commission failed to give any legal effect to the facts of record and the finding that (272 ICC 652):

> "The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available."

(n) That it is undisputed that the line-haul carload rate comprehends receipt and delivery of the lading by and to the consignee. As a matter of law, an additional charge for unloading is not justified if additional service is not in fact rendered. The unloading service is merely a part of delivery which is required under the line-haul rate.

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Wherefore, plaintiff prays:

1. This this action be heard by a three-judge court as provided and required by Title 28, United States Code, Section 2284.

2. That, upon hearing, the Court will enter an order and decree annulling and setting aside the said Order of May 7, 1952, in I. & S. Docket No. 5500 insofar as the same approves and authorizes the establishment of unloading charges of $1.05, $1.35 and $1.65 per ton, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said Order insofar as it approves and authorizes the said unloading charges.

3. That, upon hearing, the Court will enter an order and decree annulling and setting aside the said Order of December 15, 1952, dismissing the complaint in Dockets Nos. 31105 and 31106, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said Order.

4. That such other and further relief as is equitable and just may be granted.

M. W. Wells
Maguire, Voorhis & Wells,
1007 Florida Bank Building,
P. O. Box 633,
Orlando, Florida.
Attorney for Plaintiffs.

State of Florida
County of Orange.

Gordon Stedman, being first duly sworn, deposes and says that he is Secretary-Manager of Growers and Shippers League of Florida, one of the plaintiffs in the above and foregoing Complaint, that he has read the said Complaint and knows the contents thereof and that the same are true.

GORDON STEDMAN

Sworn to and subscribed before me, this ——— day of February, A.D. 1953.

KATHLEEN B. GANDEE
Notary Public for State of Florida at Large.

(Notarial seal)

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[fol. 26] EXHIBIT A TO COMPLAINT

Investigation and Suspension Docket No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

Decided May 7, 1952

Report of the Commission on Rehearing and Further Hearing

286 ICC 119

[fol. 27] 26253

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

Submitted November 26, 1951. Decided May 7, 1952

Upon Rehearing and Further Hearing Finding in Prior Report, 272 I. C. C. 648, That the Proposed Unloading Charges on Fresh Fruits and Vegetables, in Carloads, at New York, N. Y., and Philadelphia, Pa., Are Just and Reasonable, Modified. Schedules Naming the Unloading Charges Ordered Canceled Without Prejudice to the Establishment of Charges in Conformity With the Findings

Additional appearances:

Fritz R. Kahn for Secretary of Agriculture; Arthur J. Goldsmith, John P. McGrath, G. Gary Sousa, and James J. Thornton for the city of New York; Walter R. McDonald, and Warren H. Wagner for Southeastern Association of Railroad and Utilities Commissioners, and H. M. Nicholson for Department of Agriculture-Southeastern Association of Railroad and Utilities Commissioners, and National Association of Commissioners, Secretaries and Directors of Agriculture, protestants.

Alice Belmont, Julius Blumenfeld, Kathryn Patricia Casey, David B. Fitzgerald, Earl Jay Gratz, Edward I.

Kaplan, T. Ewing Montgomery, Durward Seals, Leand
I. Shelley, and Jeannette S. Turner for shippers and oth
interests, protestants.

Report of the Commission on Rehearing and Further
Hearing

By the COMMISSION:

Exceptions to the reports proposed by the examiners we
filed by respondents, to which protestants replied. Our co
clusions differ from those of the examiners. We have hea
the parties in oral argument. Exceptions and request
findings not specifically discussed in this report nor r
flected in our findings or conclusions have been given co
sideration and found not justified.

In the prior report herein, 272 I. C. C. 648, decided Oct
ber 4, 1948, we found that the charges proposed for unloa
ing fresh fruits and vegetables, in carloads, at New Yor
N. Y., and Philadelphia, Pa., were just and reasonable. T
order of suspension was vacated and the proceeding d
continued. The proposed charges, as subsequently i
creased, became effective November 1, 1948. Upon petitio
for reopening and reconsideration by the Florida Railro
[fol. 28] and Public Utilities Commission, the Californ
Citrus League, The Port of New York Authority, the Sec
tary of Agriculture, the Philadelphia Terminals Marketi
Association, and others, the proceeding was reopened f
rehearing. A rehearing was held. Orders were enter
permitting the city of New York, the Industry Committ
for the Improvement of Washington Market, and the au
tion receivers of Philadelphia to intervene and be treated
parties to any further proceedings herein. A proposed r
port on rehearing was served upon the parties to the pr
ceeding. Exceptions were filed by respondents to the pr
posed report and the issues were argued orally. Subs
quently it appearing, upon further consideration by u
that the record was deficient in respect of certain eviden
which seemed to be important, the proceeding, by noti
dated October 10, 1950, was assigned for further heari
for the introduction of additional evidence into the recor
The further hearing has been held, prior to which the
was a prehearing conference, and the parties exchange

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their exhibits and prepared statements. The facts stated in the prior report will be repeated herein only to the extent necessary to a clear understanding of the issues.

Through rates apply on fresh fruits and vegetables, in carloads, from points in the various producing areas throughout the country to stations in New York and Philadelphia. Respondents originally proposed to establish charges as follows for unloading these commodities at the points indicated, in addition to the line-haul rates:

	Per net ton
Citrus fruits	$1.50
Fresh fruits (other than citrus)	1.75
Melons (including cantaloups)	2.00
Vegetables, fresh or green, not cold pack or frozen	1.50
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.00

The respective charges which became effective November 1, 1948, and which are now in effect, are $1.95, $2.28, $2.60, $1.95, and $2.60, reflecting an increase of 30 per cent over those originally proposed as a result of the general increases authorized on or after October 6, 1947, in Ex Parte No. 166,[1] for the service indicated. Respondents' proposals reflect an effort on the part of the delivering lines to secure increased revenue from the fresh fruit and vegetable traffic terminated in New York and Philadelphia. No charges such as those under consideration have applied on this traffic [fol. 29] in the past. They would accrue solely to the delivering lines, principally the Baltimore & Ohio,[2] Erie, New York Central, Pennsylvania, and Reading.

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[1] *Increased Freight Rates, 1947*, 269 I. C. C. 33, 270 I. C. C. 81, 270 I. C. C. 93, and 270 I. C. C. 403.

[2] Abbreviated titles used herein are Baltimore & Ohio for The Baltimore and Ohio Railroad Company; Erie for Erie Railroad Company; New York Central for The New York Central Railroad Company; Pennsylvania for The Pennsylvania Railroad Company; Reading for Reading Company; and Lehigh Valley for Lehigh Valley Railroad Company.

As regards carload freight the general rule is that shippers and consignees must perform the loading and unloading or make provision therefor at their own expense. Rule 27 of the Consolidated Freight Classification provides, in part, as follows:

Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, except where tariff of carriers at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier.

The arrangements as to unloading at New York and Philadelphia, which have been in effect for many years, and also the unloading charges under consideration are covered by exceptions to the governing classification, whereby it is contemplated that the carriers shall perform the unloading of fresh fruits and vegetables without interference from the consignees or receivers. It is provided that such unloading service will be performed only at designated stations. Prior to November 1, 1948, when the charges under consideration became effective, there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic at the stations specified. The charges which became effective on that date apply only on fresh fruits and vegetables. Consideration is, however, being given by respondents to the establishment of unloading charges on traffic other than fresh fruits and vegetables, but as yet no definite conclusion in respect of such action has been reached.

The same schedule of charges was published for application at both New York and Philadelphia. In determining the level of these charges, respondents considered it impracticable to do more than estimate those which approximated the average cost of unloading particular groups of commodities at those points. Tariff complexities would result if a different charge were maintained for each of the respective commodities. Hence, respondents established charges in amounts approximating the claimed average costs of unloading certain groups of commodities. No objection to the grouping, as such, has been presented by any of the protestants.

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The Erie and the Pennsylvania handle the bulk of the traffic at New York and Philadelphia, respectively, although a substantial amount reaches New York over the lines of [fol. 30] the Baltimore & Ohio and the New York Central. Most fruits and vegetables originating at western producing points, particularly in California, and destined to New York are routed over the Erie, which usually receives the traffic at points in Indiana. Similar commodities from the Southeast, including those originating at points in Florida, ordinarily are routed over the Pennsylvania from Potomac Yard, Va., to New York. Carriers performing deliveries at Philadelphia are the Baltimore & Ohio, the Pennsylvania, and the Reading.

Respondents accord shippers numerous services in respect of the movement of fresh fruits and vegetables to pier stations in New York and Philadelphia. These services include, among others, notification to consignees of the location of their freight in transit, extra heat and light at the terminals incident to such traffic, and the providing of auction rooms and other similar services. This indicates the extent to which respondents have cooperated with the fruit and vegetable trade in facilitating the receipt of the freight and its sale.

The general position of the protestants is that the schedules naming the assailed unloading charges at both New York and Philadelphia should be found unlawful, particularly under sections 1, 2, and 3 of the Interstate Commerce Act, and that we should order cancellation of such schedules and discontinue this proceeding.

Unloading operations are less expensive at Philadelphia than at New York. At Philadelphia, the freight house platform is practically on a level with the car floor, and the unloading is a dry-land operation. At New York, the stage of the tide affects the unloading, and the distances which the freight is trucked are substantially greater than at Philadelphia. At the former, the haul by hand truck ranges from 500 to 1,500 feet. At Philadelphia, the minimum haul is 50 feet, the maximum haul is not disclosed.

As the conditions governing delivery of the traffic under consideration at New York and Philadelphia are somewhat dissimilar, the unloading charges at these points will be discussed separately in the order indicated.

Unloading charges at New York.—Approximately 75 percent of the fresh fruits and vegetables consigned to the New York market is delivered at the pier stations of the Pennsylvania, Erie, Baltimore & Ohio, and New York Central, located between Barclay Street on the south and Canal Street on the north. The remainder of the deliveries is made to chain-store warehouses or to team tracks and sidings in other parts of the city. The railroads established their delivery terminals on the water front indicated during the latter part of the nineteenth century and have concentrated their fruit and vegetable deliveries in this area. In 1927 and 1928, the Pennsylvania and the Erie spent substantial sums of money in reconstructing, for handling fresh [fol. 31] fruits and vegetables, the pier stations which they leased from the city of New York. These piers are adjacent to Washington Market, the largest fruit and vegetable market in New York and the primary market in the entire metropolitan area.

The principal consuming population served by the New York wholesale market lies east of the Hudson River, where 80 percent of the volume of fruits and vegetables delivered to that market is distributed. The wholesale market is in the lower part of Manhattan Island. The considerations which led to that location have been justified by the growth of facilities in that area to receive, sell, and store perishable commodities. At present, there are 18 cold-storage warehouses, with a gross capacity of 13,000,600 cubic feet, within 2.5 miles of the wholesale produce center.

Respondents do not accord the consignees the option of performing the unloading. Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery.

Respondents' piers equipped for the unloading of fresh fruits and vegetables are as follows: Piers 16 and 17 of the New York Central, 19, 20, and 21 of the Erie, 22 and 23 of the Baltimore & Ohio, and 27 and 28 of the Pennsylvania. Utilization of pier stations by the carriers serving Manhattan Island is not confined to those at which fresh fruits and vegetables are handled. At the present time, these carriers

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utilize approximately 35 city-owned piers for the handling of freight of all descriptions. As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are car-floated and unloaded.

The area covered by the piers specifically identified approximates 40 acres, of which one-half consists of the piers, and the other half, the slips between the piers which accommodate the car floats. Real estate in that vicinity has a value of about $800,000 an acre, a total of $32,000,000 for the area covered by the piers. In the vicinity of the existing team-track yards on Manhattan Island between Twenty-eighth and Thirty-seventh Streets, there is comparatively little room for expansion. Land in that area costs about $400,000 an acre. The piers have no team-track facilities on which cars can be placed. All parties to the proceeding agree that it is not feasible to expand the present team-track facilities on Manhattan Island.

The team-track capacities on Manhattan Island of the following carriers are: Pennsylvania, Thirty-seventh Street yard, 130 cars; Erie, West Twenty-sixth Street yard, 56 [fol. 32] cars; New York Central, Thirty-third Street yard, 350 cars; Baltimore & Ohio, Twenty-sixth Street yard, 45 cars; and Lehigh Valley, West Twenty-seventh Street, 74 cars. All of these team tracks are heavily used for non-perishable freight.

Only one of the respondents, the New York Central, has an all-rail line into Manhattan for the delivery of freight. This line enters New York from the north and extends south over the west side of the city to a point not far from the wholesale market area. The line has limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers. In fact many of the cars of fresh fruits and vegetables delivered by that carrier for trading in the wholesale market are moved by car float to its pier station (piers 16 and 17) in the vicinity of Barclay Street.

Because of the geographical location of New York, freight consigned to that point must be moved thereto either by

car floats or lighters across the Hudson River from the New Jersey side, except, as stated, traffic routed over the New York Central. The rails of the other respondents serving that point, as regards freight traffic, terminate at points on the west bank of the Hudson River in the vicinity of Jersey City, N. J. Carloads of fruits and vegetables arriving at these rail terminals, consigned to New York, are moved onto car floats equipped with tracks, and transported by tugs across the Hudson River, either to certain piers equipped for the handling of such traffic, where the freight is unloaded by the carriers and placed on the pier platform for delivery to the consignee, or to certain locations equipped with float bridges over which the cars are moved from the car floats to rails extending therefrom to certain team tracks, private sidings, or warehouses, where delivery is completed and the freight ordinarily unloaded by the consignee.

The movement of the loaded cars to the piers usually occurs in the late afternoon. The unloading commences around 8 p. m. or earlier and continues until around 5 or 6 a. m., next morning. The time it takes to unload particular types of fruits and vegetables varies according to the size and weight of the packages, and the method of refrigeration and packing in the cars. The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available. When the cars are unloaded they are immediately returned empty to the New Jersey side, and other car floats are placed at the piers for unloading. So expeditious is the unloading service that it [for. 33] permits of the use of the same platform space for unloading and stacking freight two and sometimes three times each night on which unloading is performed.

There are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purposes of inspection, but they are not permitted to take delivery of their freight from that facility. The pier floor is the first place where, after the freight has been unloaded, delivery can be taken. At the original hearing the railroads offered to permit con-

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signees to unload their freight from the car float. After the prior decision in this proceeding, the California Fruit Growers Exchange requested the railroads to permit the consignees, as a whole, to perform the unloading at the piers. The request was denied.

In taking pier station delivery, the fruit and vegetable trade has the advantage of displaying the entire contents of the car, thus affording the buyer the benefit of a thorough examination of the freight; of using the pier facilities as a sales' mart; and of occupying auction-room facilities without special charge therefor. The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from or loaded into cars on car floats. Freight of all kinds may be shipped from and to these piers, except that the Pennsylvania produce terminal (piers 27 and 28) is limited to the receipt and delivery of perishable freight. But even these piers, in addition to the handling of fruits and vegetables, are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish, oysters, flower bulbs, and raw silk. All freight, other than fruits and vegetables, is unloaded by the rail carriers at their pier stations without charge therefor in addition to the line-haul rates.

The movement of fresh fruits and vegetables from the several States to the New York area [3] in 1946, 1947, and 1948, respectively, were 114,240, 111,390, and 104,555 carloads by rail, and 60,098, 61,151, and 67,874 carload equivalents by motortruck. There were progressive decreases in the shipments by the former as contrasted with increases in shipments by the latter. For the first 7 months of 1948 and 1949, respectively, shipments of fruits and vegetables to New York were 64,988 and 57,809 carloads by rail, and 30,819 and 33,868 carload equivalents by motortruck.

When the charges assailed became effective, consignees attempted to avoid them by taking delivery at outlying team-track stations, and paying the cost of trucking into

[3] The New York area includes the New York piers, Bronx Terminal Market, Brooklyn, N. Y., certain points on Long Island, and Jersey City, Hoboken, and Kearny, N. J.

[fol. 34] the market, or by shifting from rail to motor trucks for the line haul. In February 1949, deliveries of fresh fruits and vegetables to the New York piers were about 50 percent less than in February 1948. Shipments of these commodities delivered at those piers during the periods indicated were 2,828 and 5,450 carloads, respectively. Similar traffic to New York by truck and vessel increased by the equivalent of 1,135 carloads in February 1949 over the same month in 1948. During the later period there was also an increase of 915 carloads to team tracks in New Jersey. In April 1949, as compared with the same month in 1948, deliveries by car float at the New York piers decreased by 2,471 carloads, as contrasted with increases of 1,156 carload equivalents by truck and vessel to New York stations, and of 845 carloads for New Jersey team-track deliveries. Substantially all of the freight which was diverted from the New York piers was ultimately trucked to Washington Market for primary sale. The diversion of rail shipments from pier stations to other points intensified the problems of the New York produce market, resulting in greater congestion in terminal handling, and in dissatisfaction among buyers, labor, and other elements at that facility.

Team-track delivery on Manhattan Island is to some extent dissimilar to pier-station delivery, although in both operations the movement across the Hudson River is identical. However, when cars for team tracks reach Manhattan they are accorded additional switching. After placement on the team track the consignee has 2 days' free time to unload the car. After unloading, the car is switched to the float bridge and reloaded on a car float for movement to the New Jersey shore. There is more car detention and more switching, and the unloading is substantially slower in respect of team-track delivery than is the simultaneous unloading of all cars at pier stations. A witness on behalf of the Erie stated that pier-station delivery on Manhattan Island is the most efficient method which that carrier has been able to organize. So efficient is the operation that the Erie has handled in 1 day, at piers 20 and 21, as many as 367 cars of fruit and vegetables. It never handles less than 50 cars a day. This method of delivery has been utilized by the Erie for more than 60 years.

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Respondents introduced an exhibit showing the cost of unloading fruits and vegetables at New York piers 27, 28, and 29 of the Pennsylvania, during July 10 to 16, 1949. Those costs per ton were $3.23 on fresh fruit, $4.11 on melons, cantaloups, and vegetables (top-iced), and $2.22 on other vegetables and citrus fruit. The unloading costs of the New York Central at pier 17 (Barclay Street) during July 25 to 30, 1949, were $1.72 on vegetables (other than top-iced), and $2.697 on cantaloups, melons, and vegetables (top-iced). The unloading costs of the Erie at Duane Street [fol. 35] piers during the weeks ended May 22, August 28, November 26, 1946, and February 4, 1947, revised to reflect the increases in the wages of the employees of the Seaboard Terminal & Refrigeration Company to and including March 31, 1951, were $1.76 on citrus fruit, $2.49 on fresh fruit (other than citrus), $2.96 on fresh or green vegetables (top-iced), $1.74 on fresh or green vegetables (not top-iced), and $2.63 on cantaloups and melons. The unloading costs of the Baltimore & Ohio at pier 22, during July 7 to 20, 1949, were $3.61 on fresh fruit (including deciduous fruit), $2.63 on melons, $3.26 on vegetables (top-iced), and $2.62 on vegetables (other than top-iced). These unloading costs at New York piers do not include the cost of sorting and stacking, but they do include a proportion of the expense of sweeping, cleaning, and office upkeep incident to the unloading of fruits and vegetables at the pier stations.

The record shows that the contract price of $2.12 per ton paid to the Seaboard Terminal & Refrigeration Company by the Erie for unloading and handling fruits and vegetables at the piers on December 31, 1946, was 96 per cent higher than the price paid immediately prior to World War II. In June, 1951, the price was $2.26 per ton. The contract prices are subject to an audit by the Erie of the contractor's expenses each year and provide for adjustments, including refunds should it be found the contractor's remuneration is unreasonable.

Prior to the arrival of the shipments at the piers, the carriers are informed of the contents of the cars, the names of the consignees, and other pertinent details. This permits notification of the receivers of the freight in advance of arrival and enables the carriers to allot space on their piers for each consignment. As regards the allotment of space,

the piers are generally mapped out so as to give each consignee a specified location for the contents of the cars after unloading. Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers, who, prior to the auction, usually inspect the fruit while it is on display on the pier floor. Practically all the citrus fruit, as well as fresh fruit (other than citrus), after being unloaded on the piers, is sold at public auction in rooms on the second floors of the piers assigned for that purpose. Cantaloups and melons, as a rule, are not sold at auction, but are bought at private sales on the pier floor where the packages are displayed. Fresh or green vegetables, particularly those not top-iced, frequently reach the consignee without prior sale at the piers. With the exception of tomatoes, they are not sold at auction.

Vegetables are generally removed from the piers within 3 or 4 hours after having been unloaded by the carrier. After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away.

[fol. 36] As stated, there has been an increasing tendency to accept delivery at team tracks on the New Jersey side of the Hudson River of fruits and vegetables consigned to New York. Because of that tendency, the Pennsylvania has recently reconditioned, at an approximate cost of $200,000, its team tracks in that area, so as to accommodate the increase in unloading at these facilities. The increased use of the New Jersey team tracks, to a large extent, was not the result of the unloading charges at the New York piers.

The Pennsylvania prefers to deliver at Jersey City team-track yards, rather than at New York piers, shipments of fruits and vegetables consigned to New York. Deliveries at those facilities eliminate all the difficulties and expenses of car-float service. It is contended on behalf of that respondent that the delivery of fruits and vegetables at Jersey City team tracks would be beneficial to the trade, the railroad, and the public. The Jersey City Henderson Street yard is about 1.5 miles from the wholesale produce market on Manhattan. Waldo Avenue yard is from 3 to 4 miles from that market. Receiving fruits and vegetables at team tracks in New Jersey would be inconvenient to the public,

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because the vast volume of these commodities consigned to New York is consumed east of the Hudson River.

The wholesale produce markets are located on the lower west side of New York for economic reasons. These markets are adjacent to pier stations where fruits and vegetables consigned to New York are delivered, and they are also located conveniently to the area of greatest consumption. The location of these markets would change, with a tendency to scatter the markets, if the railroads continued to increase their deliveries on the New Jersey side. If those facilities remain in their present location, deliveries made at team tracks in New Jersey will require a truck haul to those markets. The trucks which ordinarily handle this freight are centered on the lower west side of New York. In order to reach the traffic at team tracks in New Jersey, these trucks have to cross over to New Jersey by ferry or through the Holland tunnel, a distance of about 3 miles. The time necessary for such a crossing to the Henderson Street yard would range from 20 to 25 minutes, and an additional 30 minutes to locate the car and unload the contents or part thereof into the truck. Approximately an hour and a half would be consumed in moving the loaded truck back by ferry or tunnel to the New York markets. From the time the empty truck leaves New York until it returns loaded to the market from 2 to 2.5 hours would elapse under favorable traffic conditions. Trucking the traffic from the Waldo Avenue yard would consume an additional 15 to 20 minutes. Ordinarily, such operation would cause congestion and delay.

[fol. 37] The Henderson Street and Waldo Avenue team tracks of the Pennsylvania at Jersey City are formal facilities, with driveways between the tracks into which consignees can operate their trucks and take delivery from the cars. These driveways are from 50 to 70 feet in width. Because of the increased tendency to accept delivery of perishable traffic at Jersey City team tracks, the Pennsylvania also built its Manhattan produce yard in the so-called "meadows," farther removed from Jersey City. At the latter point, there is a wider scope of delivery than on Manhattan, the yards are open 24 hours a day, and there are no restrictions on unloading and delivery of traffic such as occurs in connection with pier operation. Respondents take

the position that the advantage in being able to unload the freight from the cars onto the trucks at any time induced the gradual flow of delivery of the traffic at Jersey City. Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, for making delivery at New York piers.

The city of New York receives about 100,000 carloads of fresh fruits and vegetables annually. The unloading charges assailed, ranging from $26 to $36 a car, would place an additional cost of approximately $2,000,000 a year on food consumers in that city. If the findings in the prior report herein are affirmed, similar charges will be established for the unloading operations of all commodities at all piers in Manhattan, and will have the effect of increasing the price of every piece of merchandise shipped through the port of New York, thus placing that port at a considerable disadvantage. The New York water front contributes from 25 to 40 per cent of the basic economy of that city. The city of New York is planning to rehabilitate its piers at a cost of $78,000,000, but it is intimated that it may not proceed with that program if the findings in the prior report herein are not reversed. There has also been a plan to rehabilitate the Washington Market, the cost of which, based on current prices, would exceed $60,000,000. A witness for the city of New York is apprehensive that, if the unloading charges under consideration are continued, consignees of fresh fruits and vegetables will generally accept delivery on the New Jersey side of the Hudson River. On behalf of the city, it is argued that the unloading service at the piers is an integral part of the movement of the traffic from origin to ultimate destination, for which the charge is included in the line-haul rate, and that for this service, which has been performed by the carriers without extra charge, for more than 50 years, no additional charge is warranted. A statement by the mayor of New York City, incorporated by agree-[fol. 38] ment of the parties into the record in this proceeding on further hearing, corroborated the facts stated in the foregoing paragraph.

The Port of New York Authority, hereinafter referred to

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as the port authority, is a municipal corporate instrumentality created by compact between the States of New York and New Jersey and approved by the Congress of the United States. It is charged with the duty of protecting, promoting, and developing the commerce of the port of New York, and of improving and unifying its facilities. Realizing the importance of fruits and vegetables to the inhabitants in the New York metropolitan area, and being dissatisfied with the limited facilities for handling them, the port authority and certain departments of the city of New York, developed plans for the construction of a union water front terminal at a cost of $27,000,000 in substantially the same location as the pier terminals. These plans, temporarily abandoned because of the findings in the prior report herein, contemplated a continuation of the system of delivery by car float to pier stations, and unloading of the cars to the station platforms as a part of the transportation. By establishing such a terminal, in connection with which the overhead charges against each car would be reduced by combining the alternating traffic peaks of the several carriers and providing an operation susceptible of efficient over-all control of labor, it was felt that the project would be financially self-sustaining if the revenue from the carriers for the use of the terminal and unloading of the freight approximated $2 per ton. The calculations were based upon the 1947 wage levels. The port authority offered to perform the unloading and other services as agent for the railroads. The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee.

The record shows that it would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York. The high cost of land on Manhattan Island and the time required for handling cars across float bridges during periods of peak volume of traffic, would render team-track delivery impracticable.

The Industry Committee for the Improvement of Washington Market and all of its component groups, including wholesalers, receivers, auction companies, truckmen, load-

ers, purveyors, inspection services, and cooperage companies, opposed the proposed unloading charges on fruits and vegetables at the New York piers.

The New York City Consumer Council, a coordinating agency for numerous organizations, embracing a member-[fol. 39] ship of over 250,000 persons devoted to maintaining decent living standards, opposes the assailed unloading charges at the New York piers. In a year of high buying power, the inhabitants of New York consume over 5 billion pounds of fruits and vegetables. These unloading charges are ultimately borne by the consumers.

The respondents have not shown what investment would be required for the construction in Manhattan of team tracks necessary to accommodate delivery of the fruit and vegetable traffic. The main evidence submitted by them at the last hearing is merely a comparison of the costs of transporting fruits and vegetables from points in New Jersey to the existing respective pier and team-track facilities, as to the Erie, Baltimore & Ohio, and Pennsylvania, and through yard facilities of the New York Central. Respondents assume that as to both piers and team tracks the existing facilities are adequate to accommodate the entire volume of fruit and vegetable traffic destined for Manhattan delivery. The record establishes, however, that only a relatively small part of the total volume of such traffic can be accommodated on the existing team tracks in Manhattan.

The costs per car shown by respondents for delivery of fruits and vegetables at Jersey City and New York are: for the New York Central, $22.30 at the Thirty-third Street team tracks, and $38.02 and $43.94 (not including unloading) at pier 17 in connection with car float from Sixty-fifth Street, New York, and Weehawken, N. J., respectively; for the Erie, $10.73 at Jersey City team tracks, $45.44 at Twenty-eighth Street team tracks, and $44.30 (which does not include an estimated unloading charge of $39.57) at Duane Street piers; for the Baltimore & Ohio, $70.46 at Twenty-sixth Street team tracks, and $119.86 (including unloading) at piers 22 and 23; for the Pennsylvania $58.50 at Henderson Street team tracks, Jersey City, $73.57 at Thirty-seventh Street team tracks, and $122.73 (including unloading) at piers 27 and 28.

The costs per car shown by respondents for delivery of

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fruits and vegetables at Philadelphia are: for the Baltimore & Ohio, $27.66 on team tracks, and $75.94 at the auction-sales platform; for the Pennsylvania $39.64 on team tracks, and $109.36 for station platform delivery.

The protestants conducted a cost study relative to (1) the total physical area required to expand the team-track yards of respondents in Manhattan to provide sufficient capacity to accommodate the total railroad deliveries of fresh fruits and vegetables in addition to other commodities now handled on existing team-track facilities, (2) the cost of acquiring such acreage on Manhattan Island either adjacent to existing railroad team-track yards or in the vicinity of the existing piers, (3) the cost of constructing and operating the additional team-track and other necessary facilities, [fol. 40] and (4) the additional annual fixed charges on capital investments in property and newly constructed improvements.

As a basis for estimating the team-track capacity and areas which would be required by each railroad, protestants analyzed data relating to railroad unloadings of fruits and vegetables and other freight compiled by the port authority from railroad records. Locations for possible team-track expansion adjacent to existing facilities were selected as most feasible for development. Plans were prepared for team-track yards of the necessary capacity. Insofar as possible, existing facilities of the railroads and their track-connected patrons were not disturbed. Estimates of the cost of acquiring necessary property for the proposed team-track yards were provided by the Law Department of the city of New York. The cost of razing existing structures and the construction of additional tracks and other facilities was estimated by qualified employees. In compiling the cost study consideration was given to the peak-day unloadings of fruits and vegetables at the pier stations, peak-day receipts of perishable and dry freight at the existing team tracks and the effect of hold-overs as the remaining factors of maximum team-track capacity required.

In order to handle all the fruit and vegetable traffic of each railroad on a team track in Manhattan in conjunction with traffic now being handled on existing team tracks, the Pennsylvania would require additional team-track capacity

for about 235 cars, the Erie for 257 cars, and the Baltimore & Ohio for 6 cars. The existing team-track capacity of the New York Central is adequate without further expansion.

Protestants' total estimated direct operating expense per loaded car incident to team-track delivery of fruits and vegetables in Manhattan, including a return of 6 per cent on the estimated investment in team track and facilities, is shown to be $120.91 for the Pennsylvania, and $73.93 for the Erie.

The costs per car of $122.73 shown by the Pennsylvania for delivering and unloading fruits and vegetables at piers 27-28, and of $44.30 by the Erie for delivering like traffic at Duane Street piers, includes certain water-front expenses at Jersey City of $20.20[4] and $10.92, respectively, the elimination of which results in costs of $102.53 for the Pennsylvania, and $33.38 for the Erie. Increasing the Erie delivery cost by the estimated cost of $39.57 for unloading results in an amount of $72.95. The estimated costs per car of team-track deliveries in Manhattan as shown by protestants, [fol. 41] which includes no expenses at Jersey City, of $120.91 for the Pennsylvania would exceed the cost of delivery at piers 27-28 by $18.38. The cost of $72.95 for delivering and unloading at Duane Street piers would be less than the protestants' estimated cost of expanded team-track delivery by 98 cents.

On the basis of the estimated volume of fruit and vegetable traffic the construction of additional team-track facilities in Manhattan could be justified, if at all, only for the Pennsylvania and the Erie. The estimated cost of construction of the additional team-track facilities on Manhattan would approximate $12,212,000 and $11,884,000 for these respective carriers.

In 1950 the number of cars of fruits and vegetables handled at pier stations and team tracks, respectively, in Manhattan by the following carriers were: Pennsylvania, 16,939, none; Erie 19,615, 233; New York Central, 1,888, 12,144; Baltimore & Ohio, 1,896, 2,456. More than 90 per

[4] Includes $5.39, Pennsylvania's portion of the cost of recoopering damaged crates, boxes, and packages at the Manhattan piers. Other railroads did not include this expense as chargeable to unloading and delivery.

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cent of the pier station deliveries were made by the Pennsylvania and the Erie. The participation of the New York Central and the Baltimore & Ohio in the pier deliveries of fruits and vegetables is relatively small.

On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track deliveries, and that the "difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities" disfavors the investments that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs, incident to operation of such expanded facilities.

Unloading charges at Philadelphia.—Prior to 1927, fresh fruits were distributed at Philadelphia from piers on the Delaware River adjacent to the Dock Street wholesale produce market. Cars were either floated into these piers or moved thereto over a city street. At the piers unloading, similar to the present operations at New York piers, was performed by the carriers without charge therefor other than the line-haul rate. In fact, delivery could not be accomplished without first unloading the freight. In 1927, the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce terminals, either of which was then capable of accommodating the needs of the fruit trade at that point, and at both of which unloading under the line-haul rate, as previously performed at the piers, was continued. These terminals, one-half mile apart, are [fol. 42] 3.5 and 4 miles from the Dock Street market, at which there are from 150 to 200 wholesale fruit and vegetable establishments.

Since 1927 and prior to November 1, 1948, approximately 95 per cent of the fruits and vegetables consigned to Philadelphia, other than for chain stores, has been handled at the Pennsylvania produce terminal. This facility consists of two platforms designated "A" and "B." The first is used almost exclusively for the unloading of fruit to be sold at auction, and the second for fruits and vegetables intended

for private sale. It is only at these platforms that the Pennsylvania performs unloading. The tracks at that facility have a capacity of 72 cars and there are additional team tracks which will hold 510 cars. The consignees perform the unloading when the cars are spotted on the team tracks, or at other stations of the Pennsylvania.

When the freight is unloaded on "A" platform the Philadelphia Terminal Auction Company sells the commodities, receives the price therefor, pays the freight charges, and remits to the auction receiver the proceeds, less the freight and auction charges. The present unloading charges, ranging from 3 to 10 cents per package, are passed on to the buyers of the commodities.

The auction company, when it prepares the commodities for sale, prints a catalog covering such operation. This affords the prospective purchaser the choice of the packages he desires as listed in the catalog. The catalogs are printed at the auction company's office at the Baltimore & Ohio-Reading terminal.

As to freight unloaded at "B" platform, the cars containing vegetables are, in most instances, placed adjacent to that platform and unloaded thereon in full by the Pennsylvania. The commodities are trucked from the car by railroad employees to the location on the platform where they are to be stacked, displayed, and sold. There the consignee's employees meet the carrier's truckers, unload the packages, and arrange them according to size, grade, quality, and other factors. Under this method, the buyer may inspect the entire shipment and take delivery of the freight at that point.

All freight unloaded by Pennsylvania on "A" platform is sorted by that carrier without charge therefor. It does not, however, perform sorting of freight which it unloads on "B" platform. Since November 1, 1948, when the charges assailed became effective, the unloading operation at Philadelphia has not changed, except that the Pennsylvania now charges for that service and also refuses the consignees the privilege of unloading their own freight on the platforms if they elect to do so. At present, cars will not be placed for unloading at the platforms unless unloading by the carrier is ordered by the consignee.

[fol. 43] The Baltimore & Ohio and the Reading operate

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a joint produce terminal at Philadelphia. This terminal is equipped with 6 team tracks having a capacity of 100 cars. All cars delivered on team tracks are unloaded by the consignees. The unloading operation on the terminal platform is performed by railroad employees.

When fruits and vegetables are about to arrive at Philadelphia the auction company receives orders from the receivers relative to the commodities they will offer for sale next morning. The railroads accept these orders from the auction company but not from the individual receivers. However, the latter have the right, prior to the unloading of the car, to cancel the order to unload, but they do not have the right to order the unloading of the produce for sale. The orders by the auction company to the carriers indicate the car numbers, the contents, and the name of the consignee. The freight is unloaded by the carrier and made available to the auction company on the morning following the placing of the order. The auction company then signs for the receipt of the freight and responsibility therefor passes to it from the carrier. Any service accorded the freight after the auction company takes possession is performed by its own labor. This method of unloading releases the cars quickly, about 95 percent of which are released almost immediately after arrival. It also affords the carriers an opportunity to repair all damaged packages, an operation difficult to perform on team tracks, thus reducing claims for damage. This method of unloading had been performed by the carriers prior to November 1, 1948, without charge therefor other than the line-haul rate. Since the unloading charges became effective, 63 percent of the commodities originally unloaded, sorted, sold, and delivered on the terminal platform is now unloaded on team tracks by consignees.

Receivers of fruits and vegetables in Philadelphia who formerly, in many instances, unloaded their own freight at the terminal platforms are dissatisfied with the arrangement under which they must either unload at team tracks or have the unloading at the platforms, for which charges are collected, performed by the carrier. Those receivers request the privilege of unloading their own freight on the platforms if they so desire. Certain commodities, such as potatoes, onions, tomatoes, crated melons, turnips, cabbage,

and celery, are sold to greater advantage when unloaded at those facilities.

The Philadelphia Terminals Marketing Association, composed of 54 individuals, copartners, or corporations, handling numerous carloads of fruits (other than citrus fruit) and vegetables in the Philadelphia market, opposes these unloading charges. Practically all of these commodities consigned to that market, not including shipments to chain stores, are received by members of that association. Its members operate exclusively at the Pennsylvania produce terminal and serve from 4,000 to 5,000 retailers in Phila- [fol. 44] delphia. They also sell to jobbers who transfer the commodities from the terminal to the wholesale market area. About 40 percent of their receipts of fruits and vegetables are distributed to wholesalers within a radius of 150 miles of Philadelphia.

Produce dealers in the Philadelphia market are in competition with like dealers at points such as Baltimore, Md., Pittsburgh, Pa., and New York, because these markets are accessible to certain buyers who normally procure their fruits and vegetables in Philadelphia. Buyers from Scranton, Williamsport, and Altoona, Pa., and Atlantic City, N. J., ordinarily procure their fruit and vegetable requirements in the Philadelphia market.

Since 1930 there has been a trend, with certain fluctuations, toward diversion from the railroads to the trucks of the fruit and vegetable traffic consigned to Philadelphia. During the war that trend was reversed, but since then the volume of movement by truck has increased. Within the past 15 years a greater percentage of fruits and vegetables has been consigned direct to chain stores, thus bypassing the Philadelphia market. The assailed unloading charges at Philadelphia will further divert the fruit and vegetable traffic from the produce terminals.

Prior to November 1, 1948, a wholesale and retail fruit and vegetable dealer at Wilmington, Del., purchased these commodities in the Philadelphia market, and moved them to Wilmington in his own trucks. Since that date competition has forced this dealer, because of the unloading charges, to buy these commodities at Baltimore and at points in Florida and Maine.

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A wholesale fruit and vegetable dealer at York, Pa., who handled a million-dollar volume of business in 1948, distributes these commodities to retail grocery stores, restaurants, and hotels. Prior to the 1948-49 season this dealer bought about 50 percent of his citrus fruit requirements in Philadelphia, a small portion in Baltimore, and the remainder direct from Florida. The principal reason for buying in Philadelphia was the better choice of the supply in that market. Because of the unloading charges at that point, this dealer now receives a larger portion of his citrus fruit direct by truck from Florida. He continues, however, to purchase about 46 percent of his citrus fruit in Philadelphia, and handles not less than 300 carloads of fruits and vegetables a year, of which citrus fruit constitutes 25 percent.

Prior to November 1, 1948, approximately 60 percent of the shipments to one of the principal receivers of potatoes and onions in the Philadelphia market was unloaded on "B" platform by the Pennsylvania, and 40 percent by the receiver. Since then he has discontinued ordering the Pennsylvania to unload his traffic on the terminal platform. [fol. 45] He now receives 99 percent of his traffic on team tracks, where sale is made from sample. Under this method of sale the buyer discards the damaged products, whereas in connection with platform delivery the consignee would regrade the products and thus be able to sell them.

After the unloading charges became effective, the consignees generally agreed that they could have the unloading performed for their account by private contractors for substantially less than those charges. They presented these views to the carriers, but without success. On December 8, 1948, the consignees unanimously adopted a resolution requesting that the carriers permit the auction company to unload the fruit which it was selling for their account. The Pennsylvania refused to permit that company to unload the freight at its produce terminal, taking the position that that terminal was a public facility and that the granting of such permission might give rise to a dual method of unloading, one to be conducted by the fruit and vegetable trade, and the other by the railroad for the general public. The record does not disclose the attitude of the Baltimore & Ohio and the Reading with respect to this matter.

During the 1947-48 season (November to April) the equivalent of 88 carloads of oranges, on the basis of 400 boxes per car, were received by truck in the Philadelphia market, as compared with 367 carload equivalents during the 1948-49 season. The increase in the movement by truck was due largely to the unloading charges. During the 10-month period immediately subsequent to the imposition of those charges there was a decrease of 7 percent in the carload shipments of fruits and vegetables to Philadelphia by rail under the same period in the preceding year, as contrasted with an 11-percent increase in carload equivalents by truck. From November 1, 1948, to August 31, 1949, the auction company handled 8,123 carloads, on which the unloading charges collected by the railroads approximated $325,000, an average of $40 per car.

The Pennsylvania publishes specific charges for unloading carloads of fresh fruits and vegetables at Baltimore, Pittsburgh, and Chicago. The consignees are, however, permitted to perform such unloading at these points. The protestants at Philadelphia call attention to the fact that all shipments of fruits and vegetables consigned to those markets are unloaded by the consignees, except when they request the carrier to perform that service. When thus requested, the carrier performs the service and collects the charges therefor. Protestants request the same privilege of unloading at the Philadelphia produce terminals.

The Pennsylvania has a house at Baltimore located adjacent to its team-track yard. That house is leased to [fol. 46] consignees at that point and is not operated as an ordinary terminal or freight house. Those consignees lease the platform space by doors, each of which has from 20 to 30 feet of surrounding platform space. They also have offices on the second floor of the facility. Its agent's office is the only part retained by the Pennsylvania. That carrier has never performed unloading at the Baltimore facility, nor has it been requested to do so. The fruit and vegetable trade, which has leased the facility, performs the unloading of its own traffic. The greater part of the traffic is, however, unloaded at team tracks. But when consignees perform the unloading on the house platform, it is done by their own employees. Unlike the facilities of the Philadel-

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phia produce terminal, those at Baltimore are not open to the public.

When the produce terminal was built at Pittsburgh the fruit and vegetable trade at that point requested the Pennsylvania to perform the unloading. In response thereto that carrier performed the service requested, except at the auction facility, where the auction company usually unloads its own freight. At that point consignees have the option of unloading at the produce terminal at their own expense.

At Chicago, fruits and vegetables are unloaded at a team-track yard and at an adjacent house, which is not operated by the Pennsylvania as its own facility. The house is operated as a joint facility, but the record fails to disclose the joint operation or ownership.

The fruit and vegetable terminals and the unloading operations at Baltimore, Pittsburgh, and Chicago, as indicated, are not comparable with those at Philadelphia.

The unloading costs per ton of the Pennsylvania at its produce terminal during July 17 to 23, 1949, were $2.53 for fresh fruits, $1.91 for vegetables (other than top-iced) and citrus fruit, and $3.42 for melons. Those of the Baltimore & Ohio at its perishable produce terminals during July 7 to 21, 1949, were $1.23 for citrus fruit, and $1.53 for fresh fruit (including deciduous fruit). No separate charge is made for sorting fruits at Philadelphia. The cost of that service is included in the charge for unloading.

A protestant who observed the unloading of 21 carloads of citrus fruit and 4 carloads of grapes and pears at the Baltimore & Ohio-Reading Terminal on September 18, 1949, testified that based on the actual time consumed in that operation, at the customary wage of about $1.50 per man-hour, the unloading cost per car averaged $11.29, as compared with actual charges collected by the railroad ranging from $39.44 to $42.38. The average cost of unloading submitted by this protestant did not cover a full night's operation. It applied to a part of a Sunday night, usually the heaviest unloading night in the week, and was based on the number of minutes consumed in unloading each of 25 cars. In order to determine the cost of unloading it would be [fol. 47] necessary to include about a full week's operation. The record establishes that the unloading is performed on

a piecework basis, irrespective of the time it takes to perform it. If the carriers call their employees to perform the unloading, they must be paid whether or not there is sufficient work for them to do. Each such employee is paid for the number of cars handled by the gang to which he is assigned.

A substantial portion of the freight received in Philadelphia at the Pennsylvania produce terminal is auctioned at that facility. Protestants contend that if the cars unloaded for auction were placed in the team-track yard, in addition to the carloads of vegetables normally unloaded there, the unloading facilities of the yard would not accommodate all such cars on certain days, thus increasing substantially the amount of trucking to and from the yard and greatly delaying the delivery of fruits and vegetables. They point out that these facilities were constructed about 25 years ago when horse-drawn vehicles were generally used; that they will not accommodate the large trailer-trucks used to haul a substantial portion of the fruit beyond the Philadelphia area; and that two such trucks in the same driveway will prevent other vehicles from entering that area, thus causing congestion and confusion.

The team-track facilities are sufficient to accommodate a large number of cars. There is no indication that these facilities are inadequate to accommodate the fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such services. However, team-track delivery is not desired for fruit, the auction facilities being more desirable. At certain times there has been congestion at team tracks as a result of the manner in which trailer-trucks were placed in the driveways. Those driveways are 65 feet in width and are comparable with those at team tracks generally. Except during the strikes or similar conditions, there has been no time when the team-track capacity at Philadelphia has not been sufficient to accommodate all cars unloaded at the produce terminals in addition to those unloaded at the team tracks. The team-track capacity can be increased. However, delivery on the terminal platforms is more advantageous than team-track delivery to the Philadelphia consignees.

General discussion and conclusions.—An unusual situa-

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tion, arising primarily from the topography of the area, exists on lower Manhattan as a result of which the present method of handling shipments through the pier stations is of benefit to both shippers (including consignees) and carriers. It is also helpful in the avoidance of traffic congestion. The acquisition of land in that area for additional track facilities would be impracticable if not impossible. The respondents have been willing to perform the unload-[fol. 48] ing without a separate charge until, in recent years, the cost thereof substantially increased. Upon this amplified record we conclude, as hereinafter explained, that the cost of unloading should be borne partly by the shippers and partly by the respondents.

Protestants' contention, that as respondents do not provide team tracks adjacent to the pier stations or sufficient team tracks at other points on Manhattan to accommodate the fruit and vegetable shipments the cost of the unloading must be borne by the respondents, is unsound. Physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is a general community problem and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing difficulties if this congested area is to be served by railroad transportation. Adequate team tracks at respondents' other stations on Manhattan might constitute sufficient answer to protestants' contention. Although it seems that such existing team tracks could not handle all of the fruit and vegetable traffic which now moves through the pier stations, there is little likelihood that the shippers would divert any substantial amount of this traffic from the pier stations as long as they are able to obtain the present terminal services at costs which are not unduly burdensome to them or unduly disproportionate as compared with total costs to them of a satisfactory substitute for pier deliveries. Respondents are under no obligation to provide an excessive amount of terminal service or a particular type of service for which there is no reasonable expectation that it will meet a public need. Moreover, it is conceivable that if terminal costs cannot be kept within reasonable bounds respondents might eventually be forced, as they have inti-

mated, to undertake the establishment of team-track facilities in Jersey City within a reasonable trucking distance of lower Manhattan as a substitute for direct service to the latter area.

In view of our conclusion in the next preceding paragraph, the propriety of the separate unloading charges may be determined without an extensive showing with respect to the reasonableness of the line-haul rates. The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect.

Protestants and respondents have cited several cases in support of their respective positions. However, *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25,[5] [fol. 49] decided August 12, 1947, is the most pertinent of any of the cases cited. In that case it was found that the cost of loading and unloading freight at St. Louis and other points in central territory had increased sufficiently since the beginning of World War II to justify an increase in the loading and unloading charge from 56 and 69 cents to 94 cents per ton when loaded or unloaded by the carriers on freight-house platforms or team tracks. The protestants therein had contended that as the separately published loading and unloading charges did not fully cover the cost of loading and unloading, the line-haul rates therefore included, in part, such cost and that the respondents should not be permitted to increase the separate loading and unloading charges without first justifying the level of the through charges which would result. The protestants also pointed out that at one time the carriers performed certain loading and unloading services free of charge. In deciding that protestants' arguments could not prevail, division 2 stated:

We cannot properly evaluate the reasonableness of a rate or rates on basis of the revenue received thereunder from one shipper or from a class of shippers to the exclusion of revenue received thereunder from the general public as a

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[5] Protestants' petition for reconsideration was denied by the Commission on October 29, 1947.

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whole. While it is true that neither the present nor the proposed charges are completely compensatory in and of themselves, it does not necessarily follow that in determining the lawfulness thereof, lawfulness of the line-haul rates also, from which the carrier must recoup losses that result from performance of the loading or unloading services, must be established. These line-haul rates, many of which have been prescribed or approved by this Commission, must, unless otherwise shown in a proper proceeding, be presumed to be just and reasonable.

The decisions in *New England Coal & Coke Co.* v. *N. & W. Ry. Co.*, 33 I. C. C. 276, and *Loading and Unloading Carload Freight*, 101 I. C. C. 394, also tend to support our conclusions herein.

Notwithstanding our conclusion that respondents are under no obligation to provide an excessive amount of a particular type of service, it is probable that continuance of the present charges will cause sufficient diversion of the traffic under consideration to team-track delivery, to require the construction of additional team-track facilities at considerable expense. It has also been shown that other benefits accrue to respondents from the use of pier deliveries. Pier deliveries permit expeditious handling of cars without switching expense on Manhattan. Upon consideration of these and other circumstances of record we conclude that the shippers should not be forced to pay more than $1.05, $1.35, and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect.

As indicated in the prior report, it is desirable that the charges for unloading at New York and Philadelphia be the same. The charges herein approved are for application at both points.

[fol. 50] The record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 or 3 of the act.

Upon rehearing and further hearing, we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, and the schedules naming the assailed unloading charges will be ordered canceled and the proceeding discontinued without prejudice to the establishment of charges in conformity with the views expressed herein.

The ultimate finding in the prior report is modified accor
ingly.

An appropriate order will be entered.

SPLAWN, Commissioner, concurring specially:

I fully agree with this report to the extent that it revers
the prior report, in which I dissented, and finds that t
proposed unloading charges are not shown to be just a
reasonable. The proposed charges became effective N
vember 1, 1948.

I go along with the additional ultimate findings in th
present report only because they afford some immedia
relief to shippers in that the unloading charges here a
proved are substantially lower than the proposed charg
which have been applied on this traffic since November
1948, pursuant to the findings in the prior report that su
charges were just and reasonable.

Commissioners Aitchison and Lee join in this expressio

MITCHELL, Commissioner, concurring:

I concur in the report.

I think the charges for unloading fresh fruits and veg
tables allowed by the Commission in this report are i
adequate. The present charges became effective Novemb
1, 1948, and are $1.95, $2.28, and $2.60. These charges ha
not been increased since they became effective, and it
common knowledge to all that the cost of labor since Nove
ber 1, 1948, has greatly increased. It is evident that
the present rates in effect were maintained the railroa
would still be contributing to the cost of unloading fre
fruits and vegetables at New York and Philadelphia.

I would maintain the present rates.

Commissioner Johnson joins in the concurring expr
sion of Commissioner Mitchell.

KNUDSON, Commissioner, dissenting:

In my opinion, the report of the majority is not bas
upon the provisions of the Interstate Commerce Act, whi
[fol. 51] it is the duty of this Commission to administ
and enforce. The facts in this proceeding are clear. Th
were fully stated in the reports of the examiners and ha

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been reproduced almost verbatim in the majority report. Instead, however, of applying the law to those facts the majority, in my opinion, has resorted to expediency and compromise.

Through one-factor rates apply on fresh fruits and vegetables from points in the various producing areas throughout the country to stations in New York and Philadelphia. The stations at New York are pier facilities on the Hudson River. Those at Philadelphia are produce terminals not located on the water front, except that prior to 1927 the Philadelphia stations were located on the Delaware River. These facilities are agency stations and have been used principally for the delivery of fruits and vegetables for more than 50 years. There is no intimation that they are to be discontinued for such purposes.

Delivery of carload freight is ordinarily performed by placing the car on a siding or team track convenient to the consignee. It is also performed, in certain instances by unloading the freight on the station or pier platform. Because of the physical nature of the terminals at New York and Philadelphia, the latter method of making delivery of fruits and vegetables at those points was voluntarily established by respondents. In fact, that was the only manner in which, when established, delivery could be made. The unloading was not only incident to, but was also essential to delivery. Arrangements for such unloading by respondents, without interference from the consignees, were provided for in respondents' tariffs. Pursuant thereto, delivery of fruits and vegetables to consignees at the points indicated had been made without charge, in addition to the through rate, for a period exceeding 50 years prior to November 1, 1948. On that date the separate unloading charges under consideration herein became effective. Those charges, subject to modification reflecting certain reductions, have been found just and reasonable in the report of the majority.

The through rates on the traffic under consideration included the charges for line-haul and terminal services. The latter included delivery of the freight to the consignees at New York and Philadelphia, a service voluntarily established and performed by respondents for over half a century. Delivery of the freight was obligatory on respond-

ents. Refusal by them to perform that service would be actionable conversion of the property.

Under the provisions of respondents' tariffs the consignees of fresh fruits and vegetables at New York and Philadelphia were legally entitled to receive their freight in the manner and at the particular piers and stations in- [fol. 52] dicated without charge therefor, in addition to the through rates, until it was established that the charges for performing the unloading were less than the cost of performing that service. As the through rates do not show separately the charges for line-haul and terminal service, it cannot be established that the charges for the latter are not just and reasonable. This can only be done by bringing in issue the measure of the through rates. In other words, it cannot be established that the terminal charges, which include delivery (of which unloading is an essential part), are insufficient to cover the cost thereof without indicating the measure of those charges.

In Wisconsin Potato Shippers Assn. v. A., T. & S. F. Ry. Co., 142 I. C. C. 466, complainants contended that a charge, in addition to the line-haul rates, for the use of insulated cars in the interstate movement of potatoes should have been included in the line-haul rates. Those rates were fixed on the basis of movement of the traffic in boxcars. As the shipments moved in refrigerator cars the Commission, in finding that the assailed charge was not unreasonable, stated:

> A determination of that question would require consideration of the reasonableness of the line-haul rates, and those rates are not here before us.
>
> This principle is here applicable.
>
> If the portion of the through rate applicable to the terminal charges here under consideration is not sufficient to cover the cost of that service, that fact is not established of record. Under section 15(7) of the act the burden of proof is upon respondents to show that the additional charges are just and reasonable. That burden has not been met.

In several reports the Commission found that charges for unloading freight at New York piers incident to delivery to the consignee were included in the line-haul rates; that

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"delivery to the consignee is not effected until the cars are unloaded and the lading placed at a convenient location on the pier floor"; and that where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation theretofore received for such through service. Lighterage and Storage Regulations at New York, 35 I. C. C. 47; Bills of Lading, 52 I. C. C. 671; Erie R. Co. v. Alabama & V. Ry. Co., 98 I. C. C. 268; Fruits and Vegetables to Duane St., N. Y., 66 I. C. C. 135; Allowances for Stacking, 179 I. C. C. 780; Unloading Lumber at New York Harbor, 256 I. C. C. 463. These reports, supporting protestants' contention herein and specifically referred to in the examiners' proposed reports, are omitted from the report of the majority.

[fol. 53] In support of its conclusions the majority refers to Charges for Loading and Unloading Carload Freight, 269 I. C. C. 25. It was proposed by respondents therein to establish increased charges for certain accessorial services, including carload unloading, provided for by them at St. Louis, Mo., and other points in central territory. At those points delivery of carload freight was made in the usual manner at sidings or team tracks, the charge therefor being included in the through rate from point of origin. Respondents also provided in their tariffs that, when requested, they would perform the carload unloading at certain points for 56 cents per ton when unloaded on team tracks and 69 cents when handled over freight-house platforms. They proposed to increase these charges to 94 cents. Division 2 found the proposed charges just and reasonable. That proceeding is not in point with the instant proceeding. There, unloading of the freight was not essential to delivery. It was an accessorial service performed upon request, the charge for which was separate and distinct from the through rate, which included the charge for siding or team-track delivery. The unloading charge, being separate from the through rate, could be increased without

bringing the latter in issue. Here, the unloading at New York and Philadelphia is not an accessorial service. It is an essential part of delivery, published as such in respondents' tariffs, the charges for which are included in the through rates.

Commissioner Patterson did not participate in the disposition of this proceeding.

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[fol. 54] EXHIBIT B TO COMPLAINT

Investigation and Suspension Docket No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

Decided October 4, 1948

Report of the Commission

272 ICC 648

[fol. 55] 25212

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

[fol. 56] Investigation and Suspension Docket No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

Submitted May 5, 1948. Decided October 4, 1948

Proposed unloading charges on fresh fruits and vegetables, in carloads, at New York, N. Y., and Philadelphia, Pa., found just and reasonable. Order of suspension vacated and proceeding discontinued.

Richard R. Bongartz, Francis L. Brown, A. P. Donadio, Lockwood W. Fogg, Jr., Paul V. Miller, and M. C. Smith, Jr., for respondents.

Chas. B. Bowling, Charles V. Bucy, Walter D. Matson, and J. L. Pease for Secretary of Agriculture; Lewis W. Petteway, Fred Pettijohn, and M. W. Wells for Florida Railroad and Public Utilities Commission; H. M. Nicholson for North Carolina Utilities Commission; C. E. Logwood for Public Service Commission of South Carolina; and William C. Seibert for State of Virginia, protestants.

Harold H. Angier, W. J. Augello, Frederick E. Brown,

Charles J. Doughtery, William C. Ehalt, George E. Farrand, Samuel Fraser, Edward A. Hausman, Walter Hoffman, L. C. Hunter, Wilbur La Roe, Jr., Karl D. Loos, S. H. Moerman, John A. Montgomery, Robert C. Neill, John A. O'Rourke, Leander I. Shelley, Gordon Stedman, John R. Van Arnum, H. J. Wagner, M. W. Wells, and Arthur L. Winn, Jr., for shippers and other interests, protestants.

Report of the Commission

By the COMMISSION:

By schedules filed to become effective June 1, 1947, respondents, rail carriers, propose to establish charges for unloading carload shipments of fresh fruits and vegetables at New York, N. Y., and Philadelphia, Pa. Upon protests of numerous shippers and shipper organizations, State commissions, The Port of New York Authority, and other interests, operation of the schedules was suspended to and including December 31, 1947. Respondents have voluntarily deferred the effective date of the schedules pending determination of this proceeding. No proposed report was served, but the parties have been heard in oral argument and reargument.

Charges as follows are proposed for addition to the line-[fol. 57] haul rates:

	Per net ton
Citrus Fruits	$1.50
Fresh fruits (other than citrus)	1.75
Melons (including cantaloups)	2.00
Vegetables, fresh or green, not cold pack or frozen	1.50
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.00

Respondents' proposals reflect an effort on the part of the delivering lines to secure increased revenues from the fruit and vegetable traffic terminated at New York and Philadelphia. No charges such as those proposed have applied on this traffic in the past. These charges would accrue solely to the delivering lines. Other carriers have taken no interest in this proceeding. The principal lines that would benefit from the proposals are the Baltimore &

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Ohio, Erie, New York Central, Pennsylvania, and the Reading.[1]

The general rule is that shippers must load or unload carload freight or make provision therefor at their own expense. Where the carriers perform this service a charge usually is made. Rule 27 of the Consolidated Freight Classification provides in part as follows:

Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL rating or rates, except where tariff of carrier at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier.

The present arrangements covering unloading at New York and Philadelphia, also the proposed charges, are covered by exceptions to the classification whereby it is contemplated that the carriers shall perform the unloading without interference from the shippers. It is provided that the unloading service will be performed only at designated stations. At the present time there are no charges for unloading fruits, vegetables, or other descriptions of traffic at the stations specified. The proposed charges would apply only on fruits and vegetables and not on other traffic. The substance of respondents' explanation for this seeming disparity of treatment is that since fruits and vegetables constitute the bulk of the shipments received at these stations, it was considered appropriate in the first instance to institute charges for unloading these perishables and to defer publication of similar charges on other traffic. It is indicated that consideration is being given to the establishment of unloading charges on traffic other than fruits and vegetables but that no definite conclusion has been reached. [fol. 58] There has been a gradual elimination of so-called free unloading of carload freight by the carriers in official

[1] Abbreviated titles used herein are Baltimore & Ohio for The Baltimore and Ohio Railroad Company; Erie for Erie Railroad Company; New York Central for The New York Central Railroad Company; Pennsylvania for the Pennsylvania Railroad Company; and Reading for Reading Company.

territory. It does not appear that there are points other than New York and Philadelphia that are exceptions to the general rule that the obligation of unloading carload freight rests with the shippers. Formerly, the carriers made exceptions to this rule at Chicago, Buffalo, Pittsburgh, and certain port cities to meet competitive situations at those points and for some time where loading and unloading of carload freight was performed by the carriers there was no charge. In 1924, however, the carriers began discontinuance of this practice where appropriate. During that year tariffs became effective which provided for loading and unloading charges at the interior cities just mentioned, but not at the ports. This difference in treatment was due principally to water competition. Water carriers generally load and unload at their own expense and apparently the rail lines then felt that they could not compete effectively if they were to establish loading and unloading charges in the absence of similar charges by the water lines. Loading and unloading by the railroads, without charge, was continued at the port cities for some years thereafter. In the years following 1925, loading and unloading service by the carriers without charge, was discontinued at many other interior points in official territory until finally New York and Philadelphia remained the sole exceptions.

The same schedule of charges was published for application at both New York and Philadelphia because of the long-standing competitive relation between those cities. In determining the level of the respective charges respondents considered it impracticable to do more than determine charges which approximated the claimed average cost of unloading particular groups of commodities at those stations. Tariff complexities would result if a different charge were maintained for each of the respective commodities. Accordingly, respondents have proposed charges in amounts commensurate with the claimed average costs of unloading certain groups of commodities as heretofore indicated. No objection to the grouping, as such, has been voiced by any of the protestants. The practical necessities of this broad grouping are recognized and accepted.

The Erie and the Pennsylvania handle the bulk of the traffic at New York and Philadelphia although a substan-

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tial amount reaches New York over the lines of the Baltimore & Ohio and the New York Central. Most fruits and vegetables originating at western producing points, particularly in California, and destined to New York are routed over the Erie, which usually receives the traffic at points in Indiana. Similar commodities from the Southeast, including those originating at points in Florida ordinarily [fol. 59] are transported by the Pennsylvania generally from Potomac Yard, Va., through to New York. The Erie receives almost a maximum haul over its line from Indiana to the New York area. Carriers making Philadelphia deliveries are the Baltimore & Ohio, Pennsylvania, and Reading. The situation at New York will be discussed first.

Piers 19, 20, and 21, leased by the Erie from the city of New York and known as the Duane Street Piers, are located on Manhattan Island opposite the Erie terminals in New Jersey. Cars terminated by this carrier at Jersey City, N. J., are moved onto car floats and then transported by Erie tugs across the Hudson River to those piers. These floats each have a capacity of 10 to 16 cars. There are 16 berth doors available at those piers. These permit berthing a maximum of 22 car floats alongside the piers at the same time. The piers are adjacent to Washington Market, the largest fruit and vegetable market in New York and the primary market in the entire metropolitan area.

The Erie conducts its unloading of fresh fruits and vegetables at night, generally starting around 8 p. m. on weekdays and somewhat earlier on Sundays and holidays. Usually, the unloading operations are completed early the following morning, about 5 a. m. or 6 a. m. When a car is ready for unloading a crew of workmen places gangplanks in positions so that the lading can be removed from the cars onto the piers. Thereafter and during the course of the unloading operations this crew adjusts gangplanks to meet changing tide conditions, and performs other assigned duties. On occasion these workmen break the seals of the cars, remove wooden bracing from the cars, and dispose of such bracing, although these particular duties ordinarily are handled by so-called "wood gangs." The "unloading gangs," each comprising seven men, unload the cars. An "unloading gang" consists of one carman or

checker who has charge of the crew, makes a tally of the contents of the car, and loads hand trucks in the car, a second carman who assists in the loading of hand trucks, three truckers who handle the loaded trucks from the car to the dock and return the empty trucks from the dock to the car, and two dockmen who unload the trucks on the dock and assort and stack the packages of freight on the pier floor. The "unloading gangs" also move commodities on the piers to make room for subsequent unloading operations. A crew of so-called "dock counters" checks to see that the "unloading gangs" have placed the packages at the correct locations on the floor of the piers and sees that any improperly placed packages are moved to their assigned positions. Damaged containers are segregated and then moved to another location on the pier. If the lading is not damaged the packages are recoopered and returned to their indicated locations on the pier.

[fol. 60] The above-described operations are performed by employees of the Seaboard Terminal and Refrigeration Company, hereinafter referred to as the Seaboard Company, pursuant to contractual arrangements between it and the Erie. In addition to the workmen referred to above, the Seaboard Company employs six or more float foremen who supervise the work of the "unloading gangs." These float foremen devote all of their time to this work. The Seaboard Company also employs "sweepers" who clean and sweep the Erie piers, removing the accumulated debris so that the required standard of sanitation may be maintained. The "sweepers" may be assisted by the "unloading gangs" when the latter are not otherwise occupied. The Seaboard Company employs a night general foreman and three or more assistants to supervise all of the described operations; also a night timekeeper. The Erie supplies the Seaboard Company with office space at pier 21. Clerical and accounting work in connection with the unloading operations is performed by employees of the latter company at that location. The Seaboard Company also furnishes so-called "A-Line" men who handle damaged packages that have been recoopered, placing them in their regular stacks and setting aside packages that are not in acceptable condition so that they may be inspected and subsequently delivered to the consignee or a salvage agent.

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Another employee, known as a "seal and ice clerk," observes and records the amount of ice in the car bunkers, the position of ventilators, the condition of the car seals, and seals the cars when necessary.

All cars of fresh fruits and vegetables reaching piers 19, 20, and 21 are unloaded by the Seaboard Company for the Erie in the manner described and this practice and the service performed has been in effect for many years without substantial change. The time it takes to unload particular types of fresh fruits and vegetables varies according to the size of the box, the weight per box, and the method of refrigeration and packing in the cars. The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available.

Equiment used by employees of the Seaboard Company, such as hand trucks, gangplanks, race pieces, and truck racks, is furnished and maintained by the Erie. The investment in this equipment is said to be substantial. Adequate lighting must be provided, also heating during the winter months. The Erie assumes the cost thereof. Necessary repairs to the piers and the maintenance thereof are handled by the Erie. Certain employees of that carrier are [fol. 61] engaged to some extent in the unloading operations or in duties related thereto. These include delivery clerks, electricians, float checkers, watchmen, and janitors.

The Erie is informed with respect to the contents of the cars, the names of the consignees, and other pertinent details in connection with the shipments long prior to their arrival at Duane Street piers. This permits notification to the receivers of the freight in advance of arrival and enables the carrier to allot space on the piers for each consignment. In this latter respect the Erie piers are mapped out in such a way as to give each consignee a specified location for the contents of the cars after unloading. Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers. Practically all of the citrus fruits and fresh fruits other than citrus, after being unloaded on the piers, are sold at public auction in rooms specially assigned for that purpose. These rooms, made

available by the Erie solely for the auctions, are located on the second floor of piers 20 and 21. Prospective bidders usually inspect the fruit while it is on display on the pier floor. This takes place prior to the auction. Cantaloups and melons, as a rule, are not sold at auction but are bought at private sales on the pier floor where the packages are displayed. Fresh or green vegetables, particularly those not top-iced, frequently reach the consignee without prior sale at the piers. With the exception of tomatoes they are not sold at auction.

The described operations of the Erie and the practices in connection therewith are typical of other unloading operations at New York conducted by the principal respondents, including the Baltimore & Ohio, Pennsylvania, and New York Central, except that the Pennsylvania uses mechanized equipment to move the produce from the cars to the pier floor. Further discussion of terminal operations will be limited to brief statements of such facts as are necessary to indicate the nature of the operations at other terminals in the respect that they are different than those heretofore described.

The Baltimore & Ohio makes deliveries of fresh fruits and vegetables at New York at pier 22 and at its West Twenty-sixth Street Station. Pier 22 is adjacent to the Duane Street piers. It is rented from the city of New York and is operated in much the same manner as the Erie piers. A total of 12 car floats can be accommodated. The Baltimore & Ohio performs unloading service only at pier 22. Consignees perform their own unloading at the West Twenty-sixth Street Station. The facilities at that point include certain team tracks accessible to motortrucks, such tracks having a total capacity of 45 cars.

[fol. 62] Fruits and vegetables delivered by the Pennsylvania at New York are moved on car floats from its New Jersey rail terminal, Harsimus Cove yard, to piers 27, 28, and 29. These are referred to as the Pennsylvania Produce Terminal. The unloading is performed by gangs of five or six men, the number in the gang depending upon the nature of the commodity being unloaded. Two or three of the gang are carmen who load the freight from the car onto so-called dolly trucks. The remainder of the gang consists of a tractor operator, who hauls these trucks from

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the car float to the pier, and two men on the pier who unload the trucks and stack the produce on the pier floor. The tractor ordinarily will move the loaded trucks in trains of from two to six trucks.

Produce cars are handled by the New York Central at its Barclay Street Station in New York. The cars are transported to that station on platform floats from Weehawken and West Seventy-second Street. At another location near the Bronx Terminal Market, carloads of fresh fruits and vegetables are placed on a track adjacent to the freight house. This facility is leased from the city of New York and the track also is owned by that municipality. Delivery at the freight house is performed by railroad labor and equipment as is the case in connection with the operations at the Barclay Street Terminal. All of the produce delivered from the Barclay Street Station arrive by car float. At Bronx Terminal Market some of the cars are moved from a float bridge owned by the city of New York and placed at the above-mentioned freight house for unloading. The balance of the shipments received at this terminal arrive by overland movement.

There are various team tracks and private sidings in New York at which consignees may receive cars for unloading. These are in addition to the terminals of the Erie, Baltimore & Ohio, and the New York Central, previously described. When cars are received at team tracks and private sidings the consignees unload the cars at their own expense. These facilities are not sufficient to handle all of the great bulk of fruits and vegetables received at New York, although the New York Central asserts that its team-track facilities can accommodate such cars of fruits and vegetables as it may transport to that area. A similar situation does not obtain in connection with the operations of the Erie, Baltimore & Ohio, and Pennsylvania.

A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are un- [fol. 63] loaded and the lading placed at a convenient loca-

tion on the pier floor. It is clearly indicated that it is impracticable for the shippers to perform the actual unloading operations. At the hearing respondents stated that an arrangement might be made whereby the shippers would be permitted to unload, but the trend of the evidence is that present unloading practices would be continued and would be performed under the direction and supervision of the carriers or their agents.

Services not contemplated as part of those for which the unloading charges are proposed, include sorting of the packages according to brand, grade, and size. Although usually performed by representatives of the consignee, the entire load in the first instance may be stacked by railroad labor or by agents of the carriers and then resorted and restacked either by rail or consignee employees; or the rail employees, when previously advised by the consignee, may sort the packages as they are taken from the trucks. For this resorting and restacking service, when performed by the railroads or their designated agents, a charge is made pursuant to appropriate tariff authority. See *Allowances for Stacking*, 179 I. C. C. 780.

When cars are unloaded at the pier terminals the owners of the produce must truck the contents of the cars from the pier floor to their destination in New York, either at Washington Market or some other location. A similar trucking operation occurs when the cars are unloaded at team tracks. However, at these latter points the shipper usually loads the truck direct from the car. There is no information of record with respect to the handling of the contents of the car where delivery is taken at private sidings.

Protestants urge that if the schedules become effective the receivers of the commodities will be faced with the imposition of a charge for unloading the cars, including placement of the produce on the pier floor, in addition to the expense of loading motortrucks and transporting the lading to its market destination. They claim that the total costs will be approximately double those which would be incurred if the cars were handled at team tracks. Although the record contains no data concerning the costs of loading the trucks and delivering the produce, pier-floor delivery as compared with that at team tracks, it is probable that in some instances the relative costs are not materially

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different. But it is apparent that shippers taking team-track delivery will incur added expense as to other shipments, notably where the commodities are top-iced. Pier delivery affords consignees the advantages, not available in connection with team-track delivery, of displaying their produce to prospective purchasers and the added privilege of auction sales of a considerable portion of the traffic in question, both at convenient locations.

[fol. 64] Unloading operations at Philadelphia are somewhat similar to those at New York, except that no car floatage is performed. Cars of fresh fruits and vegetables are received by the Pennsylvania at three stations in that city, the Pennsylvania Produce Terminal, Engleside Station, and Thirty-first and Chestnut Street Station. Platform facilities are provided at the latter station where consignees, primarily chain stores, perform their own unloading. Normally, space for 10 or 12 cars is alloted to receivers of these commodities. Facilities at the Engleside Station consist of team tracks having a capacity of 50 cars. The consignees perform their own unloading at the Engleside Station. The Pennsylvania Produce Terminal contains two sheds, each with a floor space of 83,600 square feet. The tracks at that plant have a capacity of 72 cars and there are additional team tracks which will hold 510 cars. The sheds at the terminal are designated shed "A" and shed "B", the first being used principally for unloading fruit to be sold at auction and the second for fruit intended for private sale. It is only at these sheds that the Pennsylvania performs the unloading. The consignees do their own unloading when the cars are spotted on the team tracks and, as stated, at the other stations of the Pennsylvania in Philadelphia.

The distances from car door to platform location at the Pennsylvania Produce Terminal are much shorter than those at the New York piers. Consequently, this carrier has not seen fit to mechanize its equipment as at New York. Packages are handled on four-wheeled, hand-propelled trucks. The unloading crew consists of six men, two loaders who work in the car, two truckers who propel the trucks from the car to the platform location, and two platform men who unload the produce from the trucks to the floor of the

terminal. As contrasted with the New York situation, it is the practice at Philadelphia to segregate each carload by brand and size of the respective commodities in conformity with the selling units shown on catalogs printed by the auction company which operates at that location. No charge is made for this special service at Philadelphia.

Operations in shed "B" are somewhat different. There the cars are unloaded by crews of five or more men, consisting of two loaders who work in the car and three or more truckers. Hand-propelled, two-wheeled trucks are used. After the trucks are loaded in the car, the men push the trucks to the assigned space on the platform and wait there while the consignees' employees unload the trucks. This method usually involved some delay because at that point the consignees inspect the packages.

In contrast with the New York operations, where the unloading is performed by a private contractor, the un- [fol. 65] loading by the Pennsylvania at Philadelphia is done by railroad labor. These employees are augmented from time to time by additional workers furnished by a labor contractor who is paid on a cost-plus basis. The Pennsylvania maintains auction rooms for the convenience of the trade and provides heat and light throughout the terminal.

The Baltimore & Ohio and the Reading operate a joint produce terminal at Philadelphia. The building used for the unloading and display of fresh fruits and vegetables is located several blocks from the terminal of the Pennsylvania. It contains a platform 800 feet long and approximately 87 feet wide. The front of the building is used for railroad offices, with auction rooms and other offices above them. An additional building is leased to a cold-storage plant and to several chain stores. These lessees perform their own unloading. The produce terminal is equipped with 6 team tracks having a total capacity of 100 cars. All cars delivered on team tracks are unloaded by the consignees. The unloading operation on the auction platform is performed by railroad employees. The unloading gangs each consist of three truckers, two pilers, and one checker. A tractor is used to pull the trucks over the platform. Apparently only one operator is employed for that work. After the contents of the car have been piled on the plat-

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form, the packages are checked by the foreman and turned over to the auction company.

The volume of fresh fruits and vegetables received at New York and Philadelphia each year is tremendous, and the movement as a whole is fairly steady throughout the year, except during the peak producing periods of particular commodities. An exhibit submitted by respondents shows that a total of 118,497 carloads of these products were received at stations in the metropolitan area of New York, during the year 1946, including certain stations in New Jersey and some nearby points on Long Island. Express shipments are not included. Of these 118,497 carloads, 72,753 were unloaded by the carriers at piers 17, 19, 20, 21, 22, 27, 28, and 29 at New York and the remainder, 45,744, by the consignees. It is impossible to determine from the record the exact number of shipments unloaded by the consignees at New York proper, but the evidence indicates that the amount thereof is substantial. Similar statistics are shown for Philadelphia. During the same year a total of 40,585 carloads were received at that city, of which the railroads unloaded 13,530 and the consignees 27,055. The bulk of the shipments unloaded by the carriers at New York and Philadelphia are sold at public auction.

The unloading of melons, top-iced vegetables, and deciduous fruits requires more time and more care than in the case of citrus fruits. Thus, unloading costs for citrus fruits are lower than for the other commodities. The ad- [fol. 66] ditional expense of unloading top-iced vegetables and melons results from the difficulties encountered in removing the ice in order to reach the packages, from the great care which must be exercised in handling the packages to keep the produce in good condition, and from the fact in the case of melons that they are easily damaged. There also are added costs for cleaning the pier or terminal floor and confining the water from the melted ice. The higher cost of handling deciduous fruits results from the fact that these products are shipped in relatively small boxes. A citrus carload consists of 525 boxes, as compared with 1,500 boxes for a carload of cherries, 1,050 boxes of plums, and 800 boxes for peaches.

Respondents made various studies to determine the costs of the unloading services at New York and Philadelphia.

The results have been tabulated and pertinent data with respect thereto are set forth in the appendix to this report. For the purpose of arriving at an average cost figure for each class of commodities at each of those cities, the figures from respondents' cost exhibits have been combined, as set forth in the appendix. Table I thereof shows the computed weighted average cost of handling each class of commodities, both at New York and Philadelphia; also the combined weighted average cost for both cities. In the preparation of the data shown in both tables I and II, the tonnage figures for the the Erie were divided by four, as the cost study made by that carrier covered four separate weekly periods, whereas the figures for the other respondents resulted from a test period of 1 week only. The figures used do not represent straight averages of the cost per ton. Instead, each figure is weighted to reflect the differences in the volume of tonnage handled at each of the respective stations. The purpose of this, as stated by respondents, is to give a more accurate composite average cost.

Table I of the appendix shows that respondents' computation of the combined costs at New York and Philadelphia average $1.21 for citrus fruits, $1.73 for other fresh fruits, $1.73 for vegetables not top-iced, $3.42 for top-iced vegetables, and $1.85 for melons. These costs are per net ton. Additional information is shown in table II of the appendix, wherein assigned costs for the various commodities are grouped. The combined costs in this table for New York and Philadelphia are $1.39 for all citrus fruits and vegetables, not top-iced, $1.73 for fresh fruits, other than citrus, and $3.07 for top-iced vegetables and melons. Table III of the appendix shows the proposed charges for unloading various fresh fruits and vegetables. These charges are stated in amounts per net ton and the equivalent charge per box or other container is also shown. Table III is included in the appendix for convenient reference in comparing the [fol. 67] proposed charges with the claimed costs assignable to the unloading operations.

Respondents explain that the basic cost items used in their studies were restricted to the wages of employees directly engaged in unloading these commodities. They point to the fact that other cost items could have been included, but perhaps due to the controversial nature of some

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of them they made no specific computations therefor. These items include the cost of furnishing equipment used in unloading, the cost of heating and lighting the terminals, additional costs for garbage removal, rental charges, and amortization costs. Considering these additional factors as well as the costs directly related to unloading, respondents reach the conclusion that the suspended charges are no higher than necessary to meet the expenses which the carriers incur in performing the unloading service.

Protestants introduced no evidence in rebuttal of the cost studies. They raise no question as to the accuracy of the cost data, considering the methods used in making the determinations nor do they claim any inaccuracies in respondents' computations shown in the appendix hereto. Such criticisms as they have made are largely with respect to respondents' failure to submit collateral data concerning costs incurred in making team-track deliveries; also data with respect to the costs of the special sorting and stacking service for which a charge is now made at New York. In addition, they call attention to the inclusion of certain items of cost which they claim are not properly chargeable to the unloading service. They also take the position that the test periods used in determining the basic cost data are not representative. Most of protestants' criticisms were with respect to the New York cost studies. In the circumstances further discussion with respect to Philadelphia seems unnecessary.

Attention is called to the fact that respondents' computations do not take into account various expenses which would be incurred in connection with team-track delivery which are not present in the case of pier delivery. The record indicates that cars of fruits and vegetables destined to team tracks in New York would be floated from the New Jersey side in the same manner as other cars intended for pier delivery. Up to the arrival at the float bridge on the Manhattan side the operations performed and therefore the costs are substantially the same, except that it takes a somewhat longer time to float to points near the team-track stations than to the piers. Thereafter, there are substantial differences. The cars must be switched off the float and then transported to the station yard. At that point

they must be spotted on designated team tracks. After unloading they must be switched from the team tracks and [fol. 68] then back to the float bridge where they are loaded on the car float. There is no expense for switching at the piers. Protestants assert that the cost of switching to and from team tracks should have been taken into consideration in respondents' cost studies, since there is no switching at the piers. They claim that this represents a saving to the carriers, as pier delivery is substituted for team-track delivery. Another factor which they say should be given consideration is the allowance for free time at team tracks. There is no detention of equipment when shipments are handled at the piers. No studies have been made concerning these switching costs or of the savings from more effective utilization of equipment as the result of pier delivery. In any event it is not appropriate to consider these matters as affecting the costs, as such, of unloading at the piers.

Another claimed defect in the cost studies is the lack of proper consideration to the sorting service for which charges are paid to the railroads when that service is performed by them on the New York piers. This service is something beyond the delivery required for the full performance of the transportation service. It involves stacking by brands and sizes, so that each lot shown in the auction catalog will be represented by separate stacks. This sorting service usually is performed as a continuous operation with the unloading, frequently by the same gangs who do the unloading. Because of the continuity of the operation and the fact that both unloading and sorting may be performed by the same gangs, it is difficult to determine when one ends and the other begins. The allocation of costs as between the two services calls for the exercise of discretion and judgment. Protestants say that the cost studies should have included both services, separately stated, so that the allocation between the two could be analyzed and tested. The cost witness for the Erie computed the total cost of the two operations and then, after crediting revenue from the sorting service, used the balance as the cost of unloading. The record does not show whether the revenue from sorting was less than, more than, or equal to the sorting cost. The Pennsylvania cost witness indicated that

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the separation of the unloading time and the sorting time was made by the men on the piers who did the work.

All of the New York cost exhibits take into consideration costs for sweeping and cleaning the piers. All, with the exception of the Erie, include charges for watchmen. Protestants refer to the fact that these piers are railroad premises and that it is a part of the transportation duty of the railroads to keep the premises clean and to afford adequate police protection. The exhibits also show costs for delivery clerks. Protestants assert, with some force, that these are terminal costs and would be incurred in [fol. 69] connection with any delivery at any railroad terminal.

The Pennsylvania and the Baltimore & Ohio used the first week in February as the test period. The New York Central selected a week in February and one in June. The Erie used 1 week in each of 4 months, February, May, August, and November. The record contains no satisfactory explanation why these particular weeks were selected for the cost studies, but there is no indication of record that other weeks would have produced materially different results .

Careful consideration of these cost studies and of the testimony of qualified witnesses who explained them leads to the conclusion that the studies were carefully prepared and sufficiently prove the facts therein set forth. While they may be subject to certain infirmities, some of which have been called to our attention by protestants, these are more than offset by several items of cost which have been omitted from the studies, as previously explained herein, some of which might well have been included.

The protestants include the Secretary of Agriculture, The Port of New York Authority, Florida Railroad and Public Utilities Commission, Florida Citrus Commission, State Corporation Commission of Virginia, North Carolina Utilities Commission, Public Service Commission of South Carolina, Growers and Shippers League of Florida, International Apple Association, National League of Wholesale Fresh Fruit and Vegetable Distributors, United Fresh Fruit and Vegetable Association, California Grape and Tree Fruit Association, California Growers and Shippers Protective League, California Citrus League, and many others. Most of the prot-

estants were represented by counsel at the hearing, and a substantial amount of evidence was presented in their behalf. Much of this evidence is statistical in nature and is not disputed by respondents. It is shown that each of the important producing areas in the United States furnishes an immense tonnage of fresh fruits and vegetables for transportation to New York and Philadelphia, which is of great importance to the affected carriers, and that costs of production have increased substantially in recent years. Selling practices and other methods used in the marketing of fresh fruits and vegetables, developed over a period of years, are the result of close cooperation between the shippers and the carriers. The practice of selling produce at auction in New York and Philadelphia has benefited the producers, the carriers, and the consuming public.

The protesting shippers believe that there is no practicable way of passing on to the ultimate consumer the increases in transportation costs represented by the proposed [fol. 70] charges, supply and demand being dominant and controlling factors. They fear that increased charges might result in a reduction in the volume of shipments to New York and Philadelphia. These ideas are conjectural and are entitled to comparatively little weight in determining the issues in this proceeding. Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates. In prescribing or approving rate adjustments for fresh fruits and vegetables, however, these terminal services usually have been considered in connection with the rates to widespread destination areas. The relative level of the rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading.

For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates. The establishment of specific charges for unloading at New York and Philadelphia, without reference to the levels of the line-haul rates is justified. Such charges are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate

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charges are published. Concurrence of carriers other than the destination lines, respondents herein, is not a prerequisite to the establishment of the proposed unloading charges.

Protestants allege that sections 2 and 3 of the Interstate Commerce Act would be violated if charges are made for unloading fresh fruits and vegetables at the respective piers, while continuing the free unloading of other commodities at the same locations. Circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables. Protestants also allege, without convincing proof, that there would be other situations where undue prejudice and preference would be created, particularly with respect to pier delivery as compared with team-track delivery. On this record it has not been shown that there would be violations of either sections 2 or 3 of the act.

Respondents have justified their proposals. In reaching this conclusion we have given due consideration to all pertinent facts of record, particularly the evidence with respect to the cost of the service. Admittedly, respondents have derived substantial benefits from the concentration of traffic at their New York and Philadelphia produce terminals and from the line-haul revenue received by them from this traffic, but these factors are in no sense controlling [fol. 71] in the determination of the issues now before us. The protesting shippers have also received worth while benefits. The present expense of unloading is such that respondents should no longer be required to furnish this service without adequate compensation. The cost of service is less at Philadelphia than at New York, but no separate charge for special sorting and stacking is made at that point. Furthermore, the record indicates the desirability of a parity of charges for unloading at New York and Philadelphia. We conclude that the charges for unloading should be the same at both points.

Requested findings and conclusions not dealt with herein have been given due consideration and are found not justified.

We find that the schedules under investigation are just and reasonable. An order will be entered vacating the order of suspension and discontinuing this proceeding.

CHAIRMAN LEE, COMMISSIONERS AITCHISON, SPLAWN, AND ALLDREDGE, *dissent.*

COMMISSIONER PATTERSON, being necessarily absent, did not participate in the disposition of this proceeding.

COMMISSIONER JOHNSON participated in the disposition of this proceeding.

APPENDIX

TABLE I.—*Statement of composite weighted average cost, in dollars per ton, of unloading fresh fruits and vegetables at New York, N. Y., and Philadelphia, Pa.; as computed by respondents*

	New York	Philadelphia	Combined
Citrus fruits	$1.25	$1.04	$1.21
Vegetables, not top-iced	1.94	.98	1.73
Fresh fruits, other than citrus	1.76	1.41	1.73
Top-iced vegetables	3.42	....	3.42
Melons	1.90	1.10	1.85
Average	1.75	1.05	1.63

TABLE II.—*Statement of composite weighted average cost, in dollars per ton, based on table I, showing weighted average for commodities taking the same charge, as computed by respondents*

	New York	Philadelphia	Combined
Citrus fruits and vegetables, not top-iced	$1.495	$1.016	$1.39
Fresh fruits, other than citrus	1.76	1.41	1.73
Top-iced vegetables and melons	3.095	1.1	3.07
Average	1.75	1.05	1.63

[fol. 72]

TABLE III.—*Statement showing proposed charges per parcel as well as per ton for unloading various fresh fruits and vegetables, as computed by respondents*

	Weight	Proposed charge per ton	Equivalent charge per parcel
	Pounds	*Cents*	*Cents*
Apples (box)	51.5	175	4.5
Cabbage (1.5 bushel basket)	58	150	4.35
Cantloups (standard crate)	68	200	6.8
Grapefruit (south Pacific coast standard)	76	150	5.7
Grapefruit (Florida standard box)	91	150	6.8
Lemons (standard 2-compartment box)	87	150	6.5
Lettuce (top-iced) bushel hamper	25	200	2.5
Crate	71	200	7.1
Oranges:			
(Florida standard)	100	150	7.5
(South Pacific coast standard)	85	150	6.375
Peaches:			
(South Pacific coast box)	21.5	175	1.88
(Georgia standard box)	55	175	4.8

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EXHIBIT C

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of May, A. D. 1952.

INVESTIGATION AND SUSPENSION DOCKET NO. 5500
UNLOADING CHARGES ON FRUITS AND VEGETABLES AT
NEW YORK AND PHILADELPHIA

It appearing, That on October 4, 1948, the Commission made and filed its report and entered its order in the above-entitled proceeding, that on June 9, 1949, this proceeding was reopened for rehearing, and that by notice of October 10, 1950 the proceeding was assigned for further hearing;

It further appearing, That the proceeding has been reheard and further heard, and that the Commission, on the date hereof, has made and filed a report on rehearing and further hearing containing its findings of fact and conclusions thereon, which said report and the aforesaid report of October 4, 1948, are hereby referred to and made parts hereof:

It is ordered, That the aforesaid order of October 4, 1948, be, and it is hereby, vacated and set aside

It is further ordered, That said respondents be, and they are hereby, notified and required to cancel the schedules naming the unloading charges under investigation herein, on or before July 3, 1952, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that the proceeding be discontinued.

W. P. BARTEL,
Secretary.

(SEAL)

EXHIBIT D

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 15th day of December, A. D. 1952.

No. 31105

FLORIDA CITRUS COMMISSION ET AL.

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.

No. 31106

FLORIDA CITRUS COMMISSION ET AL.

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.

It appearing, That in Investigation and Suspension Docket No. 5500, Unloading Charges, Fruits and Vegetables, N. Y. and Phila., 286 I.C.C. 119, the Commission, on May 7, 1952, upon rehearing and further hearing, modified the finding in the prior report therein, 272 I.C.C. 648, and found that the shippers should not be required to pay more than certain specified unloading charges on fresh fruits and vegetables, in carloads, at New York, N. Y., and Philadelphia, Pa.; that respondents were required to cancel certain suspended schedules naming proposed increased unloading charges but without prejudice to the establishment of the unloading charges stated in the findings; and that respondents subsequently canceled the suspended schedules and made effective the stated charges;

It further appearing, That the complaints in Nos. 31105 and 31106 assail on substantially the same grounds the unloading charges approved in said report and published by the defendants; that complainants therein were parties to I. & S. 5500; and that defendants' have filed motions to

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dismiss such complaints, and complainants have replied thereto;

And it further appearing, Upon consideration of such motions and replies, that the circumstances and conditions with respect to the approved unloading charges have not materially changed since substantially the same issues were decided by the Commission in I. & S. No. 5500, and that no reasonable grounds appear for further investigation of such charges or investigation of the matters in connection therewith specified in the complaints:

It is ordered, That defendants' motions to dismiss the complaints be, and they are hereby, granted, and that the complaints in Nos. 31105 and 31106 be, and they are hereby, dismissed.

By the Commission.

(SEAL)

GEORGE W. LAIRD,
Acting Secretary.

EXHIBIT E

Before the

INTERSTATE COMMERCE COMMISSION

Docket No. 31105

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CALIFORNIA CITRUS LEAGUE OF FLORIDA, CALIFORNIA GRAPE AND TREE FRUIT LEAGUE, UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, AND THE PORT OF NEW YORK AUTHORITY, *Complainants,*

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY, BROOKLYN EASTERN DISTRICT TERMINAL, BUSH TERMINAL RAILROAD COMPANY, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, EAST JERSEY RAILROAD AND TERMINAL COMPANY, ERIE RAILROAD COMPANY, HOBOKEN MANUFACTURERS RAILROAD COMPANY, THE JAY STREET CONNECTING RAILROAD, LEHIGH VALLEY RAILROAD COMPANY, THE NEW JERSEY AND NEW YORK RAILROAD COMPANY (PETER DURYEE, TRUSTEE), THE NEW YORK CENTRAL RAILROAD COMPANY, NEW YORK DOCK RAILWAY, NEW YORK, ONTARIO AND WESTERN RAILWAY COMPANY (HENRY K. NORTON, TRUSTEE), THE PENNSYLVANIA RAILROAD COMPANY, AND THE STATEN ISLAND RAPID TRANSIT RAILWAY COMPANY, *Defendants.*

Complaint.

The Complaint of the above-named complainants respectfully shows:

1. That the complainant, Florida Citrus Commission, is a regulatory body of the State of Florida, duly created by statutes of said State and thereby charged with the enforce-

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ment of the State's citrus laws and with the duty of protecting the Florida citrus industry in the matter of transportation rates and charges. Its office is located in Lakeland, Florida.

2. That the complainant, Growers and Shippers League of Florida, is a non-profit corporation under the laws of the State of Florida, and its members produce and ship from Florida in interstate commerce large quantities of fresh oranges, grapefruit and other fresh citrus fruits, and fresh vegetables to New York, New York. It is the duly authorized traffic agency of Florida Citrus Commission. Its place of business is 45 West Central Avenue, Orlando, Florida.

3. That the complainant, California Citrus League, is an association of growers and shippers of fresh oranges, grapefruit and other fresh citrus fruits from California in interstate commerce to New York, New York. Its place of business is 707 W. 5th Street, Los Angeles, California.

4. That the complainant, California Grape and Tree Fruit League is an association of substantially all the growers and shippers of California deciduous tree fruits and grapes moving interstate from California to New York, New York. Its place of business is 717 Market Street, San Francisco 3, California.

5. That the complainant, United Fresh Fruit and Vegetable Association is an association of growers, shippers and receivers of fresh fruits and fresh vegetables with members throughout the United States. Its members ship fresh fruits and fresh vegetables in interstate commerce from various origins, including Florida and California, to New York, New York. Its principal office is Wyatt Building, Washington, D. C.

6. That the complainant, The Port of New York Authority, is a municipal corporate instrumentality created by compact between the States of New York and New Jersey

with the approval of the Congress of the United States and charged with the duty of protecting, promoting and developing the commerce of the Port of New York district. Its principal office is 111 Eighth Avenue, New York 11, New York.

7. That the defendants above named are common carriers engaged in the transportation of property between points in the States of California and Florida as origins and New York, New York, as destinations, and, as such, the defendants are subject to the provisions of the Interstate Commerce Act. The defendants are all of the participating carriers to Trunk Line Territory Tariff Bureau, C. W. Boin, Agent, Freight Tariff No. 116-E, Local, Joint and Proportional Freight Tariff naming Lighterage and Terminal Regulations in New York Harbor and Vicinity, ICC No. A-931.

8. That members of some of the above named complainants ship large quantities and a great number annually of carloads of fresh oranges, grapefruit and other fresh citrus fruits and fresh vegetables from origins in Florida to New York, N.Y., by rail carriers, who have duly published tariffs stating through carload rates from said origins to New York, N.Y. Members of some of the above named complainants ship large quantities and a great number annually of carloads of fresh oranges, grapefruit and other fresh citrus fruits, grapes, and various deciduous tree fruits from origins in California to New York, N. Y., by rail carriers, who have duly published tariffs stating through carload rates from said origins to New York, N. Y. Said through line-haul rates include the entire service of transportation from origin to and including delivery at said destination. From a time when the memory of man runneth not to the contrary the so-called line-haul rates on fruits and vegetables to the New York piers have been regarded by both shippers and carriers as including compensation for the unloading service at such piers, and no

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separate charges for unloading at the New York piers have been imposed until the recent imposition of such separate charges. The defendants are participating carriers to the tariffs stating said through line-haul carload rates, and defendants are the delivering carriers at New York, N. Y. The said line-haul carload rates are not challenged by this complaint.

9. By Supplement No. 18 to ICC No. A-931, Trunk Line Territory Tariff Bureau, C. W. Boin, Agent, Freight Tariff No. 116-E, issued June 10, 1952, effective July 3, 1952, the defendants have published on pages 3 and 4 of said supplement No. 18 to Freight Tariff No. 116-E, Rule No. A-204, as Items 4667C, 4668C, 4669C, 4670C, 4671C, 4672C, 4673C, and 4674C. Said Rule No. A-204 provides:

"Exception to Rule 27 of Consolidated Classification.

"Unloading carload shipments of fruits and vegetables Cantaloupes or melons.

"Fruits fresh (not cold-pack nor frozen) or Vegetables, fresh or green (not cold-pack nor frozen), Cantaloupes or Melons, in packages, in carloads, will be unloaded by the carriers only at stations shown in Note A of this Rule and will be subject to unloading charges as follows: * * *"

Said items provide for unloading charges as follows:

Citrus fruits, viz: Oranges, Grapefruits, Tangerines, Lemons, Limes, Citrus Fruits, N.O.I.B.N., etc.	$1.05 per 2,000 pounds.
Vegetables, Fresh or Green, Not cold pack nor frozen, viz: Beans, green, Celery, etc., $1.05 per 2,000 pounds except	when top or body icing is used charge will be $1.65 per 2,000 pounds.

Fruits, Fresh, not cold pack nor frozen, viz: Apples, Cherries, Grapes, Deciduous Fruits, N.O.I.B.N., etc.	$1.35 per 2,000 pounds.
Cantaloupes and Melons, viz: Cantaloupes, Melons, N.O.I.B.N., etc.	$1.65 per 2,000 pounds.

The said unloading charges are not subject to Tariff of Increased Rates and Charges No. X-175-B.

The New York, N. Y., stations specified in Note A of said Rule include: B. & O.—Pier 22, N.R.: Erie—Duane St. Station (Piers 19, 20 and 21); and P.R.R.—Pennsylvania R.R. Produce Terminal (Piers 27 and 28, North River). Practically all of the carload shipments of fresh fruits and vegetables consigned to New York, N. Y., and delivered at railroad stations on Manhattan Island are delivered at the above named pier stations of The Baltimore and Ohio Railroad, Erie Railroad, and Pennsylvania Railroad. Generally, fresh fruits and fresh vegetables shipped from Florida are delivered at the Pennsylvania pier station, viz: Piers 27 and 28; and fresh fruits shipped from California are delivered at said Pennsylvania pier station and at the Erie pier station, viz: Duane St. Station (Piers 19, 20 and 21). Said railroads do not have adequate team tracks on Manhattan Island to make delivery thereon of all fruits and vegetables shipped respectively from Florida and California to Manhattan Island, New York. The delivering rail carriers can make delivery of such shipments consigned to New York, N. Y., only by delivery at said pier stations. The rail carriers move the cars containing the fresh fruits and vegetables from the rails terminating on the west bank of the Hudson River in the vicinity of Jersey City, N. J., onto car floats equipped with tracks, and transport the same by tugs across the Hudson River where the car-floats are placed alongside the said piers. The said railroads then unload the commodity from the cars remaining on the car floats, and place the commodity on the floor of the

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pier station. The railroads do not permit the consignee to unload the commodity from the car on the car-float, and the commodity is not available to the consignee until after it is unloaded by the railroads from the cars and placed on the floor of the pier station. It is not until after the commodity is placed by the railroad on the floor of the pier station that delivery is or can be made.

10. The said unloading charges are unjust and unreasonable in violation of Section 1 of the Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid.

Wherefore, complainants pray that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them to cease and desist from the aforesaid violations of said act, and requiring the cancellation of said unloading charges; and that other and further order or orders be made as the Commission may consider proper in the premises.

Dated at Washington, D. C., September 16, 1952.

FLORIDA CITRUS COMMISSION,
Lakeland, Florida.

GROWERS AND SHIPPERS LEAGUE OF FLORIDA,
45 W. Central Ave., Orlando, Fla.

By—M. W. WELLS, *Attorney*,

Maguire, Voorhis & Wells,
1007 Florida Bank Building,
Orlando, Florida.

CALIFORNIA CITRUS LEAGUE,
707 W. 5th St., Los Angeles, Calif.

By—KARL D. LOOS, *Attorney*,
Munsey Bldg., Washington, D. C.

California Grape and Tree Fruit League,
717 Market St., San Francisco 3, Calif.

By—Walter Hoffman, *Attorney*,
Balboa Bldg., San Francisco, Calif.

United Fresh Fruit and Vegetable Assn.,
Wyatt Bldg., Washington, D. C.

By—Durward Seals, *Traffic Manager*,

The Port of New York Authority,

By—W. P. Hedden, *Director*,
111 Eighth Ave., New York, 11, N. Y.

Sidney Goldstein, *General Counsel*,
111 Eighth Ave., New York, 11, N. Y.

Wilbur LaRoe, Jr.,
Frederick E. Brown,
Arthur L. Winn, Jr.,
Samuel H. Moerman, *Attorneys*,
Investment Bldg., Washington, D. C.

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EXHIBIT F

BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31106

Florida Citrus Commission, Growers and Shippers League of Florida, California Citrus League, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association, Philadelphia Terminals Marketing Association, a corporation, and The Auction Receivers of Philadelphia, an uncorporated association, *Complainants,*

vs.

The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, and Reading Company, *Defendants.*

Complaint.

The complaint of the above named complainants respectfully shows:

1. That the complainant Florida Citrus Commission, is a regulatory body of the State of Florida, duly created by statutes of said State and thereby charged with the enforcement of the State's citrus laws and with the duty of protecting the Florida citrus industry in the matter of transportation rates and charges. Its office is located in Lakeland, Florida.

2. That the complainant Growers and Shippers League of Florida, is a non-profit corporation under the laws of the State of Florida, and its members produce and ship from Florida in interstate commerce large quantities of fresh oranges, grapefruit, and other fresh citrus fruits, and fresh vegetables to Philadelphia, Pennsylvania. It is the duly authorized traffic agency of Florida Citrus Commission. Its place of business is 45 West Central Avenue, Orlando, Florida.

3. That the complainant California Citrus League, is an association of growers and shippers of fresh oranges, grapefruit and other fresh citrus fruits from California in interstate commerce to Philadelphia, Pennsylvania. Its place of business is 707 W. 5th Street, Los Angeles, California.

4. That the complainant California Grape and Tree Fruit League is an association of substantially all the growers and shippers of California deciduous tree fruits and grapes moving interstate from California to Philadelphia, Pennsylvania. Its place of business is 717 Market Street, San Francisco 3, California.

5. That the complainant United Fresh Fruit and Vegetable Association is an association of growers, shippers and receivers of fresh fruits and fresh vegetables with members throughout the United States. Its members ship fresh fruits and fresh vegetables in interstate commerce from various origins, including Florida and California, to Philadelphia, Pennsylvania. Its principal office is Wyatt Building, Washington, D. C.

6. That the complainant Philadelphia Terminals Marketing Association is a non-profit corporation whose membership comprises substantially all of the individuals, firms and corporations engaged in the business of handling and dealing in fruits and vegetables in carlots in the Philadelphia Market.

7. That the complainant, the Auction Receivers of Philadelphia, is an association whose membership comprises substantially all of the individuals, firms and corporations engaged in the business of handling and dealing in fruits, chiefly citrus, received in carlots in the Philadelphia market and sold at auction.

8. That the defendants above named are common carriers engaged in the transportation of property between points in the cities of California and Florida as

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origins, and Philadelphia, Pennsylvania, as destination, and, as such, the defendants are subject to the provisions of the Interstate Commerce Act. The defendants are participating carriers to Trunk Line Territory Tariff Bureau, C. W. Boin, Agent, Freight Tariff ICC No. 90-K.

9. That members of some of the above named complainants ship or receive large quantities and a great number of carloads annually of fresh oranges, grapefruit and other citrus fruits and fresh vegetables from origins in Florida to Philadelphia, Pennsylvania, transported by rail carriers who have duly published tariffs stating through carload rates from said origins to Philadelphia, Pennsylvania. Members of some of the above named complainants ship or receive large quantities and a great number of carloads annually of fresh oranges, grapefruit and other fresh citrus fruits, grapes and various deciduous tree fruits from origins in California to Philadelphia, Pennsylvania, transported by rail carriers who have duly published tariffs stating through carload rates from origins to Philadelphia, Pennsylvania. Said through line-haul rates include the entire service of transportation from origin to and including delivery at said destination, and historically have been accepted by carriers and shippers alike as including compensation for the unloading service, performed prior to 1925 at piers and thereafter at terminal platform, and no separate charges have been imposed for unloading at the terminal platform, as described in Paragraph 10, until the recent imposition of separate charges. The defendants are participating carriers to the tariffs stating said through line-haul carload rates and defendants are the delivering carriers at Philadelphia, Pennsylvania. The said line-haul carload rates are not challenged by this complaint.

10. By Supplement No. 252 to ICC No. A-848, Trunk Line Territory Tariff Bureau, C. W. Boin, Agent, Freight Tariff No. 90-K, issued June 26, 1952, effective August 1, 1952, Exceptions to Official Classification, the defendants

have published on pages 5 and 6 of said Supplement No. 252 to Freight Tariff No. 90-K, ICC No. A-848, as Item 1271 E, the following rule as Exception to Rule 27 of Official Classification:

"Exception to Rule 27

"Unloading carload shipments of fruits and vegetables, cantaloupes or melons, at station shown in Notes A (New York) and B (Philadelphia).

"Fruits, fresh (not cold-pack nor frozen) or Vegetables, fresh or green (not cold-pack nor frozen), Cantaloupes or Melons, in packages, in carloads, will be unloaded by the carriers only at stations shown in Notes A and B of this Rule and will be subject to unloading charges as follows:"

Unloading charges are provided for commodity items as follows:

CITRUS FRUITS, viz.	
Citrons, Citrus Fruits N.O.I.B.N., etc.	$1.05 per 2,000 pounds
VEGETABLES, FRESH or GREEN	
Not Cold-Pack nor Frozen, viz.	
Beans, green, Celery, etc.	$1.05 per 2,000 pounds except when top or body icing is used charge will be $1.65 per 2,000 pounds.
FRUITS, FRESH	
Not Cold-Pack nor Frozen, viz.	
Apples, grapes, deciduous fruits, N.O.I.B.N., etc.	$1.35 per 2,000 pounds
CANTALOUPES and MELONS, viz.	
Cantaloupes, Melons, N.O.I.B.N., etc.	$1.65 per 2,000 pounds

The Philadelphia, Pennsylvania stations noted in Note B of said rule are: P.R.R.-Pennsylvania R.R. Produce

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Terminal, B. & O.-Philadelphia Perishable Products Terminal, Reading-Philadelphia Perishable Products Terminal and Willow and Noble Streets.

Practically all of the carlot shipments of fresh vegetables consigned to Philadelphia, Pennsylvania, are delivered at Pennsylvania R.R. Produce Terminal where the carrier has fostered the development of an organized daily wholesale produce sale. For many years consignees have at their election taken delivery of carlot vegetables at the terminal platform adjoining the location of this daily sale, where the contents of the car would be unloaded by the carrier (or at its election by the consignee as an alternative to team track delivery. All citrus fruits and deciduous fruits in carlots consigned to Philadelphia, Pennsylvania and destined for sale at auction are delivered either at Pennsylvania R.R. Produce Terminal of Pennsylvania Railroad or Philadelphia Perishable Products Terminal of Baltimore and Ohio Railroad, at both of which they have for many years been unloaded onto the terminal platform by the carriers for sale at the organized daily auction sales conducted on alternate days at each of said terminals, which auction sales have for many years been fostered by the carriers. The terminal and team track facilities of said defendants are adequate for deliveries of carlot fruits for sale at auction and for carlot vegetables at said Philadelphia terminals only because cars of citrus and deciduous fruits delivered for sale at auction are immediately unloaded, thereby assuring immediate release of empty cars. But for such practice of unloading for sale at auction, defendants' facilities at team track would be inadequate.

Under the tariff herein complained of defendants now refuse to place any car of citrus or deciduous fruits destined for sale at auction or any car of vegetables destined for unloading and sale at the terminal sale unless the consignee orders unloading of the commodity from such cars by the carriers. Under said tariff the carriers refuse to permit the consignee to unload the commodity from the car at terminal platform, require that unloading be done

by the railroads and do not give access to the commodity until after it is unloaded from the cars by the railroad and placed on the floor of the terminal platform. It is not until after the commodity is placed by the railroad on the floor of the terminal that delivery is or can be made.

11. That the said unloading charges are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid.

WHEREFORE, complainants pray that defendants be required to answer the charges herein; that after due hearing and investigation an order be made commanding said defendants, and each of them, to cease and desist from the aforesaid violations of said act, and requiring the cancellation of said unloading charges; and that such other and further order or orders be mde as the Commission may consider proper in the premises.

Dated at Washington, D. C., September 23, 1952.

Florida Citrus Commission
Lakeland, Florida

Growers and Shippers League of Florida
45 West Central Avenue
Orlando, Florida

By M. W. Wells, *Attorney*
Maguire, Voorhis & Wells
1007 Florida Bank Bldg.
Orlando, Florida

California Citrus League
707 W. 5th Street
Los Angeles, California

By Karl D. Loos, *Attorney*
Munsey Bldg.
Washington, D. C.

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California Grape and Tree Fruit League
717 Market Street
San Francisco 3, California

By Walter Hoffman, *Attorney*
593 Market Street
San Francisco 5, California

United Fresh Fruit and Vegetable Assn.
Wyatt Bldg.
Washington, D. C.

By Durward Seals, *Traffic Manager*
Wyatt Bldg.
Washington, D. C.

Philadelphia Terminals Marketing Assn.
208 Walnut Street
Philadelphia 6, Pennsylvania

By Earl Jay Gratz, *Attorney*
David B. Fitzgerald, *Attorney*
1421 Chestnut Street
Philadelphia 2, Pennsylvania

The Auction Receivers of Philadelphia
Second and Dock Streets
Philadelphia 6, Pennsylvania

By T. Ewing Montgomery, *Attorney*
123 South Broad Street
Philadelphia 9, Pennsylvania

EXHIBIT G

Before the

INTERSTATE COMMERCE COMMISSION

Docket No. 31105

FLORIDA CITRUS COMMISSION, ET AL., *Complainants*

vs.

THE BALTIMORE & OHIO R. R. CO., ET AL., *Defendants*

Reply to Motion to Dismiss Complaint

Complainants herein for reply to the Defendants' Motion to Dismiss Complaint say:

1. They admit that they were protestants in and participated in the proceeding designated as I & S Docket No. 5500, and that therein they continuously urged that the suspended schedules stating certain unloading charges for fresh fruits and fresh vegetables were unjust, unreasonable and otherwise unlawful.

2. They admit that the complaint herein attacks the *presently effective* unloading charges on fresh fruits and vegetables at New York. The complaint speaks for itself, and, in addition to the statement quoted in paragraph 2 of the aforesaid motion, sets forth the following in paragraph 10:

> "10. *The* said unloading charges are unjust and unreasonable in violation of Section 1 of the Act *because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid.*"
>
> (Note: Words underlined are those of paragraph 10 of the complaint not quoted in paragraph 2 of the Motion to Dismiss.)

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3. The first time that unloading charges at New York, N. Y., on fresh fruits and vegetables were ever published was in schedules filed to become effective June 1, 1947. Upon the filing of numerous protests and requests for suspension of those schedules (by complainants herein and by others), the Commission by its order dated May 28, 1947, entered upon investigation of such unloading charges so published in said schedules for addition to the line-haul rates, said Investigation being designated as Investigation and Suspension Docket No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia;* and said order of May 28, 1947, suspended the operation of said schedules to and including December 31, 1947. The respondents therein voluntarily deferred the effective date of the schedules pending determination of the proceeding. On July 29, 30 and 31, and August 1, 1947, testimony therein was presented before Examiner R. M. Brown, at which hearing the brief date was fixed as September 30, 1947. Briefs therein were duly filed by respondents and protestants. Oral argument by counsel for the various parties was heard in Washington, D. C., on October 20, 1947 by Division 3 of the Commission. Thereafter, prior to any report in said proceeding but pursuant to notice from the Commission, additional oral argument therein was heard by the full Commission on May 5, 1948. The Report of the Commission was filed October 4, 1948, 272 I.C.C. 648, wherein and whereby it was stated (272 I.C.C. 663):

> "We find that the schedules under investigation are just and reasonable. An order will be entered vacating the order of suspension and discontinuing this proceeding."

The said order was entered vacating the order of suspension, and the unloading charges published in the suspended schedules went into effect on November 1, 1948.

4. On or about December 6, 1948, various petitions for rehearing and for reconsideration were filed by these Com-

plainants as protestants in I & S 5500. No action thereon was taken by the Commission until its order of June 9, 1949, which reopened said proceeding for rehearing. Additional testimony was taken before Examiner R. M. Brown in Brooklyn, N. Y., on September 27, 28 and 29, 1949. Briefs on Rehearing were duly filed on December 1, 1949. In May 1950 a Report on Rehearing proposed by Russell M. Brown and M. J. Walsh, Examiners, was served on the parties with notice thereon that "exceptions must be filed with Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before June 5, 1950." Such proposed report recommended that:

> "On rehearing the Commission should find that the charges assailed for unloading fresh fruits and vegetables in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed. The schedules naming the unloading charges assailed should be ordered cancelled and the proceeding discontinued."

No exceptions to that proposed report were filed by any protestant, and the only Exceptions thereto were those filed by Respondents therein. Thereafter, on July 24, 1950, additional oral argument was heard by the full Commission in Washington, D. C. No report was issued at that time by the Commission and on October 10, 1950, a "Notice" was issued "By the Commission" as follows:

> "Upon further consideration of the record in the above-entitled proceeding, it appears that the record is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing.
>
> "At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits

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and vegetables at railroad team-tracks on Manhattan Island and in Jersey City, N. J. Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate.

"The above-entitled proceeding will be assigned for further hearing at times and places hereafter to be announced."

5. Following the issuance of the aforesaid "Notice" of October 10, 1950, protestants filed petitions and motion for entry of order cancelling schedules, which invited attention to the finding of the Commission in said Notice that "the record is deficient in respect of further evidence which seems to be important," that under Section 15 (7) of the Interstate Commerce Act the burden of proving that the assailed charges were just and reasonable was upon the respondents, and praying that an order be entered cancelling the said schedules. The petitions and motion were denied by the Commission, by order dated November 16, 1950.

6. Pursuant to notices by the Commission, a pre-trial conference was held by Examiner M. J. Walsh in New York, N. Y., on November 8, 1950, and further testimony was presented at the further hearing before the said Examiner in Brooklyn, N. Y., on June 4, and 5, 1951. Briefs by respondents and protestants were duly filed on August 1, 1951; and in August 1951 the "Second Report on Further Hearing Proposed by M. J. Walsh, Examiner" was served on the parties, bearing notice that "Exceptions must be filed with Commission and copies served so as to reach all parties or their attorneys who appeared at the

hearing or on brief on or before September 11, 1951." Said Second Proposed Report on Further Hearing recommended that:

> "Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of Section 3(1) of the Act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered cancelled and the proceeding discontinued."

On September 11, 1951, Exceptions to said Second Proposed Report were filed by Respondents, but no exceptions were filed by any Protestant. Replies to Respondents' Exceptions were filed by Protestants. Oral argument was heard by the full Commission in Washington, D. C., on September 26, 1951.

7. The "Report of the Commission on Rehearing and Further Hearing" in said I & S Docket No. 5500 was filed May 7, 1952, which said Report states:

> "Upon rehearing and further hearing, we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, and the schedules naming the assailed unloading charges will be ordered cancelled * * *"

Thereupon, an Order was entered by the Commission on May 7, 1952 in said I & S Docket No. 5500 as follows:

> "*It is ordered*, that the aforesaid order of October 4, 1948, be, and it is hereby, vacated and set aside.
>
> "*It is further ordered*, that said respondents be, and they are hereby, notified and required to cancel the schedules naming the unloading charges under investigation herein, on or before July 3, 1952, upon notice to this Commission and to the general public by not less than one day's filing and posting in the man-

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ner prescribed in Section 6 of the Interstate Commerce Act, and that the proceeding be discontinued."

8. In the said Report of May 7, 1952, it was also stated:

"* * * it is probable that continuance of the present charges will cause sufficient diversion of the traffic under consideration to team-track delivery, to require the construction of additional team-track facilities at considerable expense. It has also been shown that other benefits accrue to respondents from the use of pier deliveries. Pier deliveries permit expeditious handling of cars without switching expense on Manhattan. Upon consideration of these and other circumstances of record we conclude that the shippers should not be forced to pay more than $1.05, $1.35 and $1.65 per ton in lieu of the charges of $1.95, $2.28 and $2.60, respectively, now in effect.

* * *

"Upon rehearing and further hearing, we find that * * * the schedules naming the assailed unloading charges will be ordered cancelled and the proceeding discontinued without prejudice to the establishment of charges in conformity with the views expressed herein."

At no time in the said proceeding during the nearly five full years between the filing of protests and requests for suspension prior to the order of May 28, 1947 instituting the said investigation and suspending the schedules, and the time of the last report, May 7, 1952, was there any mention by any respondent of unloading charges of "$1.05, $1.35 and $1.65 per ton". Certainly, no protestant suggested any unloading charge whatever, separate from the line-haul rate. Indeed, the first and only mention of said unloading charges of $1.05, $1.35 and $1.65 per ton" was on mimeographed sheet 36 (286 I.C.C. 141) of the said report of May 7, 1952. The order of May 7, 1952, entered by the Commission in I & S No. 5500 did not discontinue the proceeding *without prejudice to the publication of new unloading charges of* $1.05, $1.35 and $1.65.

9. As soon as information was received relative to the Report of the Commission dated May 7, 1952 in said I & S No. 5500, these complainants were and now are of the view that unloading charges of $1.05, $1.35 and $1.65 would be unlawful and contrary to the provisions of the Interstate Commerce Act. Consideration was then given to the taking of action in Court to "enjoin, annul or set aside" the said "order of the Interstate Commerce Commission" pursuant to Chapter 157 of the U. S. Code, 49 U.S.C. Sec. 2321. It was discovered however that the *order* did not approve or authorize the publication of any unloading charge, but that on the contrary the order (1) properly vacated and set aside the former order of October 4, 1948, (2) directed the cancellation of "the schedules naming the unloading charges under investigation", and (3) discontinued the proceeding. Those three results were that what had been sought by these complainants as protestants therein continuously for nearly five years. It was therefore considered by counsel for these complainants that there was doubt whether an appeal from said *order* to the courts could be maintained.

10. As set forth in Paragraph 9 of the complaint herein, the defendants in June 1952 issued schedules, to become effective July 3, 1952, stating new unloading charges of $1.05, $1.35 and $1.65 per ton of 2,000 pounds as therein set forth. Upon the publication of such schedules, these complainants gave consideration to the preparation for filing of protests and requests for suspension. It was realized however that the granting or denial of any protest and request for suspension was a matter within the discretion of the Commission and that whatever the exercise of such discretion it would not be subject to judicial review. Furthermore, it was realized that if the requests for suspension should be denied, the denial would be without prejudice to the filing of formal complaint, such being the long established practice and also being the only legal effect of a refusal to suspend a published tariff. To avoid

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such possible contingencies, to eliminate the delay possibly attendant upon the suspension procedure if it were unsuccessfully sought, and to simplify and facilitate the early determination by the Commission of the issue presented by the Complaint, it was determined that the Complaint herein should be filed, thereby attacking for the first time the said unloading charges published as set forth in the Complaint.

WHEREFORE, the complainants pray that the defendants' Motion to Dismiss Complaint be denied, and that defendants be required forthwith to answer or satisfy the complaint herein.

Respectfully submitted,

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Investment Building
Washington, D. C.

Washington, D. C.
November 4, 1952

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing reply to motion to dismiss complaint by mailing a copy thereof by first class mail properly addressed and postage prepaid to each of the attorneys for the defendants.

Dated at Washington, D. C. this 4th day of November, 1952.

KARL D. LOOS

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EXHIBIT H

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 5500

UNLOADING CHARGES ON FRUITS AND VEGETABLES AT NEW YORK AND PHILADELPHIA.

Submitted .....

Decided .....

Upon rehearing, findings in prior report, 272 I. C. C. 648, that the proposed unloading charges on fresh fruits, and vegetables, in carloads, at New York, N. Y., and Philadelphia, Pa., are just and reasonable, reversed. Schedules naming the unloading charges ordered canceled and proceeding discontinued.

Additional appearances:

Arthur J. Goldsmith, John P. McGrath, G. Gary Sousa, and *James J. Thornton* for the City of New York, *Walter R. McDonald,* and *Warren H. Wagner* for Southeastern Association of Railroad and Utility Commissioners, and *H. M. Nicholson* for Department of Agriculture—Southeastern Association of Railroad and Utilities Commissioners, and National Association of Commissioners, Secretaries and Directors of Agriculture, protestants.

Alice Belmont, Julius Blumenfeld, David B. Fitzgerald, T. Ewing Montgomery, Durward Seals, and *Jeannette S. Turner* for shippers and other interests, protestants.

Report on Rehearing Proposed by Russell M. Brown, and M. J. Walsh, Examiners

In the prior report herein, 272 I. C. C. 648, decided October 4, 1948, the Commission found that the charges proposed for unloading fresh fruits and vegetables, in carloads, at New York, N. Y., and Philadelphia, Pa., were just

and reasonable. The order of suspension was vacated and the proceeding discontinued. The proposed charges, as subsequently increased, became effective November 1, 1948. Upon petitions for reopening and reconsideration by the Florida Railroad and Public Utilities Commission, the Growers and Shippers League of Florida, The Florida Citrus Commission, International Apple Association, National League of Wholesale Fresh Fruit and Vegetable Distributors, United Fruit and Vegetable Association, the California Citrus League, The Port of New York Authority, the Secretary of Agriculture, the New York Carload Receivers Committee, the Philadelphia Terminals Marketing Association, and the Auction Receivers of Philadelphia; and petition for reconsideration by the California Grape and Tree Fruit Association, and California Growers and Shippers Protective League, the proceeding was reopened for rehearing. The rehearing has been held. Orders were entered permitting the City of New York, the Industry Committee for the Improvement of Washington Market, and the Auction Receivers of Philadelphia to intervene and be treated as parties to any further proceedings herein. The facts stated in the prior report will be repeated herein only to the extent considered necessary.

Through rates apply on fresh fruits and vegetables, in carloads, from points in the various producing areas throughout the country to stations in New York and Philadelphia. Respondents proposed to establish charges as follows for unloading these commodities at the points indicated in addition to the line-haul rates:

	Per net ton
Citrus Fruits	$1.50
Fresh Fruits (other than citrus)	1.75
Melons (including cantaloups)	2.00
Vegetables, fresh or green, not cold pack or frozen	1.50
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.00

The repective charges which became effective November 1, 1948, are: $1.95, $2.28, $2.60, $1.95, and $2.60, reflecting an increase of 30 percent over those originally proposed as a result of the general increases authorized on and after

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October 6, 1947, in *Ex Parte 166*[1], for the service indicated. Respondents' (proposals reflect an effort on the part of the delivering lines to secure increased revenue from the fresh fruit and vegetable traffic terminated in New York and Philadelphia. No charges such as those under consideration have applied on this traffic in the past. They would accrue solely to the delivering lines. The principal lines which would benefit from the proposals are the Baltimore & Ohio,[2] Erie, New York Central, Pennsylvania, and the Reading.

The general rule as regards carload freight is that shippers and consignees must perform the loading and unloading or make provision therefor at their own expense. Rule 27 of the Consolidated Freight Classification provides in part as follows:

Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, except where tariff of carriers at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier.

The arrangements covering unloading at New York and Philadelphia, which have been in effect for many years, and also the unloading charges under consideration are covered by exceptions to the governing classification whereby it is contemplated that the carriers shall perform the unloading of fresh fruits and vegetables without interference from the consignees or receivers. It is provided that such unloading service will be performed only at designated stations. Prior to November 1, 1948, when the charges under consideration became effective, there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic at the stations specified. The charges which became effective on that date apply only on fresh fruits and vegetables and not on other traffic. It is indicated, however, that consideration is being given to the establishment of unloading charges on traffic other than fresh fruits and vegetables

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[1] Increaseed Freight Rates, 1947, 269 I.C.C. 33, 270 I.C.C. 81, 93 and 403.

[2] Abbreviated titles used herein are Baltimore & Ohio for The Baltimore and Ohio Railroad Company; Erie for Erie Railroad Company; New York Central for The New York Central Railroad Company; Pennsylvania for the Pennsylvania Railroad Company; and Reading for Reading Company.

but that, as yet, no definite conclusion in respect of such action has been reached.

The same schedule of charges was published for application at both New York and Philadelphia. In determining the level of these charges respondents considered it impracticable to do more than estimate those which approximated the average cost of unloading particular groups of commodities at those points. Tariff complexities would result if a different charge were maintained for each of the respective commodities. Hence, respondents established charges in amounts approximating the claimed average costs of unloading certain groups of commodities as heretofore indicated. No objection to the grouping, as such, has been presented by any of the protestants.

The Erie and the Pennsylvania handle the bulk of the traffic at New York and Philadelphia although a substantial amount reaches New York over the lines of the Baltimore & Ohio and the New York Central. Most fruits and vegetables originating at western producing points, particularly in California, and destined to New York are routed over the Erie, which usually receives the traffic at points in Indiana. Similar commodities from the Southeast, including those originating at points in Florida, ordinarily are routed over the Pennsylvania from Potomac Yard, Va., to New York. Carriers performing deliveries at Philadelphia are the Baltimore & Ohio, Pennsylvania and Reading.

In support of the proposed charges respondents point out the numerous services accorded shippers in respect of the movement of fresh fruits and vegetables to stations in New York and Philadelphia. These services include, among others, notification to consignees of the location of their freight in transit, extra heat and light at the terminals incident to such traffic, and the providing of auction rooms and other similar services as showing the extent to which respondents have co-operated with the fruit and vegetable trade in facilitating the receipt of the freight and its sale.

The general position of the protestants is that the schedules naming the assailed unloading charges at both New York and Philadelphia should be found unlawful particularly under sections 1, 2 and 3 of the Interstate Commerce Act, and that the Commission should order cancelation of such schedules and discontinue this proceeding.

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Unloading operations are less expensive at Philadelphia than at New York. At Philadelphia the freight house platform is practically on a level with the car floor, and the unloading is a dry land operation. At New York the stage of the tide affects the unloading, and the distances the freight is trucked are substantially greater than at Philadelphia. At the former the haul by hand truck ranges from 500 to 1,500 feet. At Philadelphia the minimum haul is 50 feet. The maximum haul is not disclosed.

As the conditions governing delivery of the traffic under consideration at New York and Philadelphia are somewhat dis-similar, the unloading charges at these points will be discussed separately in the order indicated.

Unloading Charges at New York—Approximately 75 percent of the fresh fruits and vegetables consigned to the New York market is delivered at the pier stations of the Pennsylvania, Erie, Baltimore & Ohio, and New York Central, located between Barclay Street on the south, and Canal Street on the north. The remainder of the deliveries is made to chain store warehouses or to team tracks and sidings in other parts of the city. The railroads established their delivery terminals on the waterfront indicated during the latter part of the nineteenth century and have concentrated their fruit and vegetable deliveries in this area. In 1927 and 1928, the Pennsylvania and the Erie spent substantial sums of money in reconstructing, for handling fresh fruits and vegetables, the pier stations which they leased from the City of New York. These piers are adjacent to Washington Market, the largest fruit and vegetable market in New York and the primary market in the entire metropolitan area.

The principal consuming population served by the New York wholesale market lies east of the Hudson River, where 80 percent of the volume of fruits and vegetables delivered to that market is distributed. The wholesale market is in the lower part of Manhattan Island. The considerations which led to that location have been justified by the growth of facilities in that area to receive, sell, and store perishable commodities. At present there are 18 cold storage warehouses, with a gross capacity of 13,000,600 cubic feet within 2.5 miles of the wholesale produce center.

Rates on fresh fruits and vegetables are published from southern and western origins to New York, thus indicating

line-haul service to stations in that city by railroad. Prior to November 1, 1948, unloading of these commodities at stations (including piers) within New York was performed by the carriers at the line-haul rate. Since that date unloading charges, in addition to the line-haul rate, are collected. Respondents do not accord the consignees the option to perform the unloading. Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight to a location on the pier platform where the consignee can accept delivery.

Respondents' piers, equipped for the unloading of fresh fruits and vegetables, are as follows: Piers 16 and 17 of the New York Central, 19, 20, and 21 of the Erie, 22 and 23 of the Baltimore & Ohio, and 27 and 28 of the Pennsylvania. Utilization of pier stations by the carriers serving Manhattan Island is not confined to those at which fresh fruits and vegetables are handled. At the present time these carriers utilize approximately 35 city-owned piers for the handling of freight of all descriptions. As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are car floated and unloaded.

The area covered by the piers specifically identified approximates 40 acres, of which one-half consists of the piers, and the other half the slips between the piers which accommodate the car floats. Real estate in that vicinity has a value of about $800,000 an acre, a total of $32,000,000 for the area covered by the piers. In the vicinity of the existing team-track yards on Manhattan Island between Twenty-eighth and Thirty-seventh Streets, there is comparatively little room for expansion. Land in that area costs about $400,000 an acre. The piers have no team-track facilities on which cars can be placed. All parties to the proceeding agree that it is not feasible to expand the present team-track facilities on Manhattan Island.

The team-track capacity in Manhattan Island of the following carriers are: Pennsylvania, Thirty-Seventh Street yard, 130 cars; Erie, West Twenty-Sixth Street yard, 56 cars; New York Central, Thirty-Third Street yard, 350 cars; Baltimore & Ohio, Twenty-Sixth Street yard, 45 cars, and Lehigh Valley Railroad, West Twenty-Seventh Street,

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74 cars. All of these team tracks are heavily used for nonperishable freight. Team-track delivery in Manhattan Island in lieu of delivery at the pier stations could not be accorded on the volume of fresh fruit and vegetables consigned to New York. Because of these limited team-track facilities the bulk of the fresh fruit and vegetable traffic consigned to New York is delivered at the piers hereinbefore indicated.

Only one of the respondents, the New York Central, has an all-rail line into Manhattan Island for delivery of freight. This line enters New York from the north and extends south over the west side of the city to a point not far from the wholesale market area. The line has limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers. In fact many of the cars of fresh fruits and vegetables delivered by that carrier for trading in the wholesale market are moved by car float to its pier station (piers 16 and 17) in the vicinity of Barclay Street.

Because of the geographical location of New York, freight consigned to that point must be moved thereto either by car floats or lighters across the Hudson River from the New Jersey side except, as stated, traffic routed over the New York Central. The rails of the other respondents serving that point, as regards freight traffic, terminate at points on the west bank of the Hudson River in the vicinity of Jersey City, N. J. Carloads of fruits and vegetables arriving at these rail terminals, consigned to New York, are moved onto car floats equipped with tracks, and transported by tugs across the Hudson River either to certain piers equipped for the handling of such traffic, where the freight is unloaded by the carriers and placed on the pier platform for delivery to the consignee, or to certain locations equipped with float bridges over which the cars are moved from the car floats to rails extending therefrom to certain team tracks, private sidings, or warehouses, where delivery is completed, and the freight ordinarily unloaded by the consignee.

The movement of the loaded cars to the piers usually occurs in the late afternoon. The unloading commences around 8 p.m. or earlier and continues until around 5 a.m. or 6 a.m. next morning. The time it takes to unload particular types of fruits and vegetables varies according to

the size and weight of the packages, and the method of refrigeration and packing in the cars. The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available. When the cars are unloaded they are immediately returned empty to the New Jersey side, and other car floats are placed at the piers for unloading. So expeditious is the unloading service that it permits of the use of the same platform space for unloading and stacking freight two and sometimes three times each night on which unloading is performed.

There are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purposes of inspection, but they are not permitted to take delivery of their freight from that facility. The pier floor is the first place where, after the freight has been unloaded, delivery can be taken. At the prior hearing the railroads offered to permit consignees to unload their freight from the car float. After the prior decision in this proceeding the California Fruit Growers Exchange requested the railroads to permit the consignees, as a whole, to perform the unloading at the piers. The request was denied.

In taking pier station delivery the fruit and vegetable trade has the advantage of displaying the entire contents of the car thus affording the buyer the benefit of a thorough examination of the freight; of using the pier facilities as a sales mart; and of occupying auction room facilities without charge therefor. The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from or loaded into cars on car floats. Freight of all kinds may be shipped from and to these piers, except that the Pennsylvania Product Terminal (piers 27 and 28) is limited to the receipt and delivery of perishable freight. But even these piers, in addition to the handling of fruits and vegetables are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish, oysters, flower bulbs, and raw silk. All freight, other than fruits and vegetables, are unloaded by the rail carriers at their pier sta-

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tions without charge therefor in addition to the line-haul rates.

The movement of fresh fruits and vegetables from the several States to the New York area[3] in 1946, 1947, and 1948, respectively, were 114, 240, 111,390, and 104,555 carloads by rail, and 60,098, 61,151, and 67,874 carload equivalents by motor truck. There were progressive decreases in the shipments by rail as contrasted with increases in shipments by motor truck. For the first 7 months of 1948 and 1949, respectively, shipments of fruits and vegetables to New York were 64,988 and 57,809 carloads by rail, and 30,819 and 33,868 carload equivalents by motor truck. The department of Agriculture takes the position that the diversion of the traffic from the rails to the motor trucks resulting from the unloading charges at the New York piers.

When the charges assailed became effective, consignees attempted to avoid them by taking delivery at outlying team-track stations, and paying the cost of trucking into the market, or by shifting from rail to motor trucks for the line haul. In February 1949, deliveries of fresh fruits and vegetables to the New York piers were about 50 percent less than in February 1948. Shipments of these commodities delivered at those piers during the periods indicated were 2,828 and 5,450 carloads, respectively. Similar traffic to New York by truck and vessel increased by the equivalent of 1,135 carloads in February 1949 over the same month in 1948. During the later period there was also an increase of 915 carloads to team tracks in New Jersey. In April 1949, as compared with the same month in 1948, deliveries by car float at the New York piers decreased by 2,471 carloads, as contrasted with increases of 1,156 carloads equivalents by truck and vessels to New York stations; and of 845 carloads for New Jersey team-track deliveries. Substantially all of the freight which was diverted from the New York piers was ultimately trucked to Washington Market for primary sale. The diversion of rail shipments from pier stations to other points intensified the problems of the New York produce market, resulting in greater congestion in terminal handling, and in dissatisfaction among buyers, labor, and other elements at that facility.

[3] The New York area includes the New York piers, Bronx Terminal Market, Brooklyn, N. Y., certain points on Long Island, and Jersey City, Hoboken, and Kearney, N. J.

Team-track delivery on Manhattan Island is to a certain extent dissimilar to pier-station delivery, although in both operations the movement across the Hudson River is identical. However, when cars for team tracks reach Manhattan Island they are accorded additional switching. After placement on the team track the consignee has two days free time to unload the car. After unloading the car is switched to the float bridge and reloaded on a car float for movement to the New Jersey shore. There is more car detention and more switching, and the unloading is substantially slower in respect of team-track delivery than is the simultaneous unloading of all cars at pier stations. A witness on behalf of the Erie stated that pier-station delivery in Manhattan Island is the most efficient method which that carrier has been able to organize. So efficient is the operation that the Erie has handled in one day, at Piers 20 and 21 as many as 367 cars of fruits and vegetables. It never handles less than 50 cars a day. This method of delivery has been utilized by the Erie for more than 60 years.

Respondents introduced an exhibit showing the cost of unloading fruits and vegetables at New York piers 27, 28, and 29 of the Pennsylvania, during July 10-16, 1949. Those costs per ton were $3.23 on fresh fruit, $4.11 on melons, cantaloupes, and vegetables (top-iced), and $2.22 on other vegetables and citrus fruit. The unloading costs of the New York Central at pier 17 (Barclay Street) during July 25-30, 1949, were $1.72 on vegetables (other than top-iced), and $2.697 on cantaloupes, melons, and vegetables (top-iced). The unloading costs of the Erie at Duane Street piers during the weeks ended May 22, August 28, November 26, 1946, and February 4, 1947, revised to reflect the aggregate increases of 25.5 percent in the wages of the employees of the Seaboard Terminal & Refrigeration Company on September 1, 1947 and November 29, 1948, were $1.49 on citrus fruit, $2.11 on fresh fruit (other than citrus), $2.51 on fresh or green vegetables (top-iced), $1.46 on fresh or green vegetables (not top-iced), and $2.22 on cantaloupes and melons. The unloading costs of the Baltimore & Ohio at pier 22, during July 7-20, 1949, were $3.61 on fresh fruit (including deciduous fruit), $2.63 on melons, $3.26 on vegetables (top-iced), and $2.62 on vegetables (other than top-iced). The unloading costs at New York piers do not include the cost of sorting and stacking. But they do include

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a proportion of the expense of sweeping, cleaning, and office expenses incident to the unloading of fruits and vegetables at the pier stations.

Prior to the arrival of the shipments at the piers, the carriers are informed with respect to the contents of the cars, the names of the consignees, and other pertinent details. This permits notification to the receivers of the freight in advance of arrival and enables the carriers to allot space on their piers for each consignment. As regards the allotment of space, the piers are generally mapped out so as to give each consignee a specified location for the contents of the cars after unloading. Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers, who, prior to the auction, usually inspect the fruit while it is on display on the pier floor. Practically all the citrus fruit, and fresh fruit (other than citrus), after being unloaded on the piers, are sold at public auction in rooms on the second floors of the piers assigned for that purpose. Cantaloupes and melons, as a rule, are not sold at auction but are bought at private sales on the pier floor where the packages are displayed. Fresh or green vegetables, particularly those not top-iced, frequently reach the consignee without prior sale at the piers. With the exception of tomatoes, they are not sold at auction.

Vegetables are generally removed from the piers within 3 or 4 hours after having been unloaded by the carrier. After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away.

There has been an increased tendency to accept delivery, at team tracks on the New Jersey side of the Hudson River, of fruits and vegetables consigned to New York. Because of that tendency the Pennsylvania has recently reconditioned at an approximate cost of $200,000 its team tracks in that area, so as to accommodate the increase in unloading at these facilities. But the increased use of the New Jersey team tracks was not, to a large extent, the result of the unloading charges at the New York piers.

The Pennsylvania prefers to deliver at Jersey City team-track yards, rather than at New York piers, shipments of fruits and vegetables consigned to New York. It takes the position that deliveries at those facilities eliminate all the

difficulties and expenses of car-float service. It is contended that the delivery of fruits and vegetables at Jersey City team tracks would be beneficial to the trade, the railroad, and the public. The Jersey City, Henderson Street yard is about 1.5 miles from the wholesale produce market in Manhattan Island. Waldo Avenue yard is from three to four miles from that market. Receiving fruits and vegetables at team tracks in New Jersey would be inconvenient to the public, because the vast volume of these commodities consigned to New York are consumed east of the Hudson River.

The wholesale produce markets are located on the lower west side of New York for economic reasons. These markets are adjacent to pier stations where fruits and vegetables consigned to New York are delivered, and they are also located conveniently to the area of greatest consumption. The location of those markets would change, if the railroads increase their deliveries on the New Jersey side. This would tend to scatter the markets. But if those facilities remain in their present location and delivery is made at team tracks in New Jersey, a truck haul will be necessary to move the freight therefrom, to those markets. The trucks that ordinarily handled this freight are centered in the lower west side of New York. In the event of unloading the traffic on team tracks in New Jersey, it will be necessary that the trucks cross over to New Jersey by ferry or through the Holland tunnel, a distance of about three miles. The time necessary for such crossing to the Henderson Street yard would range from 20 to 25 minutes, and an additional 30 minutes to locate the car and unload the contents or part thereof into the truck. Approximately an hour and a half would be consumed in moving the loaded truck back by ferry or tunnel to the New York markets. From the time the empty truck leaves New York until it returns loaded to the market from 2 to 2.5 hours would elapse under favorable traffic conditions. Trucking the traffic from the Waldo Avenue yard would consume an additional 15 to 20 minutes. Ordinarily, such operation would cause congestion and delay.

The Henderson Street (Ball Ground) and Waldo Avenue team tracks of the Pennsylvania at Jersey City are normal facilities with driveways between the tracks into which consignees can operate their trucks and take delivery from the cars. These driveways are from 50 to 70 feet in width.

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Both of these team tracks were recently reconditioned and improved. As compared with perishable traffic (not including watermelons) unloaded at the New York piers, the volume unloaded at team tracks in Jersey City, of traffic consigned to New York, has increased during the past years. There has been an increased tendency to accept delivery of such traffic at Jersey City team tracks. It was because of that trend that the Pennsylvania reconditioned those facilities. For a similar reason that carrier also built its Manhattan Produce yard in the so-called "meadows", farther removed from Jersey City.

Respondents state that the taking of delivery of Jersey City team tracks of fruits and vegetables consigned to New York, increased in the fall of 1948. At Jersey City there is a wider scope of delivery, the yards are open 24 hours a day, and there are no restrictions on unloading and delivery of traffic such as occurs in connection with pier operation. Respondents take the position that the advantage in being able to unload the freight from the cars onto the trucks at any time induced the gradual flow of delivery of the traffic at Jersey City. Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, for making delivery at New York piers.

The City of New York receives about 100,000 carloads of fresh fruits and vegetables annually. The unloading charges assailed, ranging from $26 to $36 a car, will place an additional cost of $3,000,000 a year on food consumers in that city. It is contended that if the findings in the prior report herein are affirmed similar charges will be applied for the unloading operations at all piers in Manhattan Island. It is further contended that those findings will have the effect of increasing the price of every piece of merchandise shipped through the port of New York, thus placing that port at such a disadvantage as to cause irreparable damage to its waterfront and to the city as a whole. The New York waterfront contributes from 25 to 40 percent of the basic economy of that city. The City of New York is planning to rehabilitate its piers at a cost of $78,000,000, but it is intimated that it may not proceed with that program if the findings in the prior report herein are not reversed. There has also been a plan to rehabilitate the Wash-

ington Market the cost of which, based on current prices, would exceed $60,000,000. A witness for the City of New York is apprehensive that, if the unloading charges under consideration are continued, consignees of fresh fruits and vegetables will accept delivery on the New Jersey side of the Hudson River. On behalf of the City of New York, the position is taken that the unloading service at the piers is an integral part of the movement of the traffic from origin to ultimate destination, for which the charge is included in the line-haul rate; and that this service, for which charges are now in effect, has been performed by the carriers without charge, for more than 50 years.

The Port of New York authority, hereinafter referred to as the Port Authority, is a municipal corporate instrumentality created by compact between the States of New York and New Jersey and approved by the Congress of the United States. It is charged with the duty of protecting, promoting, and developing the commerce of the Port of New York, and of improving and unifying its facilities. Realizing the importance of fruits and vegetables to the inhabitants in the New York metropolitan area, and being dissatisfied with the limited facilities for handling them, the Port Authority and certain departments of the City of New York, developed plans for the construction of a union waterfront terminal at a cost of $27,000,000 in substantially the same location as the pier terminals. These plans, temporarily abandoned because of the findings in the prior report herein, contemplated a continuation of the system of delivery by car float to pier stations, and unloading of the cars to the station platform as part of the transportation. By establishing such a terminal in connection with which the overhead charges against each car would be reduced, through combining the alternating traffic peaks of the several carriers and providing an operation susceptible of efficient over-all control of labors, it was felt that the project would be financially self-sustaining if the revenue from the carriers for the use of the terminal and unloading of the freight, would equal $2 per ton. The calculations were based upon the 1947 wage levels. The Port Authority offered to perform the unloading and other services as agent for the railroads. It takes the position that the most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float,

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as at the present time, to the pier platform for delivery to the consignee.

On behalf of the Port Authority, it was stated that it would be impossible to expand rail facilities on Manhattan Island to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York. The high cost of land in Manhattan Island and the time required for handling cars across float bridges during periods of peak volume of traffic would render team-track delivery impracticable.

The Industry Committee for the Improvement of Washington Market and all of its component groups, including wholesalers, receivers, auction companies, truckmen, loaders, purveyors, inspection services and cooperage companies, opposed the proposed unloading charges on fruits and vegetables at the New York piers. A member of that committee, who is also president of a certain local of the Commission Drivers and Chauffeurs Union took the position that team-track delivery in New Jersey of the traffic under consideration would operate to the inconvenience of the consuming public. Under present operations the trucks haul the freight from the New York piers and deliver it in that city where most of it is consumed. If consignees are compelled to accept delivery at New Jersey team tracks there will be loss of time, incident to delays at the ferries and tunnel, resulting in payments for overtime to employees of trucking concerns. That union has met with consignees of the traffic under consideration and informed them that, effective on a certain date not disclosed of record, it would not haul to New York any fruits or vegetables delivered to the consignees at team tracks in New Jersey. Consignees who now accept delivery at the New York piers for which unloading charges are collected are constantly pleading with the union for permission to accept delivery at New Jersey team tracks so as to avoid paying the unloading charges.

The New York City Consumer Council, a coordinating agency for numerous organizations, embracing a membership of over 250,000 persons devoted to maintaining decent living standards, opposes the assailed unloading charges at the New York piers, and urges that they be rescinded. It takes the position that the consumer bears these charges to whom they are passed on by shippers, receivers, job-

bers, and retailers. In a year of high buying power, the inhabitants of New York consume over five billion pounds of fruits and vegetables. The council takes the position that the unloading charges are unfair and dangerous to the economy of New York in that they increase living costs and reduce the buying power of its inhabitants.

There is no question with respect to the applicability of the line-haul rates from the various points of origin to New York. The principal question for determination is what constitutes delivery of the freight by respondents to the consignees or receivers, and the time when and the particular location at which it is completed. Delivery of carload freight consists of the carrier either placing the car on a team track or siding where it can be unloaded by the consignee or, where the consignee is not permitted to perform the unloading, as in this proceeding, in unloading the freight from the cars on the floats and placing it on the floor of the pier. Here, and here only, does the transportation obligation of the carrier end. That obligation is not fulfilled until the freight is placed in a location conveniently accessible to the consignee. This method of delivery of fresh fruits and vegetables has, for more than 50 years, been included in the line-haul rates from the various origins to New York piers on such traffic. And it must be so included because the transportation service is not completed until delivery has been made. Section 1(3) of the act defines transportation to include, among other things, all services in connection with delivery of the property transported. Extra charges may, however, be assessed for accessorial services, such as, sorting or stacking the fruits and vegetables for display purposes after unloading the freight on the pier platform. But unlike delivery these services, for which extra charges are usually collected, are not included in the line-haul rate.

The carriers voluntarily permit their pier stations to be used for sales display purposes. They impose no charges for auction rooms and facilities used mainly for the sale of fruit. Frequently they pile or stack freight on the pier during the unloading operation to conserve space. These concessions and facilities are, however, separate and apart from the carriers' transportation obligations.

Car floatage in New York Harbor and delivery at piers in New York have been given consideration by the Commission in numerous proceedings. In *Lighterage and Stor-*

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age Regulations at New York, 35 I.C.C. 47, 61, a proceeding dealing with rail carriers' proposal to increase the charges in connection with the delivery and receipt of freight at New York, the Commission found that the assessment of any charge for terminal handling, the service having theretofore been performed under the line-haul rate, would have the effect of increasing that rate; and that a proper justification of such an increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate. Therein the Commission said:

*** where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through service.

In this proceeding respondents not only failed to prove the entire through charges reasonable, but have taken the position that the reasonableness of the line-haul rate is irrelevant.

On all traffic from the west to New York the delivering carriers, including respondents herein, receive amounts ranging from 3.3 to 4.4 cents per 100 pounds as an arbitrary allowance out of the line-haul rate before prorating the remainder of the through rate with connecting carriers. That allowance is made, however, in respect of all traffic regardless of whether it is delivered at piers or on team tracks. In *Erie R. R. Co.* v. *A. & W. Ry. Co.*, 98 I.C.C. 268, a proceeding dealing with the divisions accruing to complainants therein out of joint transcontinental rates on fresh fruits and vegetables from points in the West to destinations in New York and New Jersey, including Duane Street station (piers 19, 20, and 21), division 4 found, among other things, that for the future, the just and reasonable divisions of those rates to Duane Street station would be 3 cents per 100 pounds to the Erie, and of the remainder of the revenue, 27.5 percent to the lines east of Chicago, Ill., and 72.5 percent to the lines west thereof. Therein the Erie sought an arbitrary of $40 per car for performing the delivery at New York. Division 4 also found that the Erie unloaded the contents of the car at Duane Street, piled the

packages in space set aside on the pier, where the consignee took delivery, and that delivery, including unloading, was included in the line-haul rates.

In *Fruits and Vegetables at Duane St., N. Y.*, 66 I.C.C. 135, 139, dealing with the proposal of the Erie to establish, among other things, terminal charges on fruits and vegetables at its Duane Street station ranging from 2.5 to 4 cents per 100 pounds, division 4 found that "As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane Street under the line-haul rates", and that the establishment of terminal charges higher than the then existing sorting charges had not been justified. Therein division 4 said:

The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane Street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic.***

As a practical matter, it is not only essential that the shipper should have notice of the arrival of his goods, but that the carrier should place them in an accessible position to be received by him and removed. Until they are so placed and tendered for delivery it is obviously impossible for the consignee to receive and remove them and the carrier cannot reasonably be relieved of its common law liability until it has so placed or tendered the goods for delivery. See *Bills of Lading*, 52 I.C.C. 671, 701.

Upon arrival at the New York piers, the car floats must be unloaded efficiently and expeditiously. It is not practicable to let the trucks of the numerous consignees have access to the car floats. While carload freight is ordinarily required by tariffs to be loaded by shipper and unloaded by consignee, such unloading of the traffic under consideration, is impracticable at respondents' New York piers. See *Allowances for Stacking*, 179 I.C.C. 780, 781. The question at issue in that proceeding was whether or not the Pennsylvania could pay the consignee to stack packages of fruits and vegetables in piles, sorting them according to kind, brand, size and grade, so that they might be easily counted, inspected, and displayed for sale at respondent's produce

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terminal, New York. In finding the schedules not justified, division 3 said at page 784:

This record does not show that the shippers render any transportation service or furnish any instrumentality for use in such service. On the contrary, it shows that, instead of requiring the consignees to unload the shipments from the cars, as ordinarily required on carload shipments, respondent undertakes to make delivery in spaces assigned to the consignees on the piers, and its stevedores stack the packages in those spaces. It appears from this record that at that point respondent has fulfilled its legal obligation as to delivery. The subsequent restacking, in which the packages are sorted as to brand, size, etc., appears to be solely for consignees' benefit, and is apart from the transportation in connection with which allowances for services are contemplated or authorized by section 15(13) of the act. (Emphasis supplied).

That finding was to the effect that the line-haul rate extended up to and including placement of the freight on the pier floor by the carrier; but that service beyond that had to be paid for by the consignee.

In *Unloading Lumber at New York Harbor*, 256 I.C.C. 463, decided November 2, 1943, respondents therein (rail carriers serving the port of New York) proposed to establish charges for unloading east-bound lumber from cars onto lighters or barges at specified stations in New York Harbors. Theretofore the unloading had been performed by respondents free of charge. Therein division 2 said:

The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor. In *New York Harbor Facilities Applications*, 100 I.C.C. 383, the Commission found that lighterage and car floatage in New York Harbor are equivalent to necessary extensions of the rail lines of the various railroads. This conclusion was reached also in *Lighterage Cases*, 203 I.C.C. 481. The nature and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61. As such a showing was not made respondents have not met the

requirements of the statute in that respect, and accordingly, have not sustained their burden as to the reasonableness of the proposed charge.

In *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673, 677, decided May 22, 1943, division 2 found that a proposal by respondents therein to establish at Pacific Coast ports a terminal charge of 5 cents per 100 pounds, in addition to the line-haul rate, on traffic moving to and from those ports on transcontinental export and import rates was not shown to be just and reasonable. Therein the division said:

We have frequently approved the separation of certain charges for accessorial services from the line-haul rates. But this has only been upon a clear showing that the resulting separate charges for each portion of the total services were just and reasonable. * * * Here, however, the entire body of these export and import rates have been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of these terminal services as a part of the through transportation to and from the docks. Their (respondents') proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services. (Words in parentheses supplied.)

A like finding is warranted in respect of the unloading charges at New York piers.

And in the prior report herein, the Commission said at page 654:

A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until the cars are unloaded and the lading placed at a convenient location on the pier floor.

The railroads are under a physical disability at the pier stations because they have no way of making the freight accessible to the consignees without placing it on the pier. The consignees should not be required to pay for that disability. Despite this disability, however, the waters of New

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York harbor are a substantial asset to the railroads, in that they make possible extensive terminal operations to and from the several piers and other waterfront locations without the investment which otherwise would be required in switch tracks, team tracks, and rail terminal facilities. The harbor waters possess the facilities of an elastic belt line which can be extended to all parts of the lighterage limits. Unlike cars on a belt-line railroad or an industrial siding, the car floats plying in New York harbor are not restricted in their operation to a narrow roadbed or to the line of a particular carrier. See *The New York Harbor Case,* 47 I.C.C. 643, 655.

Unloading Charges at Philadelphia,—Prior to 1927, fresh fruits were distributed at Philadelphia from piers on the Delaware River adjacent to the Dock Street wholesale produce market. Cars were either floated into these piers or moved thereto over a city street. At the piers unloading, similar to the present operations at New York piers, was performed by the carriers without charge therefor other than the line-haul rate. Vegetables were delivered at Thirty-first and Chestnut Street station or at certain small yards principally in the northern section of the city. In 1927, the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce terminals, either of which was then capable of accommodating the needs of the fruit trade at that point, and at both of which unloading under the line-haul rate was continued. These terminals, one-half mile apart, are 3.5 and 4 miles from the Dock Street market at which there are from 150 to 200 wholesale fruit and vegetable establishments.

Since 1927 and prior to November 1, 1948, approximately 95 percent of the fruits and vegetables consigned to Philadelphia, other than for chain stores, has been handled at the Pennsylvania Produce Terminal. This facility consists of two platforms each with a floor space of 83,000 square feet, and team tracks with a capacity of 72 cars. Adjacent thereto are 16 team tracks with a capacity ranging from 400 to 450 cars, depending upon the length of such equipment. These facilities are separate by driveways measuring 65 feet from rail to rail. The platforms at the terminal are designated "A" and "B". The first is used almost exclusively for the unloading of fruit to be sold at auction, and the second for fruits and vegetables intended for private sale. It is only at these platforms that the Pennsyl-

vania performs unloading. The consignees perform the unloading when the cars are spotted on the team tracks, or at other stations of the Pennsylvania.

When the freight is unloaded on "A" platform the Philadelphia Terminal Auction Company sells the commodities, receives the price therefor, pays the freight charges, and remits to the auction receiver the proceeds, less the freight and auction charges. The unloading charges, ranging from 3 to 10 cents per package, are passed on to the buyers of the commodities.

When the auction company prepares the commodities for sale it prints a catalog covering such operation. If the freight consists of uniform lading such as grapes, the catalog divides the packages into lots of 101. But where the commodities are of different sizes they are usually arranged into groups of each size. When a unit is placed for sale in the auction rooms it is listed on an individual line in the catalog. For example, the catalog shows under the heading "description", 77 boxes of valencia oranges, with mark number 252, to be placed in line 37 on the auction platform. This affords the individual who bids on the commodities the choice of the packages he desires as listed in the catalog. The different line numbers are put on the terminal floor by the auction company employees after the car is unloaded, and the packages are placed in the respective lines indicated in the catalog. The catalogs are printed at the auction company's office at the Baltimore & Ohio-Reading terminal.

As to freight unloaded at "B" platform the cars containing vegetables are, in most instances, placed adjacent to that platform and unloaded thereon in full by the Pennsylvania. The commodities are trucked from the car by railroad employees to the location on the platform where they are to be stacked, displayed, and sold. There the consignee's employees meet the carrier's truckers, unload the packages, and arrange them according to size, grade, quality, and other factors. Under this method the buyer may inspect the entire shipment and take delivery of the freight at that point.

All freight unloaded by the Pennsylvania on "A" platform is sorted by that carrier without charge therefor. It does not, however, perform sorting on freight which it unloads on "B" platform. Since November 1, 1948, when the charges assailed became effective, the unloading operation

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at Philadelphia has not changed except that the Pennsylvania now charges for that service and also refuses the consignees the privilege of unloading their own freight on the platforms if they elect to do so. At present cars will not be placed for unloading at the platforms unless unloading by the carrier is ordered by the consignee.

The Baltimore & Ohio and the Reading operate a joint produce terminal at Philadelphia. The building used for the unloading and display of fruits and vegetables contains a platform 800 feet long and about 87 feet wide. The front of the building is used for railroad offices with auction rooms and other offices above them. The produce terminal is equipped with 6 team tracks having a capacity of 100 cars All cars delivered on team tracks are unloaded by the consignees. The unloading operation on the terminal platform is performed by railroad employees.

When fruits and vegetables are about to arrive at Philadelphia the auction company receives orders from the receivers relative to the commodities they will offer for sale next morning. The railroads accept these orders from the auction company but not from the individual receivers. However, the latter have the right, prior to the unloading of the car, to cancel the order to unload, but they do not have the right to order the unloading of the produce for sale. The orders by the auction company to the carriers indicate the car numbers, the contents, and the name of the consignee. The freight is unloaded by the carrier and made available to the auction company the morning following the placing of the order. The auction company does not have access to the freight until the railroad has repaired the damaged packages and put them back in their proper lines on the auction platform. It is not until then that the auction company signs for receipt of the freight, responsibility for which then passes to it from the carrier. Any service accorded the freight after the auction company takes possession is performed by its own labor. This method of unloading releases the cars quickly the use of which the carriers have for other purposes. About 95 percent of the cars unloaded in this manner are released almost immediately after arrival. It also affords the carriers an opportunity to repair all damaged packages, an operation difficult to perform on team tracks, thus reducing claims for damage. This method of unloading had been performed by the carriers prior to November 1, 1948, without charge there-

for other than the line-haul rate. As a result of the unloading charges, 63 percent of the commodities originally unloaded, sorted, sold, and delivered on the terminal platform is now unloaded on team track by consignees.

Receivers of fruits and vegetables in Philadelphia who formerly, in many instances, unloaded their own freight at the terminal platforms are dissatisfied with the arrangement under which they must either unload at team tracks or have the unloading at the platforms, for which charges are collected, performed by the carrier. Those receivers request the privilege of unloading their own freight on the platforms if they so desire. They take the position that certain commodities, such as potatoes, onions, tomatoes, crated melons, turnips, cabbage, and celery are sold to greater advantage when unloaded on the platforms.

The Philadelphia Terminals Marketing Association, composed of 54 individuals, copartners or corporations, handling numerous carloads of fruits (other than citrus fruit) and vegetables in the Philadelphia market opposes the unloading charges under consideration. Practically all of these commodities consigned to that market, not including shipments to chain stores, are received by members of that association. Its members operate exclusively at the Pennsylvania produce terminal and serve from 4,000 to 5,000 retailers in Philadelphia. They also sell to jobbers who transfer the commodities from the terminal to the wholesale market area. About 40 percent of their receipts of fruits and vegetables are distributed to wholesalers within a radius of 150 miles of Philadelphia.

Produce dealers in the Philadelphia market are in competition with like dealers at points such as Baltimore, Md., Pittsburgh, Pa., and New York, because these markets are accessible to certain buyers who normally procure their fruits and vegetables in Philadelphia. Buyers from Scranton, Williamsport, Altoona, Pa., and Atlantic City, N. J., ordinarily procure their fruit and vegetable requirements in the Philadelphia market.

Since 1930 there has been a trend, with certain fluctuations, toward diversion from the railroads to the trucks of the fruit and vegetable traffic consigned to Philadelphia. During the war that trend was reversed but subsequent thereto the volume of movement by truck has increased. Within the past 15 years a greater percentage of fruits and

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vegetables has been consigned direct to chain stores, thus by-passing the Philadelphia market. Protestants contend that the assailed unloading charges at Philadelphia will further divert the fruit and vegetable traffic from the produce terminals.

Prior to November 1, 1948, a wholesale and retail fruit and vegetable dealer at Wilmington, Del., purchased these commodities in the Philadelphia market, and moved them to Wilmington in his own trucks. Since that date competition forced this dealer, because of the unloading charges, to buy these commodities at points such as Baltimore. At present he also ships oranges direct from Florida by truck. During the past 6 years he also bought oranges in Florida when prices were lower than at Philadelphia. Prior to the imposition of the unloading charges this dealer purchased potatoes in Philadelphia, but he now procures them in Maine at a lower price. He continues to buy his other vegetable requirements in Philadelphia.

A wholesale fruit and vegetable dealer at York, Pa., who handled a million dollar volume of business in 1948, distributes these commodities to retail grocery stores, restaurants, and hotels. Prior to the 1948-49 season this dealer bought about 50 percent of his citrus fruit requirements in Philadelphia, a small portion in Baltimore, and the remainder direct from Florida. The principal reason for buying in Philadelphia was the better choice of the supply in that market. Because of the unloading charges at that point this dealer now receives a larger portion of his citrus fruit direct by truck from Florida. He continues, however, to purchase about 46 percent of his citrus fruit in Philadelphia. Approximately 40 percent of the fruit purchased by this dealer consists of California produce. He handles not less than 300 carloads of fruits and vegetables a year, of which citrus fruit constitutes 25 percent.

Prior to November 1, 1948, approximately 60 percent of the shipments to one of the principal receivers of potatoes and onions in the Philadelphia market was unloaded on "B" platform by the Pennsylvania, and 40 percent by the receiver. Since then he has discontinued ordering the Pennsylvania to unload his traffic on the terminal platform. He now receives 99 percent of his traffic on team tracks, where sale is made from sample. Under this method of sale the buyer discards the damaged products, whereas in con-

nection with platform delivery the consignee would regrade the products and thus be able to sell them.

After the unloading charges became effective the consignees generally agreed that they could have the unloading performed for their account by private contractors for substantially less than those charges. They presented these views to the carriers but without success. On December 8, 1948, the consignee unanimously adopted a resolution requesting that the carriers permit the auction company to unload the fruit which it was selling for their account. The Pennsylvania refused to permit that company to unload the freight at its produce terminal taking the position that that terminal was a public facility, and that the granting of such permission might give rise to a dual method of unloading, one to be conducted by the fruit and vegetable trade, and the other by the railroad for the general public. The Pennsylvania was apprehensive that this might lead to difficult labor problems. The record does not disclose the attitude of the Baltimore & Ohio, and the Reading.

During the 1947-48 season (November to April) the equivalent of 88 carloads of oranges, on the basis of 400 boxes per car, was received by truck in the Philadelphia market, as compared with 3617 carload equivalents during the 1948-9 season. The record indicates that the increase in the movement by truck was due largely to the unloading charges. During the 10-month period subsequent to the imposition of the unloading charges there has been a decrease of 7 percent in the carload shipments of fruits and vegetables to Philadelphia by rail under the same period in the preceding year, as contrasted with an 11 percent increase in carload equivalents by truck. From November 1, 1948, to August 31, 1949, the auction company handled 8,123 carloads, on which the unloading charges collected by the railroads approximated $325,000, an average of $40 per car.

The Pennsylvania publishes specific charges for unloading carloads of fresh fruits and vegetables at Baltimore, Pittsburgh, and Chicago. The consignees are, however, permitted to perform such unloading at these points. The protestants at Philadelphia call attention to the fact that all shipments of fruits and vegetables consigned to those markets are unloaded by the consignees except when they request the carrier to perform that service. In that event,

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the carrier performs the service and collects the charges therefor. Protestants request the similar privilege of unloading at the Philadedphia produce terminals.

The Pennsylvania has a house at Baltimore located adjacent to its team-track yard. That house is leased to consignees at that point and is not operated as an ordinary terminal or freighthouse. Those consignees lease the platform space by doors, each of which has from 20 to 30 feet surrounding platform space. They also have offices on the second floor of the facility. The only part retained by the Pennsylvania is its agent's office. That carrier has never performed unloading at the Baltimore facility, nor has it been requested to do so. It is, however, ready to perform such service if requested. The fruit and vegetable trade which has leased the facility performs the unloading of its own traffic at that point. The greater part of the traffic is, however, unloaded at team tracks. But when consignees perform the unloading on the house platform it is done by their own employees. Unlike the facilities of the Philadelphia produce terminal those at Baltimore are not open to the public.

When the produce terminal was built at Pittsburgh the fruit and vegetable trade at that point requested the Pennsylvania to perform the unloading. In response thereto that carrier performed the service requested, except at the auction facility, where the auction company usually unloads its own freight. However, when the volume of freight is low, the auction company requests the Pennsylvania to perform the unloading. At that point consignees have the option of unloading at the produce terminal at their own expense. The present unloading charge on fruits and vegetables at that point is $1.40 per ton. The sorting charge is $4.92 per car.

At Chicago, fruits and vegetables are unloaded at a team-track yard and at an adjacent house which is not operated by the Pennsylvania as its own facility. The record indicates that the house is operated as a joint facility but fails to disclose the joint operation or ownership.

The fruit and vegetable terminals and the unloading operations at Baltimore, Pittsburgh, and Chicago, as indicated, are not comparable with those at Philadelphia.

The unloading costs per ton of the Pennsylvania at its produce terminal during July 17-23, 1949, were 2.63 on fresh

fruits, 1.91 on vegetables (other than top-iced) and citrus fruit, and $3.42 on melons. Those of the Baltimore & Ohio at its perishable produce terminal during July 7-21, 1949, were $1.23 on citrus fruit, and $1.53 on fresh fruit (including deciduous fruit). No charge is made for sorting fruits at Philadelphia. The cost of that service is included in the charge for unloading.

A protestant who observed the unloading of 21 carloads of citrus fruit, and 4 carloads of grapes and pears at the Baltimore & Ohio-Reading terminal on September 18, 1949, took the position that based on the actual time consumed in that operation, at the customary wage of about $1.50 per man hour, the unloading cost per car averaged $11.29, as compared with actual charges collected by the railroad ranging from $39.44 to $42.38 per car. The average cost of unloading submitted by this protestant did not cover a full night's operation. It applied to a part of a Sunday night, usually the heaviest unloading night in the week, and was based on the number of minutes consumed in unloading each of 25 cars. In order to determine the cost of unloading it would be necessary to include about a full week's operation. The record establishes that the unloading is performed on a piece work basis, irrespective of the time it takes to perform it. If the carriers call their employees out to perform the unloading, they must be paid whether or not there is sufficient work for them to do. Each such employee is paid for the number of cars handled by the gang to which he is assigned.

A substantial portion of the freight received in Philadelphia at the Pennsylvania produce terminal is auctioned at that facility. Protestants contend that if the cars unloaded for auction were placed in the team-track yard, in addition to the carloads of vegetables normally unloaded there, the unloading facilities of the yard would not accommodate all such cars on certain days, thus resulting in increasing substantially the amount of trucking to and from the yard, and in greatly delaying the delivery of fruits and vegetables. They take the position that these facilities were constructed about 25 years ago when horse-drawn vehicles were generally used; that they will not accommodate the large trailer-trucks used to haul a substantial portion of the fruit beyond the Philadelphia area; and that two such trucks in the same driveway will prevent other vehicles

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from entering that area thus causing congestion and confusion.

The team-track facilities are sufficient to accommodate a large number of cars. There is no indication that these facilities are inadequate to accommodate the fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such service. The most that has been shown was that at certain times there was congestion as a result of the manner in which trailer-trucks were placed in the driveways. Those driveways are 65 feet in width and are comparable with those at team tracks generally. Except during strikes or similar conditions, there has been no time when the team-track capacity at Philadelphia has not been sufficient to accommodate all cars unloaded at such facilities and also those unloaded at the produce terminals. If strike conditions continued the Pennsylvania would increase its team-track yards.

Conclusions and findings.—The record establishes that the unloading by respondents of fresh fruits and vegetables at New York and Philadelphia is an expensive operation as shown by the cost computations adduced in evidence. The correctness or adequacy of these computations is not specifically questioned by many of the protestants who take the position that regardless of costs respondents should receive compensation for unloading at these points, if at all, from the line-haul rates or through increased divisions.

Unloading of fresh fruits and vegetables at New York and Philadelphia without charge therefor other than the line-haul rate had been established and for many years voluntarily performed by the rail carriers serving those points. Respondents herein seek to abandon that practice and establish charges for the unloading operations. Heretofore, it was generally assumed that compensation for those services was included in the line-haul rate or in special divisions allowed the delivering carriers. Selling and other practices in connection with the fruit and vegetable trade have developed over a period of years in reliance upon the special services offered by these carriers. The special facilities and unloading services offered by respondents obviously have attracted considerable additional traffic to their lines and in this respect they have derived worthwhile benefits which otherwise would not have accrued to them.

proceeding discontinued. The proposed charges, as subsequently increased, become effective November 1, 1948. Upon petitions for reopening and reconsideration by the Florida Railroad and Public Utilities Commission, the California Citrus League, The Port of New York Authority, the Secretary of Agriculture, the Philadelphia Terminals Marketing Association, and others, the proceeding was reopened for rehearing. A rehearing was was held. Orders were entered permitting the City of New York, the Industry Committee for the Improvement of Washington Market, and the Auction Receivers of Philadelphia to intervene and be treated as parties to any further proceedings herein. A proposed report on further hearing was prepared and served upon the parties to the proceeding. Exceptions were filed by respondent to the proposed report and the parties were heard in oral argument by the entire Commission. Subsequently it appearing, upon further consideration by the Commission, that the record was deficient in respect of certain evidence which seemed to be important, the proceeding, by notice dated October 10, 1950, was assigned for further hearing for the introduction of such additional evidence into the record. By notice dated October 30, 1950, a prehearing conference, pursuant to rule 68 of the General Rules of Practice before the Commission, was held on November 8, 1950, at which the parties to the proceeding discussed the order in which the evidence upon further hearing should be presented; whether respondents and protestants should exchange exhibits and prepared statements prior to the further hearing; when such hearing could be held; and any other matters as specified in rule 68. The further hearing has been held, prior to which the parties had exchanged their exhibits and prepared statements. The facts stated in the prior report will be repeated herein only to the extent necessary to a clear understanding of the issues.

Through rates apply on fresh fruits and vegetables, in carloads, from points in the various producing areas throughout the country to stations in New York and Philadelphia. Respondents proposed to establish charges as follows for unloading these commodities at the points indicated, in addition to the line haul rates:

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	Per net ton
Citrus fruits	$1.50
Fresh fruits (other than citrus)	1.75
Melons (including cantaloupes)	2.00
Vegetables, fresh or green, not cold pack or frozen	1.50
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.00

The respective charges which became effective November 1, 1948, and which are now in effect, are: $1.95, $2.28, $2.60, $1.95, and $2.60, reflecting an increase of 30 percent over those originally proposed as a result of the general increases authorized on or after October 6, 1947, in Ex Parte No. 166,[1] for the service indicated. Respondents' proposals reflect an effort on the part of the delivering lines to secure increased revenue from the fresh fruit and vegetable traffic terminated in New York and Philadelphia. No charges such as those under consideration have applied on this traffic in the past. They would accrue solely to the delivering lines, principally the Baltimore & Ohio,[2] Erie, New York Central, Pennsylvania, and Reading.

The general rule as regards carload freight is that shippers and consignees must perform the loading and unloading or make provision therefor at their own expense. Rule 27 of the consolidated freight classification provides, in part, as follows:

Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, except where tariff of carriers at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier.

The arrangements as to unloading at New York and Philadelphia, which have been in effect for many years, and also the unloading charges under consideration are covered

[1] *Increased Freight Rates*, 1947, 269 I.C.C. 33, 270 I.C.C. 81.

[2] Abbreviated titles used herein are Baltimore & Ohio for The Baltimore and Ohio Railroad Company; Erie for Erie Railroad Company; New York Central for The New York Central Railroad Company; Pennsylvania for the Pennsylvania Railroad Company; Reading for Reading Company; and Lehigh Valley for Lehigh Valley Railroad Company.

by exceptions to the governing classification, whereby it is contemplated that the carriers shall perform the unloading of fresh fruits and vegetables without interference from the consignees or receivers. It is provided that such unloading service will be performed only at designated stations. Prior to November 1, 1948, when the charges under consideration became effective, there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic at the stations specified. The charges which became effective on that date apply only on fresh fruits and vegetables and not on other traffic. It is indicated, however, that consideration is being given to the establishment of unloading charges on traffic other than fresh fruits and vegetables, but that as yet no definite conclusion in respect of such action has been reached.

The same schedule of charges was published for application at both New York and Philadelphia. In determining the level of these charges, respondents considered it impracticable to do more than estimate those which approximated the average cost of unloading particular groups of commodities at those points. Tariff complexities would result if a different charge were maintained for each of the respective commodities. Hence, respondents established charges in amounts approximating the claimed average costs of unloading certain groups of commodities. No objection to the grouping, as such, has been presented by any of the protestants.

The Erie and the Pennsylvania handle the bulk of the traffic at New York and Philadelphia, respectively, although a substantial amount reaches New York over the lines of the Baltimore & Ohio and the New York Central. Most fruits and vegetables originating at western producing points, particularly in California, and destined to New York are routed over the Erie, which usually receives the traffic at points in Indiana. Similar commodities from the Southeast, including those originating at points in Florida, ordinarily are routed over the Pennsylvania from Potomac Yard, Va., to New York. Carriers performing deliveries at Philadelphia are the Baltimore & Ohio, the Pennsylvania, and the Reading.

In support of the proposed charges, respondents point out the numerous services accorded shippers in respect of the

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movement of fresh fruits and vegetables to stations in New York and Philadelphia. These services include, among others, notification to consignees of the location of their freight in transit, extra heat and light at the terminals incident to such traffic, and the providing of auction rooms and other similar services, thus showing the extent to which respondents have cooperated with the fruit and vegetable trade in facilitating the receipt of the freight and its sale.

The general position of the protestants is that schedules naming the assailed unloading charges at both New York and Philadelphia should be found unlawful, particularly under sections 1, 2, and 3 of the Interstate Commerce Act, and that the Commission should order cancellation of such schedules and discontinue this proceeding.

Unloading operations are less expensive at Philadelphia than at New York. At Philadelphia, the freight house platform is practically on a level with the car floor, and the unloading is a dry-land operation. At New York, the stage of the tide affects the unloading, and the distances which the freight is trucked are substantially greater than at Philadelphia. At the former, the haul by hand truck ranges from 500 to 1,500 feet. At Philadelphia, the minimum haul is 50 feet, the maximum haul is not disclosed.

As the conditions governing delivery of the traffic under consideration at New York and Philadelphia are somewhat dissimilar, the unloading charges at these points will be discussed separately in the order indicated.

Unloading charges at New York.—Approximately 75 percent of the fresh fruits and vegetables consigned to the New York market is delivered at the pier stations of the Pennsylvania, Erie, Baltimore & Ohio, and New York Central, located between Barclay Street on the south and Canal Street on the north. The remainder of the deliveries is made to chain-store warehouses or to team tracks and sidings in other parts of the city. The railroads established their delivery terminals on the waterfront indicated during during the latter part of the nineteenth century and have concentrated their fruit and vegetable deliveries in this area. In 1927 and 1928, the Pennsylvania and the Erie spent substantial sums of money in reconstructing, for handling fresh fruits and vegetables, the pier stations which they leased from the City of New York. These piers are adjacent to Washington Market, the largest fruit and vege-

table market in New York and the primary market in the entire metropolitan area.

The principal consuming population served by the New York wholesale market lies east of the Hudson River, where 80 percent of the volume of fruits and vegetables delivered to that market is distributed. The wholesale market is in the lower part of Manhattan Island. The considerations which led to that location have been justified by the growth of facilities in that area to receive, sell, and store perishable commodities. At present, there are 18 cold storage warehouese, with a gross capacity of 13,000,600 cubic feet, within 2.5 miles of the wholesale produce center.

Respondents do not accord the consignees the option of performing the unloading. Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery.

Respondents' piers equipped for the unloading of fresh fruits and vegetables are as follows: Piers 16 and 17 of the New York Central, 19, 20, and 21 of the Erie, 22 and 23 of the Baltimore & Ohio, and 27 and 28 of the Pennsylvania. Utilization of pier stations by the carriers serving Manhattan Island is not confined to those at which fresh fruits and vegetables are handled. At the present time, these carriers utilize approximately 35 city-owned piers for the handling of freight of all descriptions. As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are car-floated and unloaded.

The area covered by the piers specifically identified approximates 40 acres, of which one-half consists of the piers, and the other half of the slips between the piers which accommodate the car floats. Real estate in that vicinity has a value of about $800,000 an acre, a total of $32,000,000 for the area covered by the piers. In the vicinity of the existing team-track yards on Manhattan Island between Twenty-eighth and Thirty-seven Streets, there is comparatively little room for expansion. Land in that area costs about $400,000 an acre. The piers have no team-track facilities on which cars can be placed. All parties to the pro-

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ceeding agree that it is not feasible to expand the present team-track facilities on Manhattan Island.

The team-track capacity on Manhattan Island of the following carriers is: Pennsylvania, Thirty-seventh Street yard, 130 cars; Erie, West Twenty-sixth Street yard, 56 cars; New York Central, Thirty-third Street yard, 350 cars; Baltimore & Ohio, Twenty-sixth Street yard, 45 cars; and Lehigh Valley, West Twenty-seventh Street, 74 cars. All of these team tracks are heavily used for non-perishable freight. Team-track delivery on Manhattan Island in lieu of delivery at the pier stations could not be accorded on the volume of fresh fruit and vegetables consigned to New York. Because of these limited team-track facilities, the bulk of the fresh fruit and vegetable traffic consigned to New York is delivered at the piers hereinbefore indicated.

Only one of the respondents, the New York Central, has an all-rail line into Manhattan Island for the delivery of freight. This line enters New York from the north and extends south over the west side of the city to a point not far from the wholesale market area. The line has limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers. In fact many of the cars of fresh fruits and vegetables delivered by that carrier for trading in the wholesale market are moved by car float to its pier station (piers 16 and 17) in the vicinity of Barclay Street.

Because of the geographical location of New York, freight consigned to that point must be moved thereto either by car floats or lighters across the Hudson River from the New Jersey side, except, as stated, traffic routed over the New York Central. The rails of the other respondents serving that point, as regards freight traffic, terminate at points on the west bank of the Hudson River in the vicinity of Jersey City, N. J. Carloads of fruits and vegetables arriving at these rail terminals, consigned to New York, are moved onto car floats equipped with tracks, and transported by tugs across the Hudson River, either to certain piers equipped for the handling of such traffic, where the freight is unloaded by the carriers and placed on the pier platform for delivery to the consignee, or to certain locations equipped with float bridges over which the cars are moved from the car floats to rails extending therefrom to certain team tracks, private sidings, or warehouses, where delivery

is completed and the freight ordinarily unloaded by the consignee.

The movement of the loaded cars to the piers usually occurs in the late afternoon. The unloading commences around 8 p.m. or earlier and continues until around 5 a.m. or 6 a.m., next morning. The time it takes to unload particular types of fruits and vegetables varies according to the size and weight of the packages, and the method of refrigeration and packing in the cars. The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available. When the cars are unloaded they are immediately returned empty to the New Jersey side, and other car floats are placed at the piers for unloading. So expeditious is the unloading service that it permits of the use of the same platform space for unloading and stacking freight two and sometimes three times each night on which unloading is performed.

There are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purposes of inspection, but they are not permitted to take delivery of their freight from that facility. The pier floor is the first place where, after the freight has been unloaded, delivery can be taken. At the original hearing the railroads offered to permit consignees to unload their freight from the car float. After the prior decision in this proceeding, the California Fruit Growers Exchange requested the railroads to permit the consignees, as a whole, to perform the unloading at the piers. The request was denied.

In taking pier station delivery, the fruit and vegetable trade has the advantage of displaying the entire contents of the car, thus affording the buyer the benefit of a thorough examination of the freight; of using the pier facilities as a sales' mart; and of occupying auction-room facilities without special charge therefor. The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from or loaded into cars on car floats. Freight of all kinds may be shipped from and to these piers, except that the Pennsylvania Product Terminal (piers 27 and 28) is limited to the receipt and delivery of perishable freight. But even these piers, in

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addition to the handling of fruits and vegetables, are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish, oysters, flower bulbs, and raw silk. All freight, other than fruits and vegetables, are unloaded by the rail carriers at their pier stations without charge therefor in addition to the line-haul rates.

The movement of fresh fruits and vegetables from the several States to the New York area[3] in 1946, 1947, and 1948, respectively, were 114,240, 111,390, and 104,555 carloads by rail, and 60,098, 61,151, and 67,874 carload equivalents by motor truck. There were progressive decreases in the shipments by rail as contrasted with increases in shipments by motor truck. For the first 7 months of 1948 and 1949, respectively, shipments of fruits and vegetables to New York were 64,988 and 57,809 carloads by rail, and 30,819 and 33,868 carload equivalents by motor truck. The Department of Agriculture takes the position that the diversion of the traffic from the rails to the motor trucks results from the unloading charges at the New York piers.

When the charges assailed became effective, consignees attempted to avoid them by taking delivery at outlying team-track stations, and paying the cost of trucking into the market, or by shifting from rail to motor trucks for the line haul. In February 1949, deliveries of fresh fruits and vegetables to the New York piers were about 50 percent less than in February 1948. Shipments of these commodities delivered at those piers during the periods indicated were 2,828 and 5,450 carloads, respectively. Similar traffic to New York by truck and vessel increased by the equivalent of 1,135 carloads in February 1949 over the same month in 1948. During the later period there was also an increase of 915 carloads to team tracks in New Jersey. In April 1949, as compared with the same month in 1948, deliveries by car float at the New York piers decreased by 2,471 carloads, as contrasted with increases of 1,156 carload equivalents by truck and vessel to New York stations, and of 845 carloads for New Jersey team-track deliveries. Substantially all of the freight which was diverted from the New York piers was ultimately trucked to Washington Market for primary sale. The diversion of rail shipments from pier stations to other points intensified the problems of the New York

[3] The New York area includes the New York Piers, Bronx Terminal Market, Brooklyn, N. Y. certain points on Long Island, and Jersey City, Hoboken, and Kearney, N. J.

produce market, resulting in greater congestion in terminal handling, and in dissatisfaction among buyers, labor, and other elements at that facility.

Team-track delivery on Manhattan Island is to some extent dissimilar to pier-station delivery, although in both operations the movement across the Hudson River is identical. However, when cars for team tracks reach Manhattan Island they are accorded additional switching. After placement on the team track the consignee had two days' free time to unload the car. After unloading, the car is switched to the float bridge and reloaded on a car float for movement to the New Jersey shore. There is more car detention and more switching, and the unloading is substantially slower in respect of team-track delivery than is the simultaneous unloading of all cars at pier stations. A witness on behalf of the Erie stated that pier station delivery on Manhattan Island is the most efficient method which that carrier has been able to organize. So efficient is the operation that the Erie has handled in one day, at piers 20 and 21, as many as 367 cars of fruits and vegetables. It never handles less than 50 cars a day. This method of delivery has been utilized by the Erie for more than 60 years.

Respondents introduced an exhibit showing the cost of unloading fruits and vegetables at New York piers 27, 28, and 29 of the Pennsylvania, during July 10 to 16, 1949. Those costs per ton were $3.23 on fresh fruit, $4.11 on melons, cantaloupes, and vegetables (top-iced), and $2.22 on other vegetables and citrus fruit. The unloading costs of the New York Central at pier 17 (Barclay Street) during July 25 to 30, 1949, were $1.72 on vegetables (other than top-iced), and $2.697 on cantaloupes, melons, and vegetables (top-iced). The unloading costs of the Erie at Duane Street piers during the weeks ended May 22, August 28, November 26, 1946, and February 4, 1947, revised to reflect the aggregate increases of 25.5 percent in the wages of the employees of the Seaboard Terminal & Refrigeration Company on September 1, 1947 and November 29, 1948, were $1.49 on citrus fruit, $2.11 on fresh fruit (other than citrus), $2.51 on fresh or green vegetables (top-iced), $1.46 on fresh or green vegetables (not top-iced), and $2.22 on cantaloupes and melons. The unloading costs of the Baltimore & Ohio at pier 22, during July 7 to 20, 1949, were $3.61 on fresh fruit (including deciduous fruit), $2.63 on melons, $3.26 on

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vegetables (top-iced), and $2.62 on vegetables (other than top-iced). The unloading costs at New York piers do not include the cost of sorting and stacking, but they do include a proportion of the expense of sweeping, cleaning, and office upkeep incident to the unloading of fruits and vegetables at the pier stations.

Prior to the arrival of the shipments at the piers, the carriers are informed of the contents of the cars, the names of the consignees, and other pertinent details. This permits notification of the receivers of the freight in advance of arrival and enables the carriers to allot space on their piers for each consignment. As regards the allotment of space, the piers are generally mapped out so as to give each consignee a specified location for the contents of the cars after unloading. Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers, who, prior to the auction, usually inspect the fruit while it is on display on the pier floor. Practically all the citrus fruit, as well as fresh fruit (other than citrus), after being unloaded on the piers, is sold at public auction in rooms on the second floors of the piers assigned for that purpose. Cantaloupes and melons, as a rule, are not sold at auction, but are bought at private sales on the pier floor where the packages are displayed. Fresh or green vegetables, particularly those not top-iced, frequently reach the consignee without prior sale at the piers. With the exception of tomatoes, they are not sold at auction.

Vegetables are generally removed from the piers within 3 or 4 hours after having been unloaded by the carrier. After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away.

As stated, there has been an increasing tendency to accept delivery at team tracks on the New Jersey side of the Hudson River of fruits and vegetables consigned to New York. Because of that tendency, the Pennsylvania has recently reconditioned, at an approximate cost of $200,000, its team tracks in that area, so as to accommodate the increase in unloading at these facilities. The increased use of the New Jersey team tracks, to a large extent, was not the result of the unloading charges at the New York piers.

The Pennsylvania prefers to deliver at Jersey City team-track yards, rather than at New York piers, shipments of

fruits and vegetables consigned to New York. It takes the position that deliveries at those facilities eliminate all the difficulties and expenses of car-float service. It is contended that the delivery of fruits and vegetables at Jersey City team tracks would be beneficial to the trade, the railroad, and the public. The Jersey City Henderson Street Ball Ground yard is about 1.5 miles from the wholesale produce market on Manhattan Island. Waldo Avenue yard is from 3 to 4 miles from that market. Receiving fruits and vegetables at team tracks in New Jersey would be inconvenient to the public, because the vast volume of these commodities consigned to New York is consumed east of the Hudson River.

The wholesale produce markets are located on the lower west side of New York for economic reasons. These markets are adjacent to pier stations where fruits and vegetables consigned to New York are delivered, and they are also located conveniently to the area of greatest consumption. The location of those markets would change if the railroads continued to increase their deliveries on the New Jersey side. This would tend to scatter the markets. If those facilities remain in their present location, deliveries made at team tracks in New Jersey will require a truck haul to those markets. The trucks which ordinarily handle this freight are centered on the lower west side of New York. In order to reach the traffic at team tracks in New Jersey, these trucks have to cross over to New Jersey by ferry or through the Holland Tunnel, a distance of about 3 miles. The time necessary for such a crossing to the Henderson Street yard would range from 20 to 25 minutes, and an additional 30 minutes to locate the car and unload the contents or part thereof into the truck. Approximately an hour and a half would be consumed in moving the loaded truck back by ferry or tunnel to the New York markets. From the time the empty truck leaves New York until it returns loaded to the market from 2 to 2.5 hours would elapse under favorable traffic conditions. Trucking the traffic from the Waldo Avenue yard would consume an additional 15 to 20 minutes. Ordinarily, such operation would cause congestion and delay.

The Henderson Street and Waldo Avenue team tracks of the Pennsylvania at Jersey City are normal facilities, with driveways between the tracks into which consignees can operate their trucks and take delivery from the cars.

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These driveways are from 50 to 70 feet in width. Because of the increased tendency to accept delivery of perishable traffic at Jersey City team tracks, the Pennsylvania also built its Manhattan produce yard in the so-called "meadows", farther removed from Jersey City. At the latter point, there is a wider scope of delivery than on Manhattan, the yards are open 24 hours a day, and there are no restrictions on unloading and delivery of traffic such as occurs in connection with pier operation. Respondents take the position that the advantage in being able to unload the freight from the cars onto the trucks at any time induced the gradual flow of delivery of the traffic at Jersey City. Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, for making delivery at New York piers.

The City of New York receives about 100,000 carloads of fresh fruits and vegetables annually. The unloading charges assailed, ranging from $26 to $36 a car, would place an additional cost of $3,000,000 a year on food consumers in that city. Certain protestants contend that if the findings in the prior report herein are affirmed, similar charges may be anticipated for the unloading operations at all piers in Manhattan Island, and that those findings will have the effect of increasing the price of every piece of mechandise shipped through the port of New York, thus placing that port at such a disadvantage as to cause irreparable damage to its waterfront and to the city as a whole. The New York waterfront contributes from 25 to 40 percent of the basic economy of that city. The City of New York is planning to rehabilitate its piers at a cost of $78,000,000, but it is intimated that it may not proceed with that program if the findings in the prior report herein are not reversed. There has also been a plan to rehabilitate the Washington Market, the cost of which based on current prices, would exceed $60,000,000. Witness for the City of New York is apprehensive that, if the unloading charges under consideration are continued, consignees of fresh fruits and vegetables will generally accept delivery on the New Jersey side of the Hudson River. On behalf of the city, it is argued that the unloading service at the piers is an integral part of the

movement of the traffic from origin to ultimate destination, for which the charge is included in the line-haul rate, and that for this service, which has been performed by the carriers without extra charge, for more than 50 years, no additional charge is warranted. A statement by the Mayor of New York City incorporated, by agreement of the parties, into the record in this proceeding on further hearing corroborated the facts stated in the foregoing paragraph.

The Port of New York Authority, hereinafter referred to as the Port Authority, is a municipal corporate instrumentality created by compact between the States of New York and New Jersey and approved by the Congress of the United States. It is charged with the duty of protecting, promoting, and developing the commerce of the Port of New York, and of improving and unifying its facilities. Realizing the importance of fruits and vegetables to the inhabitants in the New York metropolitan area, and being dissatisfied with the limited facilities for handling them, the Port Authority and certain departments of the City of New York, developed plans for the construction of a union waterfront terminal at a cost of $27,000,000 in substantially the same location as the pier terminals. These plans, temporarily abandoned because of the findings in the prior report herein, contemplated a continuation of the system of delivery by car float to pier stations, and unloading of the cars to the station platforms as a part of the transportation. By establishing such a terminal, in connection with which the overhead charges against each car would be reduced by combining the alternating traffic peaks of the several carriers and providing an operation susceptible of efficient overall control of labor, it was felt that the project would be financially self-sustaining if the revenue from the carriers for the use of the terminal and unloading of the freight approximated $2 per ton. The calculations were based upon the 1947 wage levels. The Port Authority offered to perform the unloading and other services as agent for the railroads. It takes the position that the most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee.

The record shows that it would be impossible to expand rail facilities on Manhattan Island to the extent necessary to accord team-track delivery on the volume of fruits and

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vegetables consigned to New York. The high cost of land on Manhattan Island, and the time required for handling cars across float bridges during periods of peak volume of traffic, would render team-track delivery impracticable.

The Industry Committee for the Improvement of Washington Market and all of its component groups, including wholesalers, receivers, auction companies, truckmen, loaders, purveyors, inspection services, and cooperage companies, opposed the proposed unloading charges on fruits and vegetables at the New York piers.

The New York City Consumer Council, a coordinating agency for numerous organizations, embracing a membership of over 250,000 persons devoted to maintaining decent living standards, opposes the assailed unloading charges at the New York piers. In a year of high buying power, the inhabitants of New York consume over 5 billion pounds of fruits and vegetables. The Council emphasizes that the unloading charges are borne by the consumers and urges that they are unfair and dangerous to the economy of New York in that they increase living costs and reduce buying power of its inhabitants.

The notice of October 10, 1950 assigning the proceeding for further hearing stated, among other things, that:

At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team tracks on Manhattan Island and in Jersey City, N. J. Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded pier delivery and those accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers. Respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate.

The respondents have failed to respond in any substantial way to the terms of that notice. They have not shown what

investment would be required for the construction in Manhattan of team tracks necessary to accommodate deliery of the fruit and vegetable traffic. It is obvious that the Commission wanted to know what it would cost the respondents to handle this traffic on Manhattan Island team tracks if the pier stations were not available. The evidence submitted by respondents is merely a comparison of the costs of transporting fruits and vegetables from points in New Jersey to the existing respective pier and team-track facilities, as to the Erie, Baltimore & Ohio, and Pennsylvania, and through yard facilities of the New York Central. The theory pursued by respondents assumes that as to both piers and team tracks the existing facilities are adequate to accommodate the entire volume of fruit and vegetable traffic destined for Manhattan delivery. This assumption is incorrect, because the record establishes that only a relatively small part of the total volume of such traffic can be accommodated on the existing team tracks, and that the greater portion must be handled on the piers which are of ample capacity to handle the entire traffic. Manifestly, if there is to be shown as required by the Commission's notice "any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities," the accounting developed in that respect should have shown the required investment in team-track facilities.

The costs per car shown by respondents for delivery of fruits and vegetables at Jersey City and New York are: for the New York Central, $22.30 at the Thirty-third Street team tracks, and $38.02 and $43.94 at Pier 17 in connection with carfloat from Sixty-fifth Street, New York, and Weehawken, N. J., respectively; for the Erie, $10.73 at Jersey City team tracks, $45.44 at Twenty-eight Street team tracks, and $45.79 (which does not include an estimated unloading charge of $39.57) at Duane Street piers; for the Baltimore & Ohio, $70.46 at Twenty-sixth Street team tracks, and $119.86 at Piers 22 and 23; for the Pennsylvania $58.50 at Henderson Street team tracks, Jersey City, $73.57 at Thirty-seventh Street team tracks, and $122.73 at Piers 27 and 28.

The costs per car shown by respondents for delivery of fruits and vegetables at Philadelphia are: for the Baltimore & Ohio, $27.66 on team tracks, and $75.94 at the auction sales platform; for the Pennsylvania $39.64 on team tracks, and $109.36 for station platform delivery. The Philadel-

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phia protestants introduced evidence to the effect that the unloading costs, including all properly chargeable indirect labor expense and general overhead, should not exceed $19.10 per car.

Pursuant to the Commission's notice the protestants conducted a cost study relative to (1) the total physical area required to expand the team-track yards of respondents in Manhattan to provide sufficient capacity to accommodate the total railroad deliveries of fresh fruits and vegetables in addition to other commodities now handled on existing team-track facilities, (2) the cost of acquiring such acreage on Manhattan Island either adjacent to existing railroad team-track yards or in the vicinity of the existing piers, (3) the cost of constructing and operating the additional team-track and other necessary facilities, and (4) the additional annual fixed charges on capital investments in property and newly constructed improvements.

As a basis for estimating the team-track capacity and areas which would be required by each railroad, protestants analyzed data relating to railroad unloadings of fruits and vegetables and other freight compiled by the Port Authority from railroad records. Locations for possible team-track expansion adjacent to existing facilities were selected as most feasible for development. Plans were prepared for team-track yards of the necessary capacity. Insofar as possible, existing facilities of the railroads and their track-connected patrons were not disturbed. Estimates of the cost of acquiring necessary property for the proposed team-track yards were provided by the Law Department of the City of New York. The cost of razing existing structures and the construction of additional tracks and other facilities was estimated by qualified employees. In compiling the cost study consideration was given to the peak-day unloadings of fruits and vegetables at the pier stations, peak-day receipts of perishable and dry freight at the existing team-tracks and the effect of holdovers as the remaining factors of maximum team-track capacity required.

In order to handle all the fruit and vegetable traffic of each railroad on a team track in Manhattan in conjunction with traffic now being handled on existing team tracks, the Pennsylvania would require additional team-track capacity for about 235 cars, the Erie for 257 cars, and the Baltimore & Ohio for six cars. The existing team-track capacity of the New York Central is adequate without expension.

The total estimated direct operating expense per loaded car incident to team-track delivery of fruits and vegetables in Manhattan, including a return of 6 percent on the estimated investment in team track facilities, is shown to be $120.91 for the Pennsylvania, and $73.93 for the Erie.

The costs per car of $122.73 shown by the Pennsylvania for delivering and unloading fruits and vegetables at Piers 27-28, and of $45.79 by the Erie for delivering like traffic at Duane Street piers, includes certain waterfront expenses at Jersey City of $14.81 and $10.92, respectively, the elimination of which results in costs of $107.92 for the Pennsylvania, and $34.87 for the Erie. Increasing the Erie delivery cost by the estimated cost of $39.57 for unloading results in an amount of $74.44. The estimated costs per car of team-track deliveries in Manhattan as shown by protestants, which includes no expenses at Jersey City, of $120.91 for the Pennsylvania would exceed the cost of delivery at Piers 27-28 by $12.99. The estimated cost of $74.44 for delivering and unloading at Duane Street piers would exceed the estimated cost of expanded team-track delivery by only 51 cents.

On the basis of the estimated volume of fruit and vegetable traffic protestants take the position that the construction of additional team-track facilities in Manhattan could be justified only for the Pennsylvania and the Erie. The estimated cost of construction of the additional team-track facilities would approximate $12,212,000 and $11,884,000 for these respective carriers.

In 1950 the number of cars of fruits and vegetables handled at pier stations and team tracks, respectively, in Manhattan by the following carriers were: Pennsylvania, 16,939, none; Erie, 19,615, 233; New York Central, 1,888, 12,144; Baltimore & Ohio, 1,896, 2,456. More than 90 percent of the pier station deliveries were made by the Pennsylvania and the Erie. The participation of the New York Central and the Baltimore & Ohio in the pier deliveries of fruits and vegetables is relatively small.

On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the costs that would be incurred by them for expanded team-track deliveries, and that the "difference in costs resulting from

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the fact that pier delivery does not require an investment in team-track facilities" disfavors the investments that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs incident to operation of such expanded facilities.

There is no question as to the applicability of the line-haul rates from the various points of origin to New York. The principal question for determination is what constitutes delivery of the freight by the respondents to the consignees or receivers, and the time when and the particular location at which it is completed. Delivery of carload freight consists of the carrier either placing the car on a team track or siding where it can be unloaded by the consignee, or where the consignee is not permitted to perform the unloading, as in this proceeding, in unloading the freight from the cars on the floats and placing it on the floor of the pier. Here, and here only, does the transportation obligation of the carrier end. That obligation is not fulfilled until the freight is placed in a location conveniently accessible to the consignee. This method of delivery of fresh fruits and vegetables has, for more than 50 years, been included in the line-haul rates on such traffic from the various origins to New York piers. It must be so included because the transportation service is not completed until delivery has been made. Section 1(3) of the act defines transportation to include, among other things, all services in connection with delivery of the property transported. Extra charges may, however, be assessed for accessorial services, such as sorting or stacking the fruits and vegetables for display purposes after unloading the freight on the pier platform; but unlike delivery, these services, for which extra charges are usually collected, are not included in the line-haul rate.

The carriers voluntarily permit their pier stations to be used for sales display purposes. They impose no charges for auction rooms and facilities used mainly for the sale of fruit. Frequently they pile or stack freight on the pier during the unloading operation to conserve space. These concessions and facilities are, however, separate and apart from the carriers' transportation obligations.

Car floatage in New York Harbor and delivery at piers in New York have been given consideration by the Commission in numerous proceedings. In *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61, a proceeding

dealing with the rail carriers' proposal to increase charges in connection with the delivery and receipt of freight at New York, it was found that the assessment of any charge for terminal handling, the service having theretofore been performed under the line-haul rate, would have the effect of increasing that rate; and that a proper justification of such an increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate. Therein, the Commission said:

* * * where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through service.

In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant.

On all traffic from the West to New York the delivering carriers, including the respondents herein, receive amounts ranging from 3.3 to 4.4 cents per 100 pounds as an arbitrary allowance out of the line-haul rate before prorating the remainder of the through rate with connecting carriers. That allowance is made, however, in respect of all traffic regardless of whether it is delivered at piers or on team tracks. In *Erie R. Co.* v. *Alabama & V. Ry. Co.*, 98 I.C.C. 268, a proceeding dealing with the divisions accruing to complainants therein out of joint transcontinental rates on fresh fruits and vegetables from points in the West to destinations in New York and New Jersey, including Duane Street station (piers 19, 20, and 21), division 4 found, among other things, that for the future, the just and reasonable divisions of those rates to Duane Street station would be 3 cents per 100 pounds to the Erie, and of the remainder of the revenue, 27.5 percent to the lines east of Chicago, Ill., and 72.5 percent to the lines west thereof. Therein, the Erie sought an arbitrary of $40 per car for performing the delivery at New York. Division 4 also found that the Erie unloaded the contents of the car at Duane Street, piled the packages in space set aside on the pier, where the con-

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signee took delivery, and that delivery, including unloading, was included in the line-haul rates.

In *Fruits and Vegetables at Duane St., N. Y.*, 66 I.C.C. 135, 139, dealing with the proposal of the Erie to establish, among other things, terminal charges ranging from 2.5 to 4 cents per 100 pounds on fruits and vegetables at its Duane Street station, division 4 found that "As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane Street under the line-haul rates", and that the establishment of terminal charges higher than the then-existing sorting charges had not been justified. Therein, division 4 said:

> The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruits and vegetables at Duane Street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic. * * *

As a practical matter, it is not only essential that the shipper should have notice of the arrival of his goods, but that the carrier should place them in an accessible position to be received by him and removed. Until they are so placed and tendered for delivery, it is obviously impossible for the consignee to receive and remove them and the carrier cannot reasonably be relieved of its common law liability until it has so placed or tendered the goods for delivery. See *Bills of Lading*, 52 I.C.C. 671, 701.

Upon arrival at the New York piers, the car floats must be unloaded efficiently and expeditiously. It is not practicable to let the trucks of the numerous consignees have access to the car floats. While carload freight is ordinarily required by tariffs to be loaded by the shipper and unloaded by the consignee, such unloading of the traffic under consideration is impracticable at respondents' New York piers. See *Allowances for Stacking*, 179 I.C.C. 780, 781. The question at issue in that proceeding was whether or not the Pennsylvania could pay the consignee to stack packages of fruits and vegetables in piles, sorting them according to kind, brand, size, and grade, so that they might be easily counted, inspected, and displayed for sale at respondent's

produce terminal in New York. In finding the schedules not justified, division 3 said, at page 784:

This record does not show that the shippers render any transportation service or furnish any instrumentality for use in such service. On the contrary, it shows that, instead of requiring the consignees to unload the shipments from the cars, as ordinarily required on carload shipments, respondent undertakes to make delivery in spaces assigned to the consignees on the piers, and its stevedores stack the packages in those spaces. *It appears from this record that at that point respondent has fulfilled its legal obligation as to delivery.* The subsequent restacking, in which the packages are sorted as to brand, size, etc., appears to be solely for consignees' benefit, and is part from the transportation in connection with which allowances for services are contemplated or authorized by section 15(13) of the act. (Emphasis supplied).

That finding was to the effect that the line-haul rate extended to and included placement of the freight on the pier floor by the carrier, but that service beyond that had to be paid for by the consignee.

In *Unloading Lumber at New York Harbor*, 256 I.C.C. 463, respondents therein (rail carriers serving the Port of New York) proposed to establish charges for unloading east-bound lumber from cars onto lighters or barges at specified stations in New York Harbor. Previously, the unloading had been performed by the respondents free of charge. Therein, division 2 said, page 468:

The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor. In *New York Harbor Facilities Applications*, 100 I.C.C. 383, the Commission found that lighterage and car floatage in New York Harbor are equivalent to necessary extensions of the rail lines of the various railroads. This conclusion was reached also in *Lighterage Cases*, 203 I.C.C. 481. *The nature and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul service.* It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61. As such a showing was not made respondents have not met

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the requirements of the statute in that respect, and accordingly, have not sustained their burden as to the reasonableness of the proposed charge. (Emphasis supplied)

In *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673, 677, division 2 found that a proposal by respondents therein to establish at Pacific Coast ports a terminal charge of 5 cents per 100 pounds, in addition to the line-haul rate, on traffic moving to and from those ports on transcontinental export and import rates was not shown to be just and reasonable. Therein the division said:

We have frequently approved the separation of certain charges for accessorial services from the line-haul rates. But this has only been upon a clear showing that the resulting separate charges for each portion of the total services were just and reasonable. * * * Here, however, the entire body of these export and import rates have been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of these terminal services as a part of the through transportation to and from the docks. Their proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services.

A like finding is warranted in respect of the unloading charges at New York piers.

In the prior report herein, we said, at page 654:

A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until the cars are unloaded and the lading placed at a convenient location on the pier floor.

The railroads are under a physical disability at the pier stations because they have no way, other than by placing it on the pier, of making the freight accessible to the consignees. The consignees should not be required to pay for that disability. Despite this disability, however, the waters of New York Harbor are a substantial asset to the railroads,

in that they make possible extensive terminal operations to and from the several piers and other waterfront locations without the investment which otherwise would be required in switch tracks, team tracks, and rail-terminal facilities. The harbor waters possess the facilities of an elastic belt line which can be extended to all parts of the lighterage limits. Unlike cars on a belt-line railroad or an industrial siding, the car floats plying in New York Harbor are not restricted in their operation to a narrow roadbed or to the line of a particular carrier. See *The New York Harbor Case*, 47 I.C.C. 643, 655.

Unloading charges at Philadelphia.—Prior to 1927, fresh fruits were distributed at Philadelphia from piers on the Delaware River adjacent to the Dock Street wholesale produce market. Cars were either floated into these piers or moved thereto over a city street. At the piers unloading, similar to the present operations at New York piers, was performed by the carriers without charge therefor other than the line-haul rate. In 1927, the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce terminals, either of which was then capable of accommodating the needs of the fruit trade at that point, and at both of which unloading under the line-haul rate was continued. These terminals, one-half mile apart, are 3.5 and 4 miles from the Dock Street market, at which there are from 150 to 200 wholesale fruit and vegetable establishments.

Since 1927 and prior to November 1, 1948, approximately 95 percent of the fruits and vegetables consigned to Philadelphia, other than for chain stores, have been handled at the Pennsylvania produce terminal. This facility consists of two platforms designated "A" and "B". The first is used almost exclusively for the unloading of fruit to be sold at auction, and the second for fruits and vegetables intended for private sale. It is only at these platforms that the Pennsylvania performs unloading. The consignees perform the unloading when the cars are spotted on the team tracks, or at other stations of the Pennsylvania.

When the freight is unloaded on "A" platform the Philadelphia Terminal Auction Company sells the commodities, receives the price therefor, pays the freight charges, and remits to the auction receiver the proceeds, less the freight and auction charges. The unloading

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charges, ranging from 3 to 10 cents per package, are passed on to the buyers of the commodities.

When the auction company prepares the commodities for sale it prints a catalog covering such operation. This affords the prospective purchaser the choice of the packages he desires as listed in the catalog. The catalogs are printed at the auction company's office at the Baltimore & Ohio-Reading terminal.

As to freight unloaded at "B" platform, the cars containing vegetables are, in most instances, placed adjacent to that platform and unloaded thereon in full by the Pennsylvania. The commodities are trucked from the car by railroad employees to the location on the platform where they are to be stacked, displayed, and sold. There the consignee's employees meet the carrier's truckers, unload the packages, and arrange them according to size, grade, quality, and other factors. Under this method, the buyer may inspect the entire shipment and take delivery of the freight at that point.

All freight unloaded by the Pennsylvania on "A" platform is sorted by that carrier without charge therefor. It does not, however, perform sorting of freight which it unloads on "B" platform. Since November 1, 1948, when the charges assailed became effective, the unloading operation at Philadelphia has not changed, except that the Pennsylvania now charges for that service and also refuses the consignees the privilege of unloading their own freight on the platforms if they elect to do so. At present, cars will not be placed for unloading at the platforms, unless unloading by the carrier is ordered by the consignee.

The Baltimore & Ohio and the Reading operate a joint produce terminal at Philadelphia. This terminal is equipped with 6 team tracks having a capacity of 100 cars. All cars delivered on team tracks are unloaded by the consignees. The unloading operation on the terminal platform is performed by railroad employees.

When fruits and vegetables are about to arrive at Philadelphia the auction company receives orders from the receivers relative to the commodities they will offer for sale next morning. The railroads accept these orders from the auction company but not from the individual receivers. However, the latter have the right, prior to the unloading of the car, to cancel the order to unload, but they do not have the right to order the unloading of the produce

for sale. The orders by the auction company to the carriers indicate the car numbers, the contents, and the name of the consignee. The freight is unloaded by the carrier and made available to the auction company on the morning following the placing of the order. The auction company then signs for the receipt of the freight and responsibility therefor passes to it from the carrier. Any service accorded the freight after the auction company takes possession is performed by its own labor. This method of unloading releases the cars quickly. About 95 percent of the cars unloaded in this manner are released almost immediately after arrival. It also affords the carriers an opportunity to repair all damaged packages, an operation difficult to perform on team tracks, thus reducing claims for damage. This method of unloading had been performed by the carriers prior to November 1, 1948, without charge therefor other than the line-haul rate. As a result of the unloading charges, 63 percent of the commodities originally unloaded, sorted, sold, and delivered on the terminal platform is now unloaded on team tracks by consignee.

Receivers of fruits and vegetables in Philadelphia who formerly, in many instances, unloaded their own freight at the terminal platforms are dissatisfied with the arrangement under which they must either unload at team tracks or have the unloading at the platforms, for which charges are collected, performed by the carrier. Those receivers request the privilege of unloading their own freight on the platforms if they so desire. They indicate that certain commodities, such as potatoes, onions, tomatoes, crated melons, turnips, cabbage, and celery, are sold to greater advantage when unloaded on the platforms.

The Philadelphia Terminals Marketing Association, composed of 54 individuals, copartners, or corporations, handling numerous carloads of fruits (other than citrus fruit) and vegetables in the Philadelphia market, opposes these unloading charges. Practically all of these commodities consigned to that market, not including shipments to chain stores, are received by members of that association. Its members operate exclusively at the Pennsylvania produce terminal and serve from 4,000 to 5,000 retailers in Philadelphia. They also sell to jobbers who transfer the commodities from the terminal to the wholesale market area. About 40 percent of their receipts of

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fruits and vegetables are distributed to wholesalers within a radius of 150 miles of Philadelphia.

Produce dealers in the Philadelphia market are in competition with like dealers at points such as Baltimore, Md., Pittsburgh, Pa., and New York, because these markets are accessible to certain buyers who normally procure their fruits and vegetables in Philadelphia. Buyers from Scranton, Williamsport, and Altoona, Pa., and Atlantic City, N. J., ordinarily procure their fruit and vegetable requirements in the Philadelphia market.

Since 1930 there has been a trend, with certain fluctuations, toward diversion from the railroads to the trucks of the fruit and vegetable traffic consigned to Philadelphia. During the war that trend was reversed, but since then the volume of movement by truck has increased. Within the past 15 years a greater percentage of fruits and vegetables has been consigned direct to chain stores, thus by-passing the Philadelphia market. Protestants contend that the assailed unloading charges at Philadelphia will further divert the fruit and vegetable traffic from the produce terminals.

Prior to November 1, 1948, a wholesale and retail fruit and vegetable dealer at Wilmington, Del., purchased these commodities in the Philadelphia market, and moved them to Wilmington in his own trucks. Since that date competition has forced this dealer, because of the unloading charges, to buy these commodities at Baltimore and at points in Florida and Maine.

A wholesale fruit and vegetable dealer at York, Pa., who handled a million-dollar volume of business in 1948, distributes these commodities to retail grocery stores, restaurants, and hotels. Prior to the 1948-49 season this dealer bought about 50 percent of his citrus fruit requirements in Philadelphia, a small portion in Baltimore, and the remainder direct from Florida. The principal reason for buying in Philadelphia was the better choice of the supply in that market. Because of the unloading charges at that point, this dealer now receives a larger portion of his citrus fruit direct by truck from Florida. He continues, however, to purchase about 46 percent of his citrus fruit in Philadelphia. He handles not less than 300 carloads of fruits and vegetables a year, of which citrus fruit constitutes 25 percent.

Prior to November 1, 1948, approximately 60 percent of the shipments to one of the principal receivers of potatoes

and onions in the Philadelphia market was unloaded on "B" platform by the Pennsylvania, and 40 percent by the receiver. Since then he has discontinued ordering the Pennsylvania to unload his traffic on the terminal platform. He now receives 99 percent of his traffic on team tracks, where sale is made from sample. Under this method of sale the buyer discards the damaged products, whereas in connection with platform delivery the consignee would regrade the products and thus be able to sell them.

After the unloading charges became effective the consignees generally agreed that they could have the unloading performed for their account by private contractors for substantially less than those charges. They presented these views to the carriers, but without success. On December 8, 1948, the consignees unanimously adopted a resolution requesting that the carriers permit the auction company to unload the fruit which it was selling for their account. The Pennsylvania refused to permit that company to unload the freight at its produce terminal, taking the position that that terminal was a public facility and that the granting of such permission might give rise to a dual method of unloading, one to be conducted by the fruit and vegetable trade, and the other by the railroad for the general public. The record does not disclose the attitude of the Baltimore & Ohio and the Reading with respect to this matter.

During the 1947-48 season (November to April) the equivalent of 88 carloads of oranges, on the basis of 400 boxes per car, were received by truck in the Philadelphia market, as compared with 367 carload equivalents during the 1948-49 season. The increase in the movement by truck was due largely to the unloading charges. During the 10-month period immediately subsequent to the imposition of the unloading charges there was a decrease of 7 percent in the carload shipments of fruits and vegetables to Philadelphia by rail under the same period in the preceding year, as contrasted with an 11 percent increase in carload equivalents by truck. From November 1, 1948, to August 31, 1949, the auction company handled 8,123 carloads, on which the unloading charges collected by the railroads approximated $325,000, an average of $40 per car.

The Pennsylvania publishes specific charges for unloading carloads of fresh fruits and vegetables at Baltimore,

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Pittsburgh, and Chicago. The consignees are, however, permitted to perform such unloading at these points. The protestants at Philadelphia call attention to the fact that all shipments of fruits and vegetables consigned to those markets are unloaded by the consignees, except when they request the carrier to perform that service. When thus requested, the carrier performs the service and collects the charges therefor. Protestants request the same privilege of unloading at the Philadelphia produce terminals.

The Pennsylvania has a house at Baltimore located adjacent to its team-track yard. That house is leased to consignees at that point and is not operated as an ordinary terminal or freight house. Those consignees lease the platform space by doors, each of which has from 20 to 30 feet surrounding platform space. They also have offices on the second floor of the facility. The only part retained by the Pennsylvania is its agent's office. That carrier has never performed unloading at the Baltimore facility, nor has it been requested to do so. The fruit and vegetable trade, which has leased the facility, performs the unloading of its own traffic. The greater part of the traffic is, however, unloaded at team tracks. But when consignees perform the unloading on the house platform, it is done by their own employees. Unlike the facilities of the Philadelphia produce terminal, those at Baltimore are not open to the public.

When the produce terminal was built at Pittsburgh the fruit and vegetable trade at that point requested the Pennsylvania to perform the unloading. In response thereto that carrier performed the service requested, except at the auction facility, where the auction company usually unloads its own freight. At that point consignees have the option of unloading at the produce terminal at their own expense.

At Chicago, fruits and vegetables are unloaded at a team-track yard and at an adjacent house, which is not operated by the Pennsylvania as its own facility. The house is operated as a joint facility, but the record fails to disclose the joint operation or ownership.

The fruit and vegetable terminals and the unloading operations at Baltimore, Pittsburgh, and Chicago, as indicated, are not comparable with those at Philadelphia.

The unloading costs per ton of the Pennsylvania at its produce terminal during July 17 to 23, 1949, were $2.53

for fresh fruits, $1.91 for vegetables (other than top-iced) and citrus fruit, and $3.42 for melons. Those of the Baltimore & Ohio at its perishable produce terminal during July 7 to 21, 1949, were $1.23 for citrus fruit, and $1.53 for fresh fruit(including deciduous fruit). No separate charge is made for sorting fruits at Philadelphia. The cost of that service is included in the charge for unloading.

A protestant who observed the unloading of 21 carloads of citrus fruit and 4 carloads of grapes and pears at the Baltimore & Ohio-Reading terminal on September 18, 1949, testified that based on the actual time consumed in that operation, at the customary wage of about $1.50 per man hour, the unloading cost per car averaged $11.29, as compared with actual charges collected by the railroad ranging from $39.44 to $42.38 per car. The average cost of unloading submitted by this protestant did not cover a full night's operation. It applied to a part of a Sunday night, usually the heaviest unloading night in the week, and was based on the number of minutes consumed in unloading each of 25 cars. In order to determine the cost of unloading it would be necessary to include about a full week's operation. The record establishes that the unloading is performed on a piece-work basis, irrespective of the time it takes to perform it. If the carriers call their employees to perform the unloading, they must be paid whether or not there is sufficient work for them to do. Each such employee is paid for the number of cars handled by the gang to which he is assigned.

A substantial portion of the freight received in Philadelphia at the Pennsylvania produce terminal is auctioned at that facility. Protestants contend that if the cars unloaded for auction were placed in the team-track yard, in addition to the carloads of vegetables normally unloaded there, the unloading facilities of the yard would not accommodate all such cars on certain days, thus increasing substantially the amount of trucking to and from the yard and greatly delaying the delivery of fruits and vegetables. They point out that these facilities were constructed about 25 years ago when horse-drawn vehicles were generally used; that they will not accommodate the large trailer-trucks used to haul a substantial portion of the fruit beyond the Philadelphia area; and that two such trucks in the same driveway will prevent other vehicles from entering that area, thus causing congestion and confusion.

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The team-track facilities are sufficient to accommodate a large number of cars. There is no indication that these facilities are inadequate to accommodate the fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such services. However, team-track delivery is not desired for fruit, the auction facilities being more desirable. At certain times there has been congestion at team tracks as a result of the manner in which trailer-trucks were placed in the driveways. Those driveways are 65 feet in width and are comparable with those at team tracks generally. Except during the strikes or similar conditions, there has been no time when the team-track capacity at Philadelphia has not been sufficient to accommodate all cars unloaded at the produce terminals in addition to those unloaded at the team tracks. The team-track capacity can be increased.

However, delivery on the terminal platforms is more advantageous than team delivery to the Philadelphia consignees. They had been accorded that method of delivery for many years prior to November 1, 1948. The charge therefor had been included in the line-haul rate in which no separation was made as between the charges for the line-haul and terminal components. The consignees are, therefore, entitled to platform delivery as an essential component of the through transportation until it is established by convincing evidence that the portion of the the through rate applicable to terminal service, including unloading onto the station platform, is insufficient to cover that cost. This can be determined only by bringing in issue the measure of the through rates. This the respondents have failed to do.

General discussion.—The through rates on fresh fruits and vegetables from the several producing areas to New York and Philadelphia are generally published as single units, and do not show separately the portions thereof applicable to terminal operations as distinguished from those applicable to line-haul operations. Hence, it cannot be established that the portion of the through rate applicable to terminal operations, which in the instant case includes unloading, was insufficient to cover the cost of such operations because of the fact that the terminal charges, which were not separately stated, were unascertainable.

In order to establish that the portion of the through rate which covered the cost of terminal operations, including

unloading of the freight onto the pier or station platform, was insufficient to cover the unloading cost it is necessary to know the measure of that portion of the through rate. The applicable rates reflect no such segregation.

As stated, transportation includes delivery of the property to the consignee. Delivery may be accomplished by placing the car on a team track or siding customarily used for that purpose within convenient reach of the consignee at the particular station or facility to which the traffic is billed and to which the rate charged applies, or, as in the instant proceeding, where the car cannot be placed at a convenient point at the particular billed destination at which the consignee may accept delivery and perform the unloading, of the carrier unloading the freight and placing it at a particular location on the pier or station platform where delivery can be made to the consignee. Prior to November 1, 1948, the latter method of delivery of fruits and vegetables to the consignees at the several pier stations in New York and at certain stations in Philadelphia had been voluntarily maintained and performed by respondents for a period approximating 50 years. Respondents do not propose to discontinue these stations as regular and complete terminal facilities.

The unloading of the freight by respondents at their New York pier stations was for the purpose of making simple delivery of the property to the consignees. Because of the fact that the consignees were denied access to the cars on the carfloats for the purpose of accepting delivery and of unloading the freight, delivery of the freight to the consignees at those pier stations could not be accomplished in any other manner. The unloading, which necessarily preceded the delivery of the freight to the consignee, was essential to that purpose, and therefore was included in the transportation of the property and the rate applicable thereto. The unloading of the freight by the carrier onto the pier platform is due to the physical inability of the carrier to make delivery of the freight to the consignee at billed destination, without performing such unloading. Such inability is clearly a carrier disability for which consignees should not be subjected to additional unloading charges. In the case of team-track delivery the car is placed on a team track and the consignee's truck is backed up to the car door. This cannot be done at pier stations because, as respondents admit, it is necessary to refuse

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consignees access to the carfloats for delivery of their freight. It is admitted by respondents that because of this disability the freight is not actually delivered to the consignee until it is placed on the pier floor. Delivery under the line-haul rates is not completed until the freight is placed in a location accessible to the consignee.

Respondents admitted that the unloading charges were established because of the increase in the cost of the labor performing that operation. The unloading at the New York piers is performed by non-railroad labor. If the unloading were not performed by such labor it would be performed by non-operating railroad employees, commonly called freight handlers. The record establishes that the increased costs for the non-railroad labor were the same as those for railroad freight handlers generally. And, as stated, the unloading is performed expeditiously and with a high degree of efficiency. Moreover, the several general rate increases authorized in recent years applied to the portion of the rate applicable to terminal as well as to line-haul operations.

The pier stations at New York are complete terminal facilities to which through rates on fruits and vegetables are specifically named in respondents' tariffs. Those rates cover the entire transportation of the traffic consisting of line-haul and terminal operations, including unloading of the freight in order to make simple delivery to the consignee.

Delivery of freight to the consignee must be made at a reasonably convenient and accessible point. Delivery of fruits and vegetables specifically billed to certain New York pier stations for consignees in Manhattan cannot properly be made at Jersey City or other locations intermediate to Newark, N. J., because these latter points are not the destinations to which the traffic is billed.

The preponderance of the volume of fruits and vegetables destined to New York is handled by the Erie, and the Pennsylvania. The record establishes that the team-track facilities of these carriers on Manhattan Island are sufficient to accommodate the delivery of only a small proportion of the fruits and vegetables which they handle. But even if the team-track facilities of these carriers on Manhattan Island were sufficient to accommodate delivery of the entire traffic it would not justify the unloading charges at the pier stations because the con-

signees, having been accorded delivery of their freight at those stations for approximately 50 years through respondents' voluntary action, are entitled to the continuance of such delivery without extra unloading charge until it is established that the cost of delivery, as performed by respondents prior to November 1, 1948, was not included in the through rate. Such evidence has not been adduced. As stated, a similar principle applies as to delivery at the terminal platforms at Philadelphia.

Nor can it be successfully argued that the through rates in effect prior to November 1, 1948, did not include the charges for the unloading of the freight by respondents, because respondents have continued to perform such unloading without charge in respect of other commodities at the identical New York pier stations at which charges are collected for unloading fruits and vegetables. For instance, canned fruit juices originating at points in Florida are unloaded without additional charge, other than the line-haul rate, at the same New York piers at which charges are collected for unloading fruits and vegetables. As there is keen competition between fresh fruits and fruit juices in household consumption, the assailed unloading charges are unduly prejudicial to fresh fruits and unduly preferential of fruit juices in violation of section 3(1) of the act.

Not only has there never been charges (in addition to the through rate) prior to November 1, 1948, for the unloading of fruits and vegetables at the New York pier stations and the Philadelphia produce terminals, but in *Florida Railroad Commrs.* v. *Aberdeen & R.R. Co.*, 144 I.C.C. 603, a proceeding involving line-haul rates on fruits and vegetables from Florida to points in the United States, including New York and Philadelphia, the destination carriers (respondents herein) emphasized the magnitude of their terminal services and costs, including unloading by them of the traffic as an essential part of delivery at a point convenient to the consignees. Consideration was also given to the alleged cost of unloading fruits and vegetables by the carriers at New York and Philadelphia as a part of the delivery of the traffic in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C., a proceeding involving the divisions of the rates on citrus fruits between the southern and the official territory carriers.

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Findings and conclusions.—The record establishes that the unloading by the respondents of fresh fruits and vegetables at New York and Philadelphia is expensive. The protestants, however, take the position, (a) because of the fact that delivery cannot be obtained without the unloading by the respondents, (b) is not accomplished until the unloading is performed, (c) and must therefore be included in the line-haul rates, that the respondents should receive their compensation for the unloading services out of the line-haul rates, and through increased divisions, if necessary.

The compensation for the unloading of the fruits and vegetables performed by the respondents for more than 50 years was included in the line-haul rates. The addition of a charge for this unloading service performed before delivery requires clear and convincing proof that the practice of unloading without an added charge is unfair to the respondents because of the inadequacy of the line-haul rates for the total services rendered. Following like expressions in prior proceedings referred to herein, it would appear that it is not sufficient to consider only the cost of the unloading service. The impracticability of unloading by the consignees and the adequacy of the revenues from the traffic as a whole are necessary considerations. All of the respondents receive a line haul on this traffic and derive substantial revenues therefrom. Rate uniformity based in part upon a consideration of the average cost of accomplishing delivery is an appropriate and desirable method of ratemaking. In the circumstances presented, there is no sufficient reason for differences in transportation charges based upon the differences in the costs of making the respective deliveries.

The burden of proving that the addition to the line-haul rates of separate charges for the unloading services performed by the respondents is just and reasonable and not otherwise unlawful was and is upon the respondents, under the provisions of section 15(7) of the act. This burden has not been met. In view of the conclusions reached, no finding is necessary as to the allegation made by the protestants of violation of section 2 of the act.

Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are

not shown to be just and reasonable, and that they are also in violation of section 3(1) of the act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered canceled and the proceeding discontinued.

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[fol. 165] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

No. 597, Orl.-Civ.

[Title omitted]

COMPLAINT OF THE SECRETARY OF AGRICULTURE, INTERVENOR—
Filed March 24, 1953

I

Intervening plaintiff, the Secretary of Agriculture of the United States (herein sometimes called the Secretary), brings this complaint to set aside certain action, findings, and conclusions of the Interstate Commerce Commission (herein called the Commission) in proceedings before the Commission entitled "I. & S. No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia,*" "No. 31105, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio Railroad Company, et al.,*" and "No. 31106, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio Railroad Company, et al.*"

II

The jurisdiction of the Court is founded upon section 10 of the Administrative Procedure Act (5 U. S. C. 1946 ed. sec. 1009), sections 1336, 1337, 1398, 2284, and 2321-2325 of Title 28, United States Code 1946 ed. (Supp. V), section 17 (9) of the Interstate Commerce Act (49 U. S. C. 1946 ed. sec. 17 (9)), and section 201 of the Agricultural Adjustment Act of 1938 (7 U. S. C. 1946 ed. sec. 1291).

[fol. 166] III

The United States of America is named as a party defendant pursuant to section 2322 of Title 28, United States Code 1946 ed. (Supp. V). The Commission is an administrative tribunal, created by the Act to Regulate Commerce approved February 4, 1887, 24 Stat. 379, with specifically vested powers and duties respecting interstate commerce under said Act and the various acts amendatory thereof

and supplemental thereto; hereinafter collectively referred to as the Interstate Commerce Act.

IV

The proceedings before the Commission referred to in paragraph I hereof involved the proposals of certain eastern railroads (herein called respondent carriers), which deliver fresh fruits and vegetables at their pier stations on Manhattan Island, New York, N. Y., and at their produce terminals at Philadelphia, Penna., to establish extra charges ranging from $1.50 to $2.00 a ton, in addition to the applicable line-haul rates, for unloading carload shipments of produce at those points. The proposed extra charges for unloading were published in tariff schedules filed with the Commission to become effective June 1, 1947. In response to petitions filed by the Secretary and others the Commission, Division 2, by order of May 28, 1947, in I. & S. No. 5500 suspended operation of such tariff schedules until December 31, 1947, and instituted an investigation into the lawfulness of the proposed unloading charges. Upon expiration of the 7-months suspension period provided for in section 15(7) of the Interstate Commerce Act (49 U.S.C. sec. 15(7)), the respondent carriers voluntarily postponed the effective date of the tariff schedules pending determination of the matter by the Commission.

[fol. 167] V

A hearing in I. & S. No. 5500 was held before Hearing Examiner R. M. Brown in New York, N. Y., July 29 to August 1, 1947. The Secretary became a party in interest to the proceeding before the Commission and appeared by counsel and presented testimony in opposition to the unloading charges under investigation. Such participation by the Secretary was in his capacity as representative of the agricultural community and in accordance with the general authorization and direction of Congress as stated in section 201 of the Agricultural Adjustment Act of 1938 (7 U. S. C. 1946 ed. sec. 1291) and section 203(j) of the Agricultural Marketing Act of 1946 (7 U. S. C. 1946 ed. (Supp. V) sec. 1622). No proposed report was prepared by the Hearing Examiner at that time. The parties were heard in oral argu-

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ment by Division 3 of the Commission on October 20, 1947, and in reargument by the entire Commission on May 5, 1948. By its report of October 4, 1948, 272 I. C. C. 648 (see copy attached to principal complaint as Exhibit B thereto), the Commission approved the proposed unloading charges; and such charges, subject to a 30 per cent general increase, were made effective November 1, 1948.

VI

The Secretary by petition filed on December 6, 1948, requested the Commission to reopen and reconsider I. & S. No. 5500; and other parties by similar petitions sought reopening, reconsideration, and rehearing. By order of June 9, 1949, the Commission reopened the proceeding and set the matter down for rehearing before Hearing Examiner R. M. Brown in New York City, which took place September 27 to 29, 1949. At such rehearing the Secretary appeared by counsel and presented further testimony in opposition to the assailed unloading charges. In May, 1950, a Proposed Report on Rehearing by Hearing Examiners R. M. Brown and M. J. Walsh (see Exhibit H to principal complaint) was [fol. 168] served on the parties, which proposed report contained the following conclusions and recommendations:

> The burden of proving that the assailed charges are just and reasonable is upon respondents under the provisions of section 15(7) of the act. This burden has not been met. The Commission should find that the assailed unloading charges are unjust and unreasonable. . . .
>
> On rehearing the Commission should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed. The schedules naming the unloading charges assailed should be ordered canceled and the proceeding discontinued.

The parties were heard in oral argument by the entire Commission on July 24, 1950, following which it neither adopted nor expressly rejected the proposed report of Hearing Examiners Brown and Walsh. On October 10, 1950, the

Commission issued a Notice (see pp. 15-16 of principal complaint for full text) which stated in part:

> Upon further consideration of the record in . . . [I. & S. No. 5500], it appears that the record is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing.

VII

Referring to the Commission's formal recognition that the record in I. & S. No. 5500 was "deficient," as stated in its Notice of October 10, 1950, and calling attention to the burden of proof which by statute (49 U. S. C. sec. 15(7)) is placed on the respondent carriers, the Secretary by petition of November 3, 1950 requested that the Commission issue an order directing the cancellation of the unloading charges under investigation, or, in the alternative issue an order requiring the respondent carriers to keep separate accounts of the unloading charges collected pendente lite. A copy of that petition is attached hereto as Exhibit B. Similar petitions were submitted by other parties. By order of November 16, 1950, a copy of which is attached hereto as Exhibit C, the Commission denied such petitions.

[fol. 169]

VIII

As contemplated by the Commission's Notice of October 10, 1950, a further hearing in I. & S. No. 5500 was held before Hearing Examiner M. J. Walsh in New York, N. Y. on June 4 and 5, 1951, at which further hearing the Secretary again appeared by counsel and presented testimony in opposition to the unloading charges. In August, 1951, a Second Proposed Report on Further Hearing by Hearing Examiner Walsh (see Exhibit I to principal complaint) was served on the parties, which proposed report contained the following conclusions and recommendations:

> The burden of proving that the addition to the line-haul rates of separate charges for the unloading services performed by the respondents is just and reasonable and not otherwise unlawful was and is upon the respondents, under the provisions of section 15(7) of the act. This burden has not been met. . . .

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Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of section 3(1) of the act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered canceled and the proceeding discontinued.

The entire Commission again heard the parties in oral argument on September 26, 1951. The Commission's final report on rehearing and further hearing, 286 I. C. C. 119 (Exhibit A to principal complaint), issued May 7, 1952, contains the following findings and conclusions:

. . . Upon this amplified record we conclude, as hereinafter explained, that the cost of unloading should be borne partly by the shippers and partly by the respondents. (286 I. C. C. at 140.)

• • • • • • •

. . . Upon consideration of these and other circumstances of record we conclude that the shippers should not be forced to pay more than $1.05, $1.35, and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect.

As indicated in the prior report, it is desirable that the charges for unloading at New York and Philadelphia be the same. The charges herein approved are for application at both points. (286 I. C. C. at 141.)

• • • • • • •

[fol. 170] Upon rehearing and further hearing, we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, and the schedules naming the assailed unloading charges will be ordered canceled and the proceeding discontinued *without prejudice to the establishment of charges in conformity with the views expressed herein.* The ultimate finding in the prior report is modified accordingly. (286 I. C. C. at 142.) (Emphasis supplied.)

The reduced unloading charges so approved by the Commission were made effective August 1, 1952.

IX

In No. 31105, the Florida Citrus Commission (a principal plaintiff herein) and others who were parties in I. & S. No. 5500, by complaint (Exhibit E to principal complaint herein) filed with the Commission September 16, 1952, attacked the reduced unloading charges applicable at New York, N. Y. By a concurrent complaint in No. 31106 (Exhibit F to principal complaint) the Florida Citrus Commission and a group of complainants, differing somewhat from that in No. 31105, attacked the reduced unloading charges applicable at Philadelphia, Penna. The Secretary, by separate petitions filed November 7, 1952, intervened in both of these proceedings. Upon the motions of the respondent carriers, the Commission, without further hearing, by order of December 15, 1952 (Exhibit D to principal complaint), dismissed these complaints.

X

Intervening plaintiff alleges that the Commission's action, findings, and conclusions are based upon errors of law, are not supported by substantial evidence or adequate findings, exceed the statutory powers of the Commission, and are unlawful, arbitrary, null and void, in the following respects:

[fol. 171] (1) In its decision of October 4, 1948, in I. & S. No. 5500 (272 I. C. C. 648) the Commission erred in approving the unloading charges as proposed by the respondent carriers notwithstanding the failure of those carriers to sustain their statutory burden of proof that such extra charges would be just and reasonable.

(2) By its order of November 16, 1950, in I. & S. No. 5500 the Commission erred in refusing to direct the cancellation of the unjustified unloading charges then in effect.

(3) In its decision of May 7, 1952, in I. & S. No. 5500 (286 I. C. C. 119) the Commission erred in approving the continued imposition of unloading charges although reduced in measure.

(4) By its order of December 15, 1952, the Commission erred in summarily dismissing the complaints in Nos. 31105 and 31106.

(5) Throughout these proceedings the Commission has erroneously disregarded the fact that the so-called unloading charges are in reality duplicate charges for making delivery of shipments at destination, for which service the respondent carriers are already compensated in their line-haul rates, and that such extra charges are therefore extortionate in violation of section 1, paragraphs (4) and (5), of the Interstate Commerce Act (49 U. S. C. sec. 1 (4) and (5)).

(6) The Commission has erroneously approved these extra charges for unloading without any substantial evidence before it that the sums of the line-haul rates and the unloading charges would in the aggregate be just and reasonable for the total transportation services performed.

(7) The Commission's approval of identical unloading charges at New York and Philadelphia is not supported by substantial evidence or adequate findings.

Wherefore, intervening plaintiff prays that the Court will hold unlawful and set aside the Commission's action, findings, and conclusions as specified in paragraph X hereof; [fol. 172] will direct the Commission to strike from its files the tariff schedules in which the assailed unloading charges are published; and will grant intervening plaintiff such other and further relief in the premises as to equity may appertain and as may be deemed by this Court fit and proper.

Respectfully submitted by direction of the Secretary of Agriculture of the United States.

(S.) Karl D. Loos, Solicitor. (S.) Charles W. Bucy, Associate Solicitor. (S.) Walter D. Matson, Attorney, Office of the Solicitor, United States Department of Agriculture, Washington 25, D. C.

[fol. 173] EXHIBIT A TO COMPLAINT

Order

At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 28th day of May, A. D., 1947.

Investigation and Suspension Docket No. 5500

Unloading Charges Fruits & Vegts.—New York & Phila.

It appearing, That there have been filed with the Interstate Commerce Commission tariffs containing schedules stating new individual and joint rates and charges, and new individual and joint regulations and practices affecting such rates and charges, to become effective on the 1st day of June, 1947, designated as follows:

The Baltimore and Ohio Railroad Company:
Supplement No. 7 to I. C. C. No. 23716;
The New York Central Railroad Company:
Supplements Nos. 30 and 33 to I. C. C. No. 471;
The Pennsylvania Railroad Company:
Supplement 74 to I. C. C. 2505;
Reading Company:
Supplement No. 153 to I. C. C. No. 2205;
W. C. Curlett, Agent:
Supplements Nos. 25 and 29 to I. C. C. No. A-848, MF-I. C. C. No. A-60 and F. F.-I. C. C. No. A-7;
Supplements Nos. 31 and 32 to I. C. C. No. A-856.

It is ordered, That the Commission upon complaint, without formal pleading, enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz.:

The Baltimore and Ohio Railroad Company:
Supplement No. 7 to I. C. C. No. 23716, page 2 thereof except reference marks 4 in a square and 1 encircled and the explanations thereof; pages 3 and 4 thereof;

The New York Central Railroad Company:
Supplement No. 30 to I. C. C. No. 471, on page 2 thereof, in Rule No. 65, the expiration date of June 30, 1947;

Supplement No. 33 to I. C. C. No. 471, page 2 thereof except Rule No. 30 and the explanations of reference marks 21, 23 and 32 in squares; page 3 thereof;

The Pennsylvania Railroad Company:

Supplement 74 to I. C. C. 2505, in full;

Reading Company:

Supplement No. 153 to I. C. C. No. 2205, pages 2, 3 and 4 thereof;

[fol. 174] W. S. Curlett, Agent:

Supplement No. 25 to I. C. C. No. A-848, MF-I. C. C. No. A-60 and F. F.-I. C. C. No. A-7, on page 15 thereof, in Item No. 1322B, the expiration date of June 30, 1947;
Supplement No. 29 to I. C. C. No. A-848, MF-I. C. C. No. A-60 and F. F.-I. C. C. No. A-7, in full;
Supplement No. 31 to I. C. C. No. A-856, on page 9 thereof, in Item No. 1095A, the expiration date of June 30, 1947; on page 18 thereof, in Item No. 4666A, the expiration date of June 30, 1947;
Supplement No. 32 to I. C. C. No. A-856, in full.

It further appearing, That the schedules described in the first ordering paragraph hereof make certain increases in rates for the transportation of fresh fruits, fresh vegetables, cantaloupes and melons, carloads, in interstate and foreign commerce, and the rights and interests of the public appearing to be injuriously affected thereby, and it being the opinion of the Commission that the effective date of such schedules should be postponed pending said hearing and decision thereon:

It is further ordered, That the operation of the schedules described in the first ordering paragraph hereof be suspended, and that the use of the rates, charges, regulations and practices therein stated be deferred upon interstate and foreign traffic to and including the 31st day of December, 1947, unless otherwise ordered by the Commission, and no change shall be made in such rates, charges, regulations and practices during the said period of suspension unless authorized by the Commission.

It is further ordered, That the rates and charges and the regulations and practices thereby sought to be altered shall not be changed until this investigation and suspension proceeding has been disposed of or until the period of suspension has expired, unless authorized by the Commission.

It is further ordered, That a copy of this order be filed with said schedules in the office of the Interstate Commerce Commission, and that copies hereof be forthwith served upon the carriers parties to said schedules and that said carriers parties to said schedules be, and they are hereby, made respondents to this proceeding.

And it is further ordered, That this proceeding be, and the same is hereby, assigned for hearing July 14, 1947, 8:30 A. M. United States Standard Time (9:30 A. M. District of Columbia Daylight Saving Time), at the office of the Interstate Commerce Commission, Washington, D. C., before Examiner Weems.

By the Commission, Division 2.

W. P. Bartel, Secretary. (Seal.)

[fol. 175] EXHIBIT B TO COMPLAINT OF THE SECRETARY OF AGRICULTURE

Before the Interstate Commerce Commission

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

I. & S. No. 5500

Petition of the Secretary of Agriculture of the United States for Interim Relief

Chas. B. Bowling, Chief; J. L. Pease, Transportation Specialist; Transportation Rates and Services Division, Transportation and Warehousing Branch, Production and Marketing Administration; Charles W. Bucy, Associate Solicitor; Walter D. Matson, Attorney, United States Department of Agriculture, Washington 25, D. C.

November 3, 1950.

[fol. 176] Before the Interstate Commerce Commission

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

I. & S. No. 550

Petition of the Secretary of Agriculture of the United States for Interim Relief

Comes now the Secretary of Agriculture of the United States and, for reasons stated below, requests the Commission, by order, by way of interim relief for protestants in this proceeding, either (1) to require respondents forthwith to cancel the unloading charges under investigation, or (2) to require respondents to keep accurate account in detail of all amounts received by reason of such unloading charges, specifying by whom and in whose behalf such amounts are paid, as a basis upon completion of the contemplated further hearing and final decision herein of a further order requiring respondents to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such unloading charges as by such final decision shall be found not justified.

I

The interest of petitioner in this proceeding, and in particular with respect to the interim relief sought by this petition, springs from section 201 of the Agricultural Adjustment Act of 1938 (7 U. S. C. 1291) and section 203(j) of the Agricultural Marketing Act of 1946 (7 U. S. C. 1622), which statutes authorize and direct the Secretary of Agriculture to participate in such proceedings.

[fol. 177] Section 202 of the latter act states in part as follows:

> In order to attain these objectives, it is the intent of Congress to provide for . . . (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and *the price spread between the producer and consumer*

may be narrowed, that dietary and nutritional standards may be improved, that new and wider markets for American agricultural products may be developed, both in the United States and in other countries, with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner. (Emphasis supplied.)

While the purposes of the statute would be best served by immediate cancellation of these unloading charges, we are nevertheless vitally interested in the alternative interim relief which would be provided by an accounting order.

II

By section 15(7) the burden of proof is placed upon respondents to show that the unloading charges are just and reasonable, ". . . and the Commission shall give to the hearing and decisions of such questions preference over all other questions pending before it and decide the same as speedily as possible." From the time of the first hearing, July 29 to August 1, 1947, we have not ceased to contend that the respondents have failed to sustain their statutory burden of proof. While the Commission by its decision of October 4, 1948 (Commissioners Lee, Aitchison, Splawn, and Alldredge dissenting) found that "Respondents have justified their proposals,"[1] yet upon rehearing the examiners have recommended a reversal of that decision, and the [fol. 178] Commission's Notice of October 10, 1950, recognizes "that the record is deficient in respect of certain evidence which seems to be important."

During the past 3 years respondents have had ample time and opportunity to perfect their proof, assuming that the assailed charges are justifiable, which we categorically deny. The deficiencies in the record pointed out in the Commission's Notice of October 10 are the same deficiencies which protestants called to the attention of the Commission and

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[1] *Unloading Charges, Fruits and Vegetables, N. Y. and Phila.*, 272 I. C. C. 648, 662. Commissioner Patterson did not participate in that decision.

respondents in our briefs filed September 30, 1947. In these circumstances the continued maintenance of these unjustified unloading charges pending a further hearing is repugnant to section 15(7) and should not be permitted.

III

The record in this proceeding shows that these unloading charges are borne to a large extent, either immediately, or ultimately, by the American farmer (Tr. 588-9, 593, 614, 636-7, 666, 675, 677, 685, 716, 1182-4). The measure of this added transportation burden is approximately $2,000,000 a year at New York and $373,000 a year at Philadelphia, plus the Ex Parte 166 increases. The damage already suffered by the agricultural community is irreparable. In addition, respondents have estimated that it will take them until June 1, 1951, to assemble the data which they should have presented in 1947. Thus several months more must elapse before the contemplated further hearing could be held and a final decision reached. Respondents should not be permitted to burden the agricultural community with another $3,000,000 or more of unjustified unloading charges. The Commission has the power and, we submit, the duty in the public interest to order the cancellation of these unjustified charges at once.

[fol. 179]

IV

While the proceeding cannot, strictly speaking be called either a "rate case" or a "revenue case" as those terms are generally used, the ostensible purpose of the assailed charges is to provide additional revenue for the particular carriers performing the unloading service. This objective, however, has been only partially achieved. At the first hearing Witness L. A. Dilks, chief statistician for the Pennsylvania Railroad (Tr. 301), and that respondent's "cost" witness (Tr. 380), admitted on cross examination that during their test week they paid the Penn Stevedoring Company, which company supplied the labor for the unloading service at the Pennsylvania piers in New York, a total of $27,096, of which approximately $10,000 was "contractor's profit" (Tr. 376-9). That $10,000 profit paid to the supplier of labor is at the rate of $500,000 a

year and represents 25 percent of the $2,000,000 [2] total unloading charges assessed by all lines at New York. Such incidental enrichment of a stranger to this proceeding, whether at the expense of the American farmer or at the expense of the consumer of the products of the American farm, is manifestly unjust and unreasonable and should be ordered discontinued forthwith by cancellation of the unloading charges.

Wherefore, upon consideration of the premises, the Commission is requested in the alternative either (1) to issue an order directing the cancellation of these unloading charges, or (2) to issue an order requiring respondents to keep separate accounts of the unloading charges collected pendente lite.

[fol. 180] Respectfully submitted by direction of the Secretary of Agriculture of the United States.

Chas. B. Bowling, Chief, J. L. Pease, Transportation Specialist, Transportation Rates and Services Division, Transportation and Warehousing Branch, Production and Marketing Administration, Charles W. Bucy, Associate Solicitor, Walter D. Matson, Attorney, United States Department of Agriculture, Washington 25, D. C.

[fol. 181] EXHIBIT C TO COMPLAINT OF THE SECRETARY OF AGRICULTURE

Order

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 16th day of November, A. D. 1950

Investigation and Suspension Docket No. 5500 Unloading Charges on Fruits and Vegetables at New York and Philadelphia

Upon further consideration of the record in the above-entitled proceeding and upon consideration of petitions

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[2] Not including the Ex Parte 166 increases.

and a motion, by the Secretary of Agriculture; the Port of New York Authority; the City of New York; the International Apple Association, National League of Wholesale Fresh Fruit and Vegetable Distributors, and United Fresh Fruit and Vegetable Association; and Florida Railroad and Public Utilities Commission, Florida Citrus Commission, and Growers and Shippers League of Florida; for (1) a finding that the burden of proof has not been sustained; (2) an order suspending or requiring cancellation of the unloading charges; or (3) an accounting order such as is described in section 15(7) of the Interstate Commerce Act; and a reply by respondents;

And it appearing. That the reasons presented in support of the petitions and motion do not warrant the action requested;

It is ordered, That the said motion be, and it is hereby, overruled and that the said petitions be, and they are hereby, denied.

By the Commission, W. P. Bartel, Secretary. (Seal.)

[fol. 182] In the United States District Court

[Title omitted]

Complaint of the New York Fruit Auction Corporation and United Fruit Buyers' Ass'n, Inc., Intervenors

I

The plaintiff New York Fruit Auction Corporation is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

The plaintiff, United Fruit Buyers' Association Inc. is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

II

The corporations referred to in the preceding paragraph are engaged in the distribution of fresh fruits and vegetables in the City of New York and its environs and the total annual business of said corporations aggregates annually sums in excess of several hundred million dollars; and such [fol. 183] corporations are vitally affected by reason of any

unlawful and excessive rates and charges by railroad for fresh fruits and vegetables delivered into the City of New York and ultimately purchased by consumers such as housewives, hotels, restaurants and other eating places.

III

This action is brought under, the United States is made a defendant under, and the jurisdiction of this Court is conferred by, United States Code, Title 28, Sections 1336, 2321 through 2325, inclusive.

The Interstate Commerce Commission is an agency of the Government of the United States, created and established by Act of Congress, February 4, 1887, Interstate Commerce Act as amended, Title 49, United States Code.

IV

The New York Fruit Auction Corporation and the United Fruit Buyers' Association Inc. were parties in interest as members of the Industry Committee for the Improvement of Washington Market. In the proceedings before the Interstate Commerce Commission, Investigation and Suspension Docket 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia,* The Industry Committee for the Improvement of Washington Market took part in and presented evidence and argument in Investigation and Suspension Docket No. 5500 and showed that the assessment of separate unloading charges on shipments of fruit and vegetables, as applied by the railroads, were unlawful and excessive inasmuch as the line-haul rates include simple delivery and the charges specified as unloading charges actually cover the service to make the contents of the cars accessible for simple delivery. Therefore the Intervenors herein were injured by the assessment of such unlawful and excessive charges. In particular the assessment of separate unloading charges on shipments of fruit and vegetables were and are wholly discriminatory inasmuch as no separate unloading charges were assessed upon frozen fruit and vegetables and canned fruits and vegetables and fruit concentrate juices, all of which commodities were and are in direct competition with fresh fruit and vegetables.

[fol. 184] V

The New York Fruit Auction Corporation and the United Fruit Buyers' Association Inc. support in full the position taken by plaintiffs in their complaint in Civil Action No. 597 and concur in all contentions therein made. Accordingly, under authority of Rule 10 (c) of the Rules of Civil Procedure, the New York Fruit Auction Corporation and the United Fruit Buyers' Association Inc. adopt, by reference, paragraphs 4, 5, 6, 7, and 8 of that complaint, in their entirety, together with the exhibits referred to in said paragraphs and attached to the said complaint, and rely upon them as if incorporated herein in full.

Wherefore, the New York Fruit Auction Corporation and the United Fruit Buyers' Association Inc. pray:

1. This action be heard by a three-judge court as provided and required by Title 28, United States Code, Section 2284.

2. That, upon hearing, the Court will enter an order and decree annulling and setting aside the Order of May 7, 1952, in I. & S. Docket No. 5500 insofar as the same approves and authorizes the establishment of unloading charges of $1.05, $1.35 and $1.65 per ton, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said Order insofar as it approves and authorizes the said unloading charges.

3. That, upon hearing, the Court will enter an order and decree annulling and setting aside the Order of December 15, 1952, dismissing the complaint in Docket No. 31105, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said Order.

[fol. 185] That such other and further relief as is equitable and just may be granted.

(S.) M. W. Wells, Maguire, Voorhis & Wells, 1007 Florida Bank Building, P. O. Box 633, Orlando, Florida, Attorney for Plaintiff.

Of Counsel, Edward I. Kaplan, 280 Broadway, New York City, New York.

[fol. 186] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF CALIFORNIA CITRUS LEAGUE AND CALIFORNIA GRAPE & TREE FRUIT LEAGUE, INTERVENORS

California Citrus League and California Grape & Tree Fruit League bring this complaint against the United States of America and the Interstate Commerce Commission, and for its complaint says:

1. Jurisdictional Allegations

This action is one to enjoin, annul and set aside orders of the Interstate Commerce Commission as hereinafter more fully appears. This action is brought under the provisions of Title 28, United States Code, Sections 1336, 1337, 1398, 2321, 2322, 2323, 2324, 2325, and 2284.

2. Plaintiff—Intervenors

California Citrus League is an association of growers and shippers of fresh oranges, lemons, grapefruit and other fresh citrus fruits. Its principal place of business if 707 W. 5th Street, Los Angeles, California. Its members have shipped prior to January 1, 1947 and have continued to the present time to ship large quantities comprising a great number of carloads annually of fresh oranges, grapefruit [fol. 187] and other fresh citrus fruits from origins in California both to New York, N. Y. and Philadelphia, Pa., by rail common carriers, who have duly published tariffs stating through carload rates from said origins in California to both New York, N. Y., and Philadelphia, Pa.

California Grape & Tree Fruit League is an association of substantially all of the growers and shippers of California deciduous tree fruits and grapes moving interstate from California to New York, N. Y., and Philadelphia, Pa. Its place of business is 717 Market Street, San Francisco, California. Its members have shipped, prior to January 1, 1947 and have continued to ship up to the present time, large quantities, comprising a great number of carloads annually

of deciduous tree fruits and grapes from origins in California both to New York and Philadelphia, by rail common carriers, who have duly published tariffs stating joint through carload rates from said origins in California to both New York, N. Y. and Philadelphia, Pa.

Plaintiff-Intervenors are interested in the controversy or question before the Interstate Commerce Commission in Investigation & Suspension Docket No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia.* They were parties of record in said proceeding and participated actively therein from the commencement thereof to the final order therein by the Interstate Commerce Commission.

California Citrus League and California Grape & Tree Fruit League are also interested in the controversy or question before the Interstate Commerce Commission and were complainants in both Dockets No. 31105, *Florida Citrus Commission et al.* vs. *The Baltimore and Ohio Railroad Company, et al.*, and in Docket No. 31106, *Florida Citrus Commission et al.* vs. *The Baltimore & Ohio Railroad Company, et al.*, before the Interstate Commerce Commission, as hereafter more fully appears.

3. Defendants

(a) The United States of America is made defendant herein pursuant to Title 28, United States Code, Section 2322.

(b) The Interstate Commerce Commission is a commis-[fol. 188] sion and agency of the government of the United States of America, created and established by Act of Congress, February 4, 1887, Interstate Commerce Act as amended, Title 49, United States Code.

4. Purpose of Action

(a) The purpose of this action is to enjoin, annul and set aside the Report of the Commission on Rehearing and Further Hearing (286 ICC 119) decided May 7, 1952, and the order of the Interstate Commerce Commission thereon dated May 7, 1952, in the proceeding entitled Investigation and Suspension Docket No. 5500, *Unloading Charges on*

Fruits and Vegetables at New York and Philadelphia, and the final order of the said Commission dated December 15, 1952, in Docket No. 31105, *Florida Citrus Commission et al.* v. *The Baltimore and Ohio Railroad Company, et al.*, and in Docket No. 31106, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio Railroad Company, et al.*

(b) There are hereby expressly made a part hereof the following: copy of the said Report of the Interstate Commerce Commission on Rehearing and Further Hearing decided May 7, 1952, in said I. & S. Docket No. 5500, attached to the original complaint herein as Exhibit A; copy of the prior Report of the Commission, decided October 4, 1948, in said I. & S. Docket No. 5500 attached to the original complaint as Exhibit B; a copy of the aforesaid Order of the Commission of May 7, 1952 in said I. & S. Docket No. 5500, attached to the original complaint as Exhibit C; and a copy of the said Order of the Interstate Commerce Commission in said Docket Nos. 31105 and 31106, dated December 15, 1952, attached to the original complaint as Exhibit D.

5. Record Before Interstate Commerce Commission

(a) A certified copy of all pleadings and proceedings, transcript of testimony and all exhibits presented in evidence before the Interstate Commerce Commission in said I. & S. Docket No. 5500 will be presented to the Court and offered in evidence at the hearing in this action.

(b) A certified copy of the complaint, defendant railroads' motion to dismiss, petitions for leave to intervene and orders thereon, complainants' reply to the defendants' said motion to dismiss and the aforesaid Order of the Commission dated December 15, 1952, in said Dockets Nos. 31105 and 31106, will be presented to the Court and offered in evidence at the hearing in this action.

[fol. 189] 6. Controversy or Question Before the Interstate Commerce Commission

(a) From the time of first delivery of fresh oranges, grapefruit, other fresh citrus fruits, fresh fruits and vegetables originating in both California and other parts of the country such as Florida, consigned to New York, N. Y., and

Philadelphia, Pa., have been transported in interstate commerce by the railroad common carriers from said origins to New York, N. Y. and Philadelphia, Pa., and there delivered upon payment of the lawfully assessed transportation charges in accordance with freight tariffs duly filed with the Interstate Commerce Commission as provided by law. The through line-haul freight rates include the entire service of transportation from origin to and including delivery at destination.

(b) At no time prior to November 1, 1948, as hereafter set forth, were any separate charges for unloading of fresh oranges, grapefruit, other fresh citrus fruits, other fresh fruits and vegetables at New York, N. Y. or Philadelphia, Pa., assessed in addition to the transportation or line-haul charges. The compensation received by the railroads for delivery (including unloading by the railroads) was included in the amounts paid for transportation or line-haul freight charges.

(c) In 1947, for the first time, the terminal or delivering rail carriers at New York, N. Y. and Philadelphia, Pa., proposed by tariff schedules filed with the Interstate Commerce Commission to become effective June 1, 1947, to establish charges for unloading carload shipments of fresh fruits and vegetables at New York, N. Y. and Philadelphia, Pa. Upon protests of California Citrus League, Florida Citrus Commission, California Grape and Tree Fruit League, and of numerous other shippers and shipper organizations, the Port of New York Authority, and other interests affected thereby, the operation of the schedules was suspended by order of the Interstate Commerce Commission to and including December 31, 1947. Said order [fol. 190] instituted the investigation entitled Investigation and Suspension Docket No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia.* Neither the origin railroads as a whole nor the intermediate connecting carriers were parties to said tariffs nor to the proceedings before the Interstate Commerce Commission as hereinafter set forth. The delivering rail carrier respondents voluntarily deferred the effective date of the said unloading charges pending determination of the Investigation and Suspension Proceeding.

(d) The said tariff schedules so proposed to become effective for the first time on June 1, 1947, stated unloading charges as follows for addition to the line-haul rates:

	Per net ton
Citrus fruits	$1.50
Fresh fruits (other than citrus)	1.75
Melons (including cantaloups)	2.00
Vegetables, fresh or green, not cold pack or frozen	1.50
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.00

(e) It is stated on page 649 of 272 ICC that the delivering railroads' "proposals reflect an effort on the part of the delivering lines to secure increased revenues from the fruit and vegetable traffic terminated at New York and Philadelphia. No charges such as those proposed have applied on this traffic in the past. These charges would accrue solely to the delivering lines. Other carriers have taken no interest in this proceeding. The principal lines that would benefit from the proposals are the Baltimore & Ohio, Erie, New York Central, Pennsylvania, and the Reading".

(f) From the beginning of rail transportation of citrus fruits, other fresh fruits and fresh vegetables from California, Florida and other states of origin to New York, N. Y., the movement by rail has been to the Jersey Shore, thence by carfloats (on which rail tracks are fixed, upon which the cars are placed) across the Hudson River to the Produce Terminals or railroad stations on the piers on the Manhattan Island side of the Hudson River. The railroad cars, containing the carloads of citrus fruits, other fresh fruits or fresh vegetables remain on the carfloats while [fol. 191] the latter are alongside the pier stations and the cars are not moved onto the piers. The New York, N. Y. pier stations involved include: The Baltimore & Ohio Railroad Company, Pier 22, North River; Erie Railroad Company Duane St. Station (Piers 19, 20 and 21); and Pennsylvania Railroad Company Produce Terminal (Piers 27 and 28 North River). Practically all of the carload ship-

ments of fresh fruits and vegetables consigned to New York, N. Y. and delivered at railroad stations on Manhattan Island are delivered at the above named Pier stations of The Baltimore & Ohio, Erie and Pennsylvania Railroad Companies.

Generally, fresh citrus fruits and other fresh fruits and vegetables shipped from origins in California are delivered at said Pennsylvania Railroad Company Produce Terminal (Piers 27 and 28 North River), and at the Erie Pier Station, namely, the Duane St. Station (Piers 19, 20 and 21). As a general rule, fresh fruits and vegetables shipped from origins in Florida are delivered at the Pennsylvania Pier Station, namely, Piers 27 and 28. Said delivering railroads do not have adequate team tracks on Manhattan Island to make delivery thereon of all fresh fruits and vegetables shipped respectively from Florida and California to Manhattan Island, New York. The delivering rail carriers can make delivery of such carload shipments consigned to New York, N. Y. only by delivery at said pier stations. When the car floats are placed by the railroads alongside the said piers, the railroads then unload the commodity from the cars as the latter continue to rest on the car floats. The railroads cause the lading or commodity from the cars to be placed on the floor of the pier station, where it is then available for the first time to the consignee to take delivery. The railroads do not permit the consignee to unload the commodity from the car on [fol. 192] the car float, and the commodity is not available to the consignee until after it is unloaded by the railroads from the cars and placed on the floor of the pier station. It is not until after the commodity is placed by the railroad on the floor of the pier station that delivery is or can be made. The line-haul freight rates are for the entire service of transportation from origin to and including delivery at destination. The unloading by the railroads is merely a part of delivery, a service established by long custom and practice by the railroads to enable them to perform their transportation duty, a requirement necessary and antecedent to delivery occasioned by the delivering railroads' disability and lack of sufficient team track facilities on Man-

hattan Island, and it is a mere substitute for team track delivery.

(g) Prior to 1925, movement by rail of carload shipments of fresh citrus fruits, other fresh fruits and vegetables from California and Florida origins to Philadelphia, Pa., was similar to that at New York, N. Y., namely, the cars were moved across the river on car floats by the railroads, and the commodity unloaded from the cars onto the floor of the rail station by the railroads. The through line-haul rates included the entire service of transportation from origin to and including delivery at destination; and the line haul freight rates have been accepted by carriers and shippers alike as including compensation for delivery, including unloading by the railroads.

Since about 1925, practically all of the carlot shipments of fresh fruits and fresh vegetables delivered by railroad at Philadelphia, Pa., have been delivered at the Pennsylvania Produce Terminal or at the Philadelphia Perishable Products Terminal of the Baltimore and Ohio Railroad Company. When delivered at the terminal platform, the cars are placed alongside the platform and are unloaded by the railroads, who place the commodity on the floor of the station platform. The railroads do not permit the consignee to unload the cars onto the station platform, and [fol. 193] delivery of the commodity cannot be obtained by the consignee from cars alongside the station platform nor until after it has been unloaded by the railroads onto the floor of the platform. Such method of delivery by the railroads is a substitute for and an alternative to team track delivery. The terminal and team track facilities of the delivering railroads at Philadelphia are adequate for deliveries of carlot fruits for sale at auction and for carlot vegetables only because cars of citrus and deciduous fruits delivered for sale at auction are immediately unloaded by the railroads, thereby assuring immediate release of empty cars and permitting immediate removal of the empty cars from the tracks alongside the station platforms and but for such practice of unloading by the railroads for sale at auction the railroads' facilities at team tracks would be inadequate.

(h) The Report of the Commission in said I & S Docket No. 5500, 272 ICC 648, decided October 4, 1948, found "that

the schedules under investigation are just and reasonable. An order will be entered vacating the order of suspension and discontinuing this proceeding" (272 ICC 663). The said unloading charges, originally published to become effective on June 1, 1947, went into effect on November 1, 1948.

(i) Thereafter, the said proceeding was reopened for further hearing and reconsideration. The final order of the Interstate Commerce Commission in said Investigation and Suspension Docket No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, dated May 7, 1952, notified and required the respondents (delivering railroads) to cancel the schedules naming the unloading charges under investigation. However, the Report of the Commission further provided (286 ICC 142):

> [fol. 194] "Upon rehearing and further hearing, we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, and the schedules naming the assailed unloading charges will be ordered canceled and the proceeding discontinued *without prejudice to the establishment of charges in conformity with the views expressed herein.* The ultimate finding in the prior report is modified accordingly." (Emphasis added.)

Thereby, the said Interstate Commerce Commission approved the assessment of unloading charges at New York, N. Y., and Philadelphia, Pa., the statement thereon page 141 of 286 ICC being:

> "Upon consideration of these and other circumstances of record we conclude that the shippers should not be forced to pay more than $1.05, $1.35 and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect."

By tariff schedules filed in accordance with the said findings of the Interstate Commerce Commission by the delivering railroads, the revised unloading charges in the amounts of $1.05, $1.35 and $1.65 at New York, N. Y., and at Philadelphia, Pa., went into effect in 1952.

(j) Thereafter, California Citrus League, together with Florida Citrus Commission, Growers and Shippers League of Florida, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association and the Port of New York Authority as complainants, filed with the Interstate Commerce Commission their formal complaint against the Baltimore and Ohio Railroad Company, Erie Railroad Company, The Pennsylvania Railroad Company, and other delivering carriers parties to the said tariff schedules alleging that "the said unloading charges at (New York, N. Y.) are unjust and unreasonable in violation of Section 1 of the Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid." Said complaint was docketed by the Interstate Commerce Commission as Docket No. 31105, and a copy of said complaint, attached to the original complaint as Exhibit E, is made a part hereof.

[fol. 195] (k) Thereafter, California Citrus League together with Florida Citrus Commission, Growers and Shippers League of Florida, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association, Philadelphia Terminals Marketing Association, and The Auction Receivers of Philadelphia as complainants, filed with the Interstate Commerce Commission their formal complaint against The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, and Reading Company, alleging that "the said unloading charges (at Philadelphia, Pa.) are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid." Said complaint was docketed by the Interstate Commerce Commission as Docket No. 31106. A copy of said complaint, attached to the original complaint as Exhibit F is made a part hereof.

(l) After the service of complaints in said Dockets Nos. 31105 and 31106 upon the defendants named therein, the said defendants filed with the Interstate Commerce Commission a motion to dismiss each of said complaints. The said motions to dismiss set forth that:

"8. Since the issue raised by the complaint herein was in all respects specifically ruled upon by the entire Commission in I & S Docket No. 5500, and since all the complainants in the complaint herein were parties to I. & S. Docket No. 5500, and since the complaint herein alleges nothing that was not fully considered and disposed of by the entire Commission in I. & S. Docket No. 5500, it would be contrary to the public interest for the Commission to waste its resources in hearing the complaint herein, and it would be vexatious and burdensome to subject defendants herein to further hearing and argument. * * *

"11. The dispute raised by the complaint herein has already been heard and disposed of in I. & S. Docket No. 5500. No useful purpose would be served by burdening the Commission and defendants with further hearings and argument."

The said motions to dismiss filed by the defendant railroads in said complaints further specifically stated:

"5. The Commission's report dated May 7, 1952, contains this sentence (286 ICC 119, 142): 'The ultimate finding in the prior report is modified accord-[fol. 196] ingly.' Said ultimate finding in the prior report was (272 ICC 648, 663): 'We find that the schedules under investigation are just and reasonable.' In other words, the entire Commission on May 7, 1952, made a specific finding that the lower unloading charges, now alleged by the complaint herein to be unjust and unreasonable, are 'just and reasonable.'"

(m) The complainants in said Dockets Nos. 31105 and 31106 filed their Reply to Motion to Dismiss Complaint, the same being identical in both cases except for the docket number and the names of the respective parties. A copy of the said Reply in Docket No. 31105 appended to the original complaint as Exhibit G is made a part hereof. The said Replies expressly set forth that:

"At no time in the said proceeding (I. & S. Docket No. 5500) during the nearly five full years between the filing of protests and requests for suspension prior to

the order of May 28, 1947 instituting the said investigation and suspending the schedules, and the time of the last report, May 7, 1952, was there any mention by any respondent of unloading charges of '$1.05, $1.35 and $1.65 per ton'. Certainly, no protestant suggested any unloading charge whatever, separate from the line-haul rate. Indeed, the first and only mention of said unloading charges of '$1.05, $1.35 and $1.65 per ton' was on mimeographed sheet 36 (286 ICC 141) of the said report of May 7, 1952. The order of May 7, 1952, entered by the Commission in I. & S. Docket No. 5500 did not discontinue the proceeding *without prejudice to the publication of new unloading charges* of $1.05, $1.35 and $1.65."

(n) As heretofore shown by Exhibit D attached to the original complaint, the Interstate Commerce Commission by its order of December 15, 1952, dismissed the complaints in Dockets Nos. 31105 and 31106.

7. Proceedings before Interstate Commerce Commission

(a) Tariff schedules proposing originally unloading charges on fruits and vegetables at New York, N. Y., and at Philadelphia, Pa., were filed with Interstate Commerce Commission to become effective June 1, 1947.

(b) Upon the filing of numerous protests and request for suspension of the said schedules, the Interstate Commerce Commission by its order dated May 28, 1947 entered upon investigation of such unloading charges so published in said schedules for addition to the line-haul rates, said Investigation being designated as Investigation and Suspension Docket No. 5500. The same order suspended the operation [fol. 197] of the said schedules to and including December 31, 1947. The railroad respondents in said proceeding voluntarily deferred the effective date of the schedules pending determination of the proceedings.

(c) Testimony in said I. & S. Docket No. 5500 was presented before Examiner R. M. Brown at hearings in New York, N. Y. on July 29, 30 and 31 and August 1, 1947. Brief date was then fixed as September 30, 1947, and briefs therein were duly filed by respondents and protestants.

(d) On October 3, 1947, oral argument by counsel for the parties was heard in Washington, D. C., by Division 3 of the Interstate Commerce Commission.

(e) An additional oral argument was assigned for May 5, 1948, and was heard by the full Commission.

(f) The Report of the Commission (272 ICC 648-Exhibit B attached to the original complaint) was decided October 4, 1948, wherein the Commission found "that the schedules under investigation are just and reasonable". The unloading charges went into effect on November 1, 1948.

(g) In December, 1948, various petitions for rehearing and for reconsideration were filed; and by its order of June 9, 1949, the Interstate Commerce Commission reopened said proceeding for rehearing.

(h) Additional testimony in said I. & S. Docket No. 5500 was taken before Examiner R. M. Brown in Brooklyn, N. Y., on September 27, 28 and 29, 1949. Briefs on Rehearing were duly filed on December 1, 1949. In May, 1950 a Report on Rehearing, proposed by Russell M. Brown and M. J. Walsh, Examiners, was served on the parties with notice thereon that "exceptions must be filed with the Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before June 5, 1950." Such proposed report recommended that:

> [fol. 198] "On rehearing the Commission should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, add that the findings in the prior report herein should be reversed. The schedules naming the unloading charges assailed should be ordered cancelled and the proceeding discontinued."

A copy of said Proposed Report, attached as Exhibit H to the original complaint, is made a part hereof.

(i) Additional oral argument in said I. & S. Docket No. 5500 was heard by the full Commission in Washington, D. C., on July 24, 1950. No report was issued at that time; and on October 10, 1950, a "notice" was issued "By the Commission" as follows:

> "Upon further consideration of the record in the above entitled proceeding, it appears that the record is

deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing.

"At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team-tracks on Manhattan Island and in Jersey City, N. J. Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate. "The above entitled proceeding will be assigned for further hearing at times and places hereafter to be announced."

(j) Following the issuance of said Notice of October 10, 1950, protestants therein filed petitions and motions for entry of order cancelling the schedules. The petitions and motion were denied by the Commission by order dated November 16, 1950.

(k) A pre-trial conference was held by Examiner M. J. Walsh in New York, N. Y., on November 8, 1950. Further testimony was presented before the said Examiner in Brooklyn, N. Y., on June 4 and 5, 1951. Briefs were duly filed on August 1, 1951; and in August, 1951, the "Second Report on Further Hearing Proposed by M. J. Walsh, examiner" was served on the parties, bearing notice that "Exception must be filed with Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before September 11, 1951." [fol. 199] Said Second Proposed Report on Further Hearing recommended that:

"Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of Section 3(1) of the Act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered cancelled and the proceeding discontinued."

A copy of said Second Report on Further Hearing attached to the original complaint as Exhibit I is hereby made a part hereof.

(l) On September 11, 1951, Exceptions to said Second Proposed Report were filed by the railroad respondents. Replies to Exceptions were filed by Protestants. Oral argument was heard by the full Commission in Washington, D. C. on September 26, 1951. The "Report of the Commission on Rehearing and Further Hearing" was decided May 7, 1952—Exhibit A attached to the original complaint.

(m) The formal complaint in Docket No. 31105, dated September 16, 1952, was filed attacking the justness and reasonableness of the unloading charges at New York, N. Y.—Exhibit E attached to the original complaint. The Motion to Dismiss the complaint was filed by Defendant Railroads, dated October 21, 1952. The City of New York filed its petition for leave to intervene, dated November 6, 1952; and the Secretary of Agriculture of the United States filed his petition for leave to intervene, dated November 7, 1952; both attacking the unloading charges as being unjust and unreasonable in violation of Section 1(5) of the Interstate Commerce Act. Those petitions were granted by order of the Commission, dated November 12, 1952. The complainants' reply to defendants' motion to dismiss the complaint was dated November 4, 1952. The Commission's order dismissing the complaint was dated December 15, 1952—Exhibit D attached to the original complaint.

(n) The formal complaint in Docket No. 31106, dated September 23, 1952, was filed attacking the justness and reasonableness of the unloading charges at Philadelphia, Pa.—Exhibit F attached to the original complaint. The Motion to Dismiss the complaint was filed by defendant rail-

[fol. 200] roads dated October 21, 1952. The complainants' Reply to the motion to dismiss was dated November 4, 1952. The Commission's Order dismissing the complaint was dated December 15, 1952—Exhibit D attached to the original complaint.

8. Orders and Reports Are Illegal and Invalid

Plaintiff-Intervenors, California Citrus League and California Grape and Tree Fruit League, allege that the said Orders of the Interstate Commerce Commission dated May 7, 1952 and December 15, 1952 and the reports of said Commission referred to and made part of said order of May 7, 1952, are illegal and invalid for the following reasons:

(a) That the said Interstate Commerce Commission acted arbitrarily, unreasonably and unlawfully in authorizing and approving unloading charges on fruits and vegetables at New York, N. Y., and at Philadelphia, Pa., to be added to the line-haul rates.

(b) That the said unloading charges are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid.

(c) That said Interstate Commerce Commission acted arbitrarily, unreasonably and unlawfully in authorizing and approving unloading charges of $1.05, $1.35 and $1.65 in its Report and Order of May 7, 1952 in said I. & S. Docket No. 5500 and its Order of December 15, 1952, dismissing the complaints in the Dockets Nos. 31105 and 31106, and thereby denied the protestants in I. & S. Docket 5500, including California Citrus League, the full hearing to which they were entitled.

(d) That no opportunity to be heard on the unloading charges of $1.05, $1.35, and $1.65 was allowed.

(e) That the said Interstate Commerce Commission disregarded and failed to apply the provisions of Sec. 15(7) [fol. 201] of the Interstate Commerce Act that:

> "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or

practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, * * *"

(f) That the said Interstate Commerce Commission having found in its Notice of October 10, 1950, "that the record is deficient in respect of certain evidence which seems to be important," failed to give effect to and apply the law which requires the cancellation of tariff schedules when the carriers have failed to carry the burden of proof to show that the new charges are just and reasonable.

(g) That the said Interstate Commerce Commission did not, and on the record before it could not, find that the aggregate charges consisting of the unloading charges added to the line-haul rates were just and reasonable.

(h) That there is no evidence sufficient to justify a finding that the assailed unloading charges are just and reasonable.

(i) That the finding in the Report and Order of May 7, 1952, that the railroads be permitted to establish unloading charges of $1.05, $1.35 and $1.65 is contrary to the evidence in the record of said hearing and there is no evidence in said record to support such finding.

(j) That the finding in the Order of December 15, 1952, that the railroads be permitted and authorized to establish unloading charges of $1.05, $1.35 and $1.65 per ton is not supported by any evidence and was made without any hearing in Dockets Nos. 31105 and 31106.

(k) That the said Commission acted unlawfully, arbitrarily and unreasonably in failing to make findings, supported by evidence, to show that the approved unloading charges are just and reasonable.

(l) That the said Commission failed to give any legal effect to the facts of record and the finding that (272 ICC 654):

[fol. 202] "A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the

consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not affected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. It is clearly indicated that it is impracticable for the shippers to perform the actual unloading operations."

(m) That the said Commission failed to give any legal effect to the facts of record and the finding that (272 ICC 652):

"The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignee in the short space of time available."

(n) That it is undisputed that the line-haul carload rate comprehends receipt and delivery of the lading by and to the consignee. As a matter of law, an additional charge for unloading is not justified if additional service is not in fact rendered. The unloading service is merely a part of delivery which is required under the line-haul rate.

Wherefore, plaintiff-intervenors, California Citrus League and California Grape and Tree Fruit League, pray:

1. That this action be heard by a three-judge court as provided and required by Title 28, United States Code, Section 2284.

2. That, upon hearing, the Court will enter an order and decree annulling and setting aside the said Order of May 7, 1952, in I. & S. Docket No. 5500 insofar as the same approves and authorizes the establishment of unloading charges of $1.05, $1.35 and $1.65 per ton, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said order insofar as it approves and authorizes the said unloading charges.

[fol. 203] 3. That, upon hearing, the Court will enter an order and decree annulling and setting aside the said Order of December 15, 1952, dismissing the complaints in Dockets Nos. 31105 and 31106, and enjoining the defendants, their

officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said Order.

4. That such other and further relief as is equitable and just may be granted.

(S.) Preston B. Kavanagh, John F. Donelan, Dickson R. Loos, 707 Munsey Building, Washington 4, D. C. (S.) Walter Hoffman, J. D., Balboa Building, San Francisco, Calif. (S.) M. W. Wells, 1007 Florida Bank Building, P. O. Box 633, Orlando, Florida, Attorneys for Plaintiff-Intervenors, California Citrus League, California Grape and Tree Fruit League.

[fol. 204] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF THE PORT OF NEW YORK AUTHORITY, INTERVENOR

I

The plaintiff, The Port of New York Authority, is a municipal corporate instrumentality of the States of New York and New Jersey, created by compact between the two States with the approval of Congress (Pub. Res. No. 17, 67 Cong., S. J. Res. 88, dated August 23, 1921), and charged with the duty of promoting and protecting the commerce of the port of New York, including the prevention of unlawful and excessive transportation rates and charges by railroads on traffic delivered in the New York district, and plaintiff is authorized to participate in any proceeding affecting the commerce of the port of New York. (Compact, Art. XIII, Chap. 154, Laws of New York, 1921, see page 25, [fol. 205] and Chap. 151, Laws of New Jersey, 1921, see page 27) The principal offices of the Authority are located at 111 Eighth Avenue, New York 11, N. Y.

II

This action is brought under, the United States is made a defendant under, and the jurisdiction of this Court is

conferred by, United States Code, Title 28, Sections 1336, 2321 through 2325, inclusive.

The Interstate Commerce Commission is an agency of the Government of the United States, created and established by Act of Congress, February 4, 1887, Interstate Commerce Act as amended, Title 49, United States Code.

III

The venue of this action is in this Court, pursuant to Provisions of United States Code, Title 28, Section 1398, because the orders of the Commission sought to be enjoined, annulled and set aside relate to rates and charges for transportation of fruits and vegetables from shipping points located throughout the State of Florida, including Orlando, and the domicile or place of business of the plaintiffs in Civil Action No. 597 are within the jurisdiction of this Court.

IV

The Port of New York Authority was a party in interest in the proceedings before the Interstate Commerce Commission, Investigation and Suspension Docket 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, and was a complainant in Docket No. 31105, *Florida Citrus Commission, et al.* v. *The Baltimore & Ohio Railroad Company, et al.* It took part in and presented evidence and argument in Investigation and Suspension Docket No. 5500 [fol. 206] and showed that the assessment of separate unloading charges on shipments of fruit and vegetables, as applied by the railroads, were unlawful and excessive inasmuch as the line-haul rates include simple delivery and the charges specified as unloading charges actually cover the service to make the contents of the cars accessible for simple delivery, therefore the port of New York was injured by the assessment of such unlawful and excessive charges. In Docket No. 31105, The Port of New York Authority joined with others in filing with the Commission a formal complaint against separate unloading charges assessed by the railroads on fruits and vegetables delivered in New York City and this complaint, over the objection of The Port of New York Authority, was denied and dismissed

without hearing to the unlawful damage and injury of the New York district and the consignees of such shipments there located.

V

The Port of New York Authority supports in full the position taken by plaintiffs in their complaint in Civil Action No. 597 and concurs in all contentions therein made. Accordingly, under authority of Rule 10(c) of the Rules of Civil Procedure, The Port of New York Authority adopts, by reference, paragraphs 4, 5, 6, 7, and 8 of that complaint, in their entirety, together with the exhibits referred to in said paragraphs and attached to the said complaint, and relies upon them as if incorporated herein in full.

Wherefore, The Port of New York Authority prays:

1. This action be heard by a three-judge court as provided and required by Title 28, United States Code, Section 2284.

2. That, upon hearing, the Court will enter an order and decree annulling and setting aside the said Order of May 7, [fol. 207] 1952, in I. & S. Docket No. 5500 insofar as the same approves and authorizes the establishment of unloading charges of $1.05, $1.35 and $1.65 per ton, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said Order insofar as it approves and authorizes the said unloading charges.

3. That, upon hearing, the Court will enter an order and decree annulling and setting aside the said Order of December 15, 1952, dismissing the complaint in Docket No. 31105, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said Order.

That such other and further relief as is equitable and just may be granted.

(S.) M. W. Wells, Maguire, Voorhis & Wells, 1007 Florida Bank Building, P. O. Box 633, Orlando, Florida, Attorney for Plaintiff.

Of Counsel: Sidney Goldstein, General Counsel, The Port of New York Authority, 111 Eighth Avenue, New York

11, N. Y. (S.) Wilbur La Roe, Jr., Frederick E. Brown, Arthur L .Winn, Jr., Samuel H. Moerman, Investment Building, Washington 5, D. C.

[fol. 208] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF THE CITY OF NEW YORK, INTERVENOR

I

The City of New York is a municipal corporation existing under and by virtue of the laws of the State of New York having its municipal office and place of business at New York, New York.

II

That The City of New York is charged with the duty of promoting and protecting commerce in the City of New York, including the prevention of unlawful and excessive transportation rates and charges by railroads on traffic delivered into the City of New York as well as the protection of the welfare of its 8,000,000 inhabitants as might be affected by reason of any unlawful and excessive rates and charges by railroads for commodities delivered into the City of New York and ultimately purchased by New York City consumers.

III

This action is brought under, the United States is made a defendant under and the jurisdiction of this court is con-
[fol. 209] ferred by United States Code, Title 28 §§1336, 2321 through 2325 inclusive. The Interstate Commerce Commission is an agency of the government of the United States created and established by act of Congress, February 4, 1887, Interstate Commerce Commission Act as amended Title 49 United States Code.

IV

The venue of this action is in this court, pursuant to the provisions of United States Code, Title 28 §1398, because

the orders of the commission sought to be enjoined, annulled and set aside relate to rates and charges for the transportation of fruits and vegetables from shipping points located throughout the State of Florida including Orlando. The domicile and place of business of the plaintiffs in civil action No. 597 are within the jurisdiction of this Court.

V

The City of New York was a party in interest in the proceedings before the Interstate Commerce Commission, Investigation and Suspension Docket No. 5500, Unloading charges on fruits and vegetables at New York and Pennsylvania, and was a party in interest in Docket No. 31105, Florida Citrus Commission et al v. Baltimore and Ohio Railroad Company et al. In Investigation and Suspension Docket No. 5500 the City of New York took part in and presented evidence and arguments and showed the assessment of separate unloading charges on shipment of fruits and vegetables as applied by the railroad were unlawful and excessive and that the consumers in the City of New York as well as business as a while therein were injured by the assessment of such unlawful and excessive charges. In Docket No. 31105 the City of New York petitioned the Inter- [fol. 210] state Commerce Commission for leave to intervene which was granted by order of the commission dated November 12, 1952 in which it was alleged that the City of New York objected to the separate unloading charges assessed by the railroad as being unlawful and injurious to the businesses in the City of New York as well as the consumers in the City of New York. The complaint and objections were denied and dismissed without hearing, to the unlawful damage and injury of the City of New York, the businesses therein, the consignees and consumers of such shipments there located.

VI

The City of New York supports in full the position taken by the plaintiffs in their complaint in civil action No. 597 and concurs in all contentions therein made. Accordingly under Rule 10(c) of the Rules of Civil Procedure the City

of New York adopts by reference paragraphs 4, 5, 6, 7 and 8 of that complaint in their entirety, together with the exhibits referred to in said paragraphs and attached to the said complaint and relies upon them as if incorporated herein in full.

Wherefore, The City of New York prays

(1) That this action be heard by a three court judge as provided and required by Title 28, United States Code, §2824.

(2) That upon hearing, the Court will enter an order and decree annulling and setting aside the said order of May 7, 1952 in I & S Docket No. 5500 in so far as the same approves and authorizes the establishment of unloading charges of $1.05, $1.35, and $1.65 per ton and enjoining the defendants, their officers, employees, agents and agencies [fol. 211] from enforcing the same and enjoining the operation of the same in so far as it approves the said unloading charges.

(3) That upon hearing the Court will enter an order and decree annulling and setting aside the said order of December 15, 1952, dismissing the complaint in Docket No. 31105 and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same and enjoining the operation of said order.

(4) That such other and further relief as is equitable and just may be granted.

(S.) M. W. Wells, Maguire, Voorhis and Wells, 1007 Florida Bank Building, P. O. Box 633, Orlando, Florida, Attorneys for The City of New York.

Of Counsel: Denis M. Hurley, Corporation Counsel, City of New York, Municipal Building, New York, N. Y.; James J. Thornton and G. Gary Sousa, Assistants Corporation Counsel, City of New York, Municipal Building, New York, N. Y.

[fol. 212] IN THE UNITED STATES DISTRICT COURT

[Title omitted]

COMPLAINT OF UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, IDAHO SHIPPERS ASSOCIATION, INC., NATIONAL ONION ASSOCIATION, AND WESTERN GROWERS ASSOCIATION, INTERVENERS

United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association bring this complaint against the United States of America and the Interstate Commerce Commission, and for their complaint say:

[fol. 213] 1. *Jurisdictional Allegations.*

This action is one to enjoin, annul, and set aside orders of the Interstate Commerce Commission as hereinafter more fully appears. This action is brought under the provisions of Title 28, United States Code, Sections 1336, 1337, 1398, 2321, 2322, 2323, 2324, 2325, and 2284.

2. *Plaintiff-Interveners.*

United Fresh Fruit and Vegetable Association is a national trade association having some three thousand members, including Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association, residing in all of the States of the United States of America, who are engaged in growing, packing, shipping, and distributing fresh fruits and vegetables throughout the United States. Its headquarters are at 777 Fourteenth Street, N. W., Washington 5, D. C. Numerous of its members, including those here named with it as intervening plaintiffs, shipped prior to January 1, 1947, and have continued to ship up until the present, in interstate commerce, large quantities of fresh fruits and vegetables in carload quantities from origin points throughout the United States to New York, N. Y., and Philadelphia, Pa., by rail common carriers which have duly published tariffs stating joint through rates from said origin points to New York, N. Y., and Philadelphia, Pa.

Idaho Shippers Association, Inc., with headquarters in

Idaho Falls, Idaho, is an association of growers and shippers of fresh fruits and vegetables from Idaho to New York and Philadelphia, among other destinations. Its members shipped prior to January 1, 1947, and have continued to ship up until the present, in interstate commerce, large quantities of fresh fruits and vegetables in carload quantities from points in the State of Idaho to Philadelphia and New York, by rail common carriers which have duly published tariffs stating joint through rates from said origin points in Idaho to New York and Philadelphia.

National Onion Association, with headquarters in Kenton, Ohio, is an association of growers and shippers of onions from numerous points to Philadelphia and New York, among other destinations. Its members shipped [fol. 214] prior to January 1, 1947, and have continued to ship up until the present, in interstate commerce, large quantities of onions, in carload quantities, from numerous points to Philadelphia and New York, by rail common carriers which have duly published tariffs stating joint through rates from said origin points to Philadelphia and New York.

Western Growers Association is an association of growers and shippers, representing 90 percent of the vegetable and melon shippers from Arizona and California, all of whom shipped prior to January 1, 1947, and have continued to ship until the present, in interstate commerce, large quantities of fresh vegetables and melons from Arizona and California to Philadelphia and New York by rail carriers which have duly published tariffs stating joint through rates from said origin points in Arizona and California to New York and Philadelphia.

Plaintiff-Interveners are interested in the controversy or question before the Interstate Commerce Commission in Investigation and Suspension Docket No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia.* United Fresh Fruit and Vegetable Association was a party of record in the said proceeding and participated (in its own behalf and in behalf of its members, including Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association) therein from the commencement thereof to the final order entered therein by the Interstate Commerce Commission. Plaintiff-

Interveners are also interested in the controversy or question before the Interstate Commerce Commission (and United Fresh Fruit and Vegetable Association was a party complainant therein) in Docket No. 31105, *Florida Citrus Commission et al.* v. *The Baltimore and Ohio Railroad Company, et al.*, and in Docket No. 31106, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio Railroad Company, et al.*, before the Interstate Commerce Commission, as hereinafter more fully appears.

3. *Defendants.*

(a) The United States of America is made defendant herein pursuant to Title 28, United States Code, Section 2322.

[fol. 215] (b) The Interstate Commerce Commission is a commission and agency of the government of the United States of America, created and established by Act of Congress, February 4, 1887, Interstate Commerce Act as amended, Title 49, United States Code.

4. *Purpose of Action.*

(a) The purpose of this action is to enjoin, annul and set aside the Report of the Commission on Rehearing and Further Hearing (286 ICC 119) decided May 7, 1952, and the order of the Interstate Commerce Commission thereon dated May 7, 1952, in the proceeding entitled Investigation and Suspension Docket No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, and the final order of the said Commission dated December 15, 1952 in Docket No. 31105, *Florida Citrus Commission et al.* v. *The Baltimore and Ohio Railroad Company, et al.*, and in Docket No. 31106, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio Railroad Company, et al.*

(b) There are hereby expressly made a part hereof the following: copy of the said Report of the Interstate Commerce Commission on Rehearing and Further Hearing decided May 7, 1952, in said I. & S. Docket No. 5500, attached to the original complaint herein as Exhibit A; copy of the prior Report of the Commission, decided October 4, 1948, in said I. & S. Docket No. 5500 attached to the original complaint as Exhibit B; a copy of the aforesaid Order of the

Commission of May 7, 1952 in said I. & S. Docket No. 5500, attached to the original complaint as Exhibit C; and a copy of the said Order of the Interstate Commerce Commission in said Dockets No. 31105 and 31106, dated December 15, 1952, attached to the original complaint as Exhibit D.

5. *Record before Interstate Commerce Commission.*

(a) A certified copy of all pleadings and proceedings, transcript of testimony and all exhibits presented in evidence before the Interstate Commerce Commission in said I. & S. Docket No. 5500 will be presented to the Court and offered in evidence at the hearing in this action.

(b) A certified copy of the complaint, defendant railroads' motion to dismiss, petitions for leave to intervene [fol. 216] and orders thereon, complainants' reply to the defendants' said motion to dismiss and the aforesaid Order of the Commission dated December 15, 1952, in said Dockets Nos. 31105 and 31106, will be presented to the Court and offered in evidence at the hearing in this action.

6. *Controversy or Question before the Interstate Commerce Commission.*

(a) From the time of first delivery of fresh fruits and vegetables, carload shipments of fresh fruits and vegetables originating throughout the United States, consigend to New York, N. Y., and Philadelphia, Pa., have been transported in interstate commerce by the railroad common carriers from said origins to New York, N. Y., and Philadelphia, Pa., and there delivered upon payment of the lawfully assessed transportation charges in accordance with freight tariffs duly filed with the Interstate Commerce Commission as provided by law. The through line-haul freight rates include the entire service of transportation from origin to and including delivery at destination.

(b) At no time prior to November 1, 1948, as hereinafter set forth, were any separate charges for unloading of fresh fruits and vegetables at New York, N. Y., or Philadelphia, Pa., assessed in addition to the transportation or line-haul charges. The compensation received by the railroads for delivery (including unloading by the railroads) was included in the amounts paid for transportation or line-haul freight charges.

(c) In 1947, for the first time, the terminal or delivering rail carriers at New York, N. Y., and Philadelphia, Pa., proposed by tariff schedules filed with the Interstate Commerce Commission to become effective June 1, 1947, to establish charges for unloading carload shipments of fresh fruits and vegetables at New York, N. Y., and Philadelphia, Pa. Upon protests of United Fresh Fruit and Vegetable Association, of numerous other shippers and shipper organizations, and of the Port of New York Authority, and other interests affected thereby, the operation of the schedules was suspended by order of the Interstate Commerce Commission to and including December 31, 1947. Said order instituted the investigation entitled Investigation and Suspension Docket No. 5500, *Unloading Charges on Fruits* [fol. 217] *and Vegetables at New York and Philadelphia.* Neither the origin railroads as a whole nor the intermediate connecting carriers were parties to said tariffs nor to the proceedings before the Interstate Commerce Commission as hereinafter set forth. The delivering rail carrier respondents voluntarily deferred the effective date of the said unloading charges pending determination of the Investigation and Suspension Proceeding.

(d) The said tariff schedules so proposed to become effective for the first time on June 1, 1947, stated unloading charges as follows for addition to the line-haul rates:

	Per net ton
Citrus fruits	$1.50
Fresh fruits (other than citrus)	1.75
Melons (including cantaloups)	2.00
Vegetables, fresh or green, not cold pack or frozen	1.50
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.00

(e) It is stated on page 649 of 272 ICC that the delivering railroads' "proposals reflect an effort on the part of the delivering lines to secure increased revenues from the fruit and vegetable traffic terminated at New York and Philadelphia. No charges such as those proposed have applied on this traffic in the past. These charges would accrue solely to the delivering lines. Other carriers have taken

no interest in this proceeding. The principal lines that would benefit from the proposals are the Baltimore & Ohio, Erie, New York Central, Pennsylvania, and the Reading".

(f) From the beginning of rail transportation of citrus fruits, other fresh fruits and fresh vegetables from California, Florida, and other States of origin to New York, N. Y., the movement by rail has been to the Jersey Shore, thence by carfloats (on which rail tracks are fixed, upon which the cars are placed) across the Hudson River to the Produce Terminals or railroad stations on the piers on the Manhattan Island side of the Hudson River. The railroad cars, containing the carloads of citrus fruits, other fresh fruits or fresh vegetables, remain on the carfloats while the latter are alongside the pier stations and the cars are not moved onto the piers. The New York, N. Y. pier sta- [fol. 218] tions involved include: The Baltimore & Ohio Railroad Company, Pier 22, North River; Erie Railroad Company Duane St. Station (Piers 19, 20 and 21); and Pennsylvania Railroad Company Produce Terminal (Piers 27 and 28 North River). Practically all of the car-load shipments of fresh fruits and vegetables consigend to New York, N. Y., and delivered at railroad stations on Manhattan Island are delivered at the above named Pier stations of The Baltimore & Ohio, Erie, and Pennsylvania Railroad Companies.

Generally, fresh citrus fruits and other fresh fruits and vegetables shipped from origins in California are delivered at said Pennsylvania Railroad Company Produce Terminal (Piers 27 and 28 North River), and at the Erie Pier Station, namely, the Duane St. Station (Piers 19, 20 and 21). As a general rule, fresh fruits and vegetables shipped from origins in Florida are delivered at the Pennsylvania Pier Station, namely Piers 27 and 28. Said delivering railroads do not have adequate team tracks on Manhattan Island to make delivery thereon of all fresh fruits and vegetables shipped respectively from Florida and California to Manhattan Island, New York. The delivering rail carriers can make delivery of such carload shipments consigned to New York, N. Y. only by delivery at said pier stations. When the car floats are placed by the railroads alongside the said piers, the railroads then unload the commodity from the cars as the latter continue to rest on the car floats.

The railroads cause the lading or commodity from the cars to be placed on the floor of the pier station, where it is then available for the first time to the consignee to take delivery. The railroads do not permit the consignee to unload the commodity from the car on the carfloat, and the commodity is not available to the consignee until after it is unloaded by the railroads from the cars and placed on the floor of the pier station. It is not until after the commodity is placed by the railroad on the floor of the pier station that delivery is or can be made. The line-haul freight rates are for the entire service of transportation from origin to and including delivery at destination. The unloading by the railroads is merely a part of delivery, a service established by long custom and practice by the railroads to enable them to perform their transportation duty, a requirement necessary [fol. 219] and antecedent to delivery occasioned by the delivering railroads' disability and lack of sufficient team track facilities on Manhattan Island, and it is a mere substitute for team track delivery.

(g) Prior to 1925 movement by rail of carload shipments of fresh citrus fruits, other fresh fruits and vegetables from California and Florida origins to Philadelphia, Pa., was similar to that at New York, N. Y., namely, the cars were moved across the river on carfloats by the railroads, and the commodity unloaded from the cars onto the floor of the rail station by the railroads. The through line-haul rates include the entire service of transportation from origin to and including delivery at destination; and the line-haul freight rates have been accepted by carriers and shippers alike as including compensation for delivery, including unloading by the railroads.

Since about 1925, practically all of the carlot shipments of fresh fruits and fresh vegetables delivered by railroad at Philadelphia, Pa., have been delivered at the Pennsylvania Produce Terminal or at the Philadelphia Perishable Products Terminal of the Baltimore and Ohio Railroad Company. When delivered at the terminal platform, the cars are placed alongside the platform and are unloaded by the railroads, who place the commodity on the floor of the station platform. The railroads do not permit the consignee to unload the cars onto the station platform, and delivery of the commodity cannot be obtained by the consignee from

cars alongside the station platform nor until after it has been unloaded by the railroads onto the floor of the platform. Such method of delivery by the railroads is a substitute for and an alternative to team track delivery. The terminal and team track facilities of the delivering railroads at Philadelphia are adequate for deliveries of carlot fruits for sale at auction and for carlot vegetables only because cars of citrus and deciduous fruits delivered for sale at auction are immediately unloaded by the railroads, thereby assuring immediate release of empty cars and permitting immediate removal of the empty cars from the tracks alongside the station platforms and but for such practice of unloading by the railroads for sale at auction the railroads' facilities at team tracks would be inadequate.

(h) The Report of the Commission in said I & S Docket No. 5500, 272 ICC 648, decided October 4, 1948, found "that the schedules under investigation are just and reasonable. An order will be entered vacating the order of suspension [fol. 220] and discontinuing this proceeding" (272 ICC 663). The said unloading charges, originally published to become effective on June 1, 1947, went into effect on November 1, 1948.

(i) Thereafter, the said proceeding was reopened for further hearing and reconsideration. The final order of the Interstate Commerce Commission in said Investigation and Suspension Docket No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, dated May 7, 1952, notified and required the respondents (delivering railroads) to cancel the schedules naming the unloading charges under investigation. However, the Report of the Commission further provided (286 ICC 142):

> "Upon rehearing and further hearing, we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not not shown to be just and reasonable, and the schedules naming the assailed unloading charges will be ordered canceled and the proceeding discontinued without prejudice to the establishment of charges in conformity with the views expressed herein. The ultimate finding in the prior report is modified accordingly." Emphasis added.)

Thereby, the said Interstate Commerce Commission approved the assessment of unloading charges at New York, N. Y., and Philadelphia, Pa., the statement thereon page 141 of 286 ICC being:

> "Upon consideration of these and other circumstances of record we conclude that the shippers should not be forced to pay more than $1.05, $1.35 and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect."

By tariff schedules filed in accordance with the said finding of the Interstate Commerce Commission by the delivering railroads, the revised unloading charges in the amounts of $1.05, $1.35 and $1.65 at New York, N. Y., and at Philadelphia, Pa., went into effect in 1952.

(j) Thereafter, California Citrus League, together with Florida Citrus Commission, Growers and Shippers League of Florida, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association and the Port of New York Authority as complainants, filed with the Interstate Commerce Commission their formal complaint against the Baltimore and Ohio Railroad Company, Erie Railroad Company, The Pennsylvania Railroad Company, and other delivering carriers parties to the said tariff schedules alleging that "the said unloading charges at (New York, N. Y.) are unjust and unreasonable in violation of Section 1 of the Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid." Said complaint was docketed by the [fol. 221] Interstate Commerce Commission as Docket No. 31105, and a copy of said complaint, attached to the original complaint as Exhibit E, is made a part hereof.

(k) Thereafter, California Citrus League together with Florida Citrus Commission, Growers and Shippers League of Florida, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association, Philadelphia Terminals Marketing Association, and The Auction Receivers of Philadelphia as complainants, filed with the Interstate Commerce Commission their formal complaint against The Baltimore and Ohio Railroad Company, The Pennsylvania Railroad Company, and Reading Company, alleging that

"the said unloading charges (at Philadelphia, Pa.) are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid." Said complaint was docketed by the Interstate Commerce Commission as Docket No. 31106. A copy of said complaint, attached to the original complaint as Exhibit F is made a part hereof.

(1) After the service of complaints in said Dockets Nos. 31105 and 31106 upon the defendants named therein, the said defendants filed with the Interstate Commerce Commission a motion to dismiss each of said complaints. The said motions to dismiss set forth that:

> "8. Since the issue raised by the complaint herein was in all respects specifically ruled upon by the entire Commission in I & S Docket No. 5500, and since all the complainants in the complaint herein were parties to I & S Docket No. 5500, and since the complaint herein alleges nothing that was not fully considered and disposed of by the entire Commission in I & S Docket No. 5500, it would be contrary to the public interest for the Commission to waste its resources in hearing the complaint herein, and it would be vexatious and burdensome to subject defendants herein to further hearing and argument. * * *
>
> "11. The dispute raised by the complaint herein has already been heard and disposed of in I & S Docket No. 5500. No useful purpose would be served by burdening the Commission and defendants with further hearings and argument."

The said motions to dismiss filed by the defendant railroads in said complaints further specifically stated:

> [fol. 222] "5. The Commission's reported dated May 7, 1952, contains this sentence (286 ICC 119, 142): 'The ultimate finding in the prior report is modified accordingly.' Said ultimate finding in the prior report was (272 ICC 648, 663); 'We find that the schedules under investigation are just and reasonable.' In other words, the entire Commission on May 7, 1952, made a specific finding that the lower unloading charges, now alleged

by the complaint herein to be unjust and unreasonable, are 'just and reasonable.' "

(m) The complainants in said Dockets Nos. 31105 and 31106 filed their Reply to Motion to Dismiss Complaint, the same being identical in both cases except for the docket number and the names of the respective parties. A copy of the said Reply in Docket No. 31105 appended to the original complaint as Exhibit G is made a part hereof. The said Replies expressly set forth that:

> "At no time in the said proceeding (I. & S. Docket No. 5500) during the nearly five full years between the filing of protests and requests for suspension prior to the order of May 28, 1947 instituting the said investigation and suspending the schedules, and the time of the last report, May 7, 1952, was there any mention by any respondent of unloading charges of '$1.05, $1.35 and $1.65 per ton'. Certainly, no protestant suggested any unloading charge whatever, separate from the line-haul rate. Indeed, the first and only mention of said unloading charges of '$1.05, $1.35 and $1.65 per ton' was on mimeographed sheet 36 (286 ICC 141) of the said report of May 7, 1952. The order of May 7, 1952, entered by the Commission in I. & S. Docket No. 5500 did not discontinue the proceeding *without prejudice to the publication of new unloading charges* of $1.05, $1.35 and $1.65."

(n) As heretofore shown by Exhibit D attached to the original complaint, the Interstate Commerce Commission by its order of December 15, 1952, dismissed the complaints in Dockets Nos. 31105 and 31106.

7. *Proceedings before Interstate Commerce Commission.*

(a) Tariff schedules proposing originally unloading charges on fruits and vegetables at New York, N. Y., and at Philadelphia, Pa., were filed with Interstate Commerce Commission to become effective June 1, 1947.

(b) Upon the filing of numerous protests and request for suspension of the said schedules, the Interstate Commerce Commission by its order dated May 28, 1947, entered upon investigation of such unloading charges so published

in said schedules for addition to the line-haul rates, said Investigation being designated as Investigation and Suspension Docket No. 5500, *Unloaing Charges on Fruits and Vegetables at New York and Philadelphia.* The same order [fol. 223] suspended the operation of the said schedules to and including December 31, 1947. The railroad respondents in said proceeding voluntarily deferred the effective date of the schedules pending determination of the proceedings.

(c) Testimony in said I. & S. Docket No. 5500 was presented before Examiner R. M. Brown at hearings in New York, N. Y., on July 29, 30 and 31 and August 1, 1947. Brief date was then fixed as September 30, 1947, and briefs therein were duly filed by respondents and protestants.

(d) On October 3, 1947, oral argument by counsel for the parties was heard in Washington, D. C., by Division 3 of the Interstate Commerce Commission.

(e) An additional oral argument was assigned for May 5, 1948, and was heard by the full Commission.

(f) The Report of the Commission (272 ICC 648-Exhibit B attached to the original complaint) was decided October 4, 1948, wherein the Commission found "that the schedules under investigation are just and reasonable". The unloading charges went into effect on November 1, 1948.

(g) In December 1948, various petitions for rehearing and for reconsideration were filed; and by its order of June 9, 1949, the Interstate Commerce Commission reopened said proceeding for rehearing.

(h) Additional testimony in said I. & S. Docket No. 5500 was taken before Examiner R. M. Brown in Brooklyn, N. Y., on September 27, 28 and 29, 1949. Briefs on Rehearing were duly filed on December 1, 1949. In May 1950 a Report on Rehearing, proposed by Russell M. Brown and M. J. Walsh, Examiners, was served on the parties with notice thereon that "exceptions must be filed with the Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before June 5, 1950." Such proposed report recommended that:

> "On rehearing the Commission should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed. The sched-

ules naming the unloading charges assailed should be ordered cancelled and the proceeding discontinued."

[fol. 224] A copy of said Proposed Report, attached as Exhibit H to the original complaint, is made a part hereof.

(i) Additional oral argument in said I. & S. Docket No. 5500 was heard by the full Commission in Washington, D. C., on July 24, 1950. No report was issued at that time; and on October 10, 1950, a "notice" was issued "By the Commission" as follows:

> "Upon further consideration of the record in the above entitled proceeding, it appears that the record is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing.
>
> "At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team-tracks on Manhattan Island and in Jersey City, N. J. Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate.
>
> "The above entitled proceeding will be assigned for further hearing at times and places hereafter to be announced."

(j) Following the issuance of said Notice of October 10, 1950, protestants therein filed petitions and motions for entry of order cancelling the schedules. The petitions and

motion were denied by the Commission by order dated November 16, 1950.

(k) A pre-trial conference was held by Examiner M. J. Walsh in New York, N. Y., on November 8, 1950. Further testimony was presented before the said Examiner in Brooklyn, N. Y., on June 4 and 5, 1951. Briefs were duly filed on August 1, 1951; and in August 1951 the "Second Report on Further Hearing Proposed by M. J. Walsh, examiner" was served on the parties, bearing notice that "Exceptions must be filed with Commission and copies served so as to reach all parties or their attorneys who appeared at the hearing or on brief on or before September 11, 1951." Said Second Proposed Report on Further Hearing recommended that:

> [fol. 225] "Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of Section 3(1) of the Act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered cancelled and the proceeding discontinued."

A copy of said Second Report on Further Hearing attached to the original complaint as Exhibit I is hereby made a part hereof.

(l) On September 11, 1951, Exceptions to said Second Proposed Report were filed by the railroad respondents. Replies to Exceptions were filed by Protestants. Oral argument was heard by the full Commission in Washington, D. C., on September 26, 1951. The "Report of the Commission on Rehearing and Further Hearing" was decided May 7, 1952—Exhibit A attached to the original complaint.

(m) The formal complaint in Docket No. 31105, dated September 16, 1952, was filed attacking the justness and reasonableness of the unloading charges at New York, N. Y. —Exhibit E attached to the original complaint. The Motion to Dismiss the complaint was filed by Defendant Railroads, dated October 21, 1952. The City of New York filed its petition for leave to intervene, dated November 6, 1952;

and the Secretary of Agriculture of the United States filed his petition for leave to intervene, dated November 7, 1952; both attacking the unloading charges as being unjust and unreasonable in violation of Section 1(5) of the Interstate Commerce Act. Those petitions were granted by order of the Commission, dated November 12, 1952. The complainants' reply to defendants' motion to dismiss the complaint was dated November 4, 1952. The Commission's order dismissing the complaint was dated December 15, 1952 —Exhibit D attached to the original complaint.

(n) The formal complaint in Docket No. 31106, dated September 23, 1952, was filed attacking the justness and reasonableness of the unloading charges at Philadelphia, Pa.—Exhibit F attached to the original complaint. The Motion to Dismiss the complaint was filed by defendant railroads, dated October 21, 1952. The complainants' Reply to the motion to dismiss was dated November 4, 1952. The Commission's Order dismissing the complaint was dated December 15, 1952—Exhibit D attached to the original complaint.

[fol. 226] 8. *Orders and Reports are Illegal and Invalid.*

Plaintiff-Interveners, United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association and Western Growers Association allege that the said Orders of the Interstate Commerce Commission dated May 7, 1952, and December 15, 1952, and the reports of said Commission referred to and made part of said Order of May 7, 1952, are illegal and invalid for the following reasons:

(a) That the said Interstate Commerce Commission acted arbitrarily, unreasonably and unlawfully in authorizing and approving unloading charges on fruits and vegetables at New York, N. Y., and at Philadelphia, Pa., to be added to the line-haul rates.

(b) That the said unloading charges are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates as aforesaid.

(c) That said Interstate Commerce Commission acted arbitrarily, unreasonably and unlawfully in authorizing and approving unloading charges of $1.05, $1.35 and $1.65 in its Report and Order of May 7, 1952, in said I. & S. Docket No. 5500 and its Order of December 15, 1952, dismissing the complaints in the Dockets Nos. 31105 and 31106, and thereby denied the protestants in I. & S. Docket 5500, including California Citrus League, and the complainants in Dockets 31105 and 31106, including California Citrus League, the full hearing to which they were and are entitled.

(d) That no opportunity to be heard on the unloading charges of $1.05, $1.35 and $1.65 was allowed.

(e) That the said Interstate Commerce Commission disregarded and failed to apply the provisions of Sec. 15(7) of the Interstate Commerce Act that:

> [fol. 227] "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, * * *"

(f) That the said Interstate Commerce Commission having found in its Notice of October 10, 1950, "that the record is deficient in respect of certain evidence which seems to be important," failed to give effect to and apply the law which requires the cancellation of tariff schedules when the carriers have failed to carry the burden of proof to show that the new charges were just and reasonable.

(g) That the said Interstate Commerce Commission did not, and on the record before it could not, find that the aggregate charges consisting of the unloading charges added to the line-haul rates are just and reasonable.

(h) That there is no evidence sufficient to justify a finding that the assailed unloading charges are just and reasonable.

(i) That the finding in the Report and Order of May 7, 1952, that the railroads be permitted to establish unloading charges of $1.05, $1.35 and $1.65 is contrary to the evidence in the record of said hearing and there is no evidence in said record to support such finding.

(j) That the finding in the Order of December 15, 1952, that the railroads be permitted and authorized to establish unloading charges of $1.05, $1.35 and $1.65 per ton is not supported by any evidence and was made without any hearing in Dockets Nos. 31105 and 31106.

(k) That the said Commission acted unlawfully, arbitrarily and unreasonably in failing to make findings, supported by evidence, to show that the approved unloading charges are just and reasonable.

(l) That the said Commission failed to give any legal effect to the facts of record and the finding that (272 ICC 654):

> "A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not affected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. It is clearly indicated that it is impracticable for the shippers to perform the actual unloading operations."

[fol. 228] (m) That the said Commission failed to give any legal effect to the facts of record and the finding that (272 ICC 652):

> "The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignee in the short space of time available."

(n) That it is undisputed that the line-haul carload rate comprehends receipt and delivery of the lading by and to the consignee. As a matter of law, an additional charge for unloading is not justified if additional service is not in fact rendered. The unloading service is merely a part of delivery which is required under the line-haul rate.

Wherefore, plaintiff-interveners, United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc.,

National Onion Association, and Western Growers Association, pray:

1. That this action be heard by a three-judge court as provided and required by Title 28, United States Code, Section 2284.

2. That, upon hearing, the Court will enter an order and decree annulling and setting aside the said Order of May 7, 1952, in I. & S. Docket No. 5500 insofar as the same approves and authorizes the establishment of unloading charges of $1.05, $1.35 and $1.65 per ton, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said order insofar as it approves and authorizes the said unloading charges.

3. That, upon hearing, the Court will enter an order and decree annulling and setting aside the said Order of December 15, 1952, dismissing the complaints in Dockets Nos. 31105 and 31106, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same, and enjoining the operation of said Order.

[fols. 228a-229] 4. That such other and further relief as is equitable and just may be granted.

(S.) Wilmer A. Hill, 225-229 Transportation Building, Washington 6, D. C. (S.) M. W. Wells, 1007 Florida Bank Building, Orlando, Florida. Attorneys for Plaintiff-Interveners, United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association.

[fol. 230] In the United States District Court

[Title omitted]

Complaint of Philadelphia Terminals Association, et al., Intervenors

1. Philadelphia Terminals Marketing Association with its principal of ice at 208 Walnut Street, Philadelphia, Pennsylvania, is a non-profit corporation whose membership comprises substantially all the individuals, firms and

corporations engaged in the business of handling fruits and vegetables in carlots in the Philadelphia market.

2. The Auction Receivers of Philadelphia, with its principal office at Delaware and Oregon Avenues, Philadelphia, Pennsylvania, is an association whose membership comprises substantially all the individuals, firms and corporations engaged in the business of handling and dealing in fruits, chiefly citrus, received in carlots in the Philadelphia market and sold at auction. Approximately half of its members are also members of Philadelphia Terminals Marketing Association.

3. Dan Storey, Jr., with principal office at Dock and Granite Streets, Philadelphia, Pennsylvania, is an individual engaged in the business of handling and dealing in fruits and vegetables in carlots in the Philadelphia market and is a member of Philadelphia Terminals Marketing Association, and through it participated in the proceedings before the Interstate Commerce Commission hereinafter specified.

[fol. 231] 4. Max Feldbaum and Sons, with principal office at Fruit Trade Building, Philadelphia, Pennsylvania, is a partnership composed of the following partners: Max Feldbaum, Milton Feldbaum and Morris Feldbaum, and is engaged in the business of handling and dealing in fruits and vegetables in carlots in the Philadelphia market and is a member of Philadelphia Terminals Marketing Association and through it participated in the proceedings before the Interstate Commerce Commission hereinafter specified.

5. A. Cancelmo Company, with principal office at 153 Dock Street, Philadelphia, Pennsylvania, is a partnership composed of the following partners: A. V. Cancelmo, A. V. Concelmo, Jr., V. W. Cancelmo, and M. W. Cancelmo, is engaged in the business of handling and dealing in fruits, chiefly citrus, received in carlots in the Philadelphia market and sold at auction, and also handles and deals in fruits and vegetables in carlots in the Philadelphia market. It is a member of The Auction Receivers of Philadelphia and of Philadelphia Terminals Marketing Association, and through them participated in the proceedings before the Interstate Commerce Commission hereinafter specified.

6. B. M. Young, with principal office at Delaware Avenue

and Swanson Streets, Philadelphia, Pennsylvania, is an individual engaged in the business of handling and dealing in fruits, chiefly citrus, received in carlots in the Philadelphia market and sold at auction. He is a member of The Auction Receivers of Philadelphia and through it participated in the proceedings before the Interstate Commerce Commission hereinafter specified.

7. This action is brought under, the United States of America is made defendant under, and the jurisdiction of this Court is conferred by, Title 28 Sections 1336, 2321-2325 inclusive of the United States Code.

The Interstate Commerce Commission is an agency of the Government of the United States created and established by Act of Congress, February 4, 1887, Interstate Commerce Act as amended, Title 49, United States Code.

[fol. 232] 8. The venue of this action is in this Court, pursuant to provisions of United States Code, Title 28, Section 1398, because the orders of the Commission sought to be enjoined, annulled and set aside relate to rates and charges for transportation of fruits and vegetables from shipping points located throughout the State of Florida, including Orlando, and the domicile or place of business of plaintiffs in Civil Action 597 are within the jurisdiction of this Court.

9. Intervenors Philadelphia Terminals Marketing Association and The Auction Receivers of Philadelphia were parties in interest in the proceedings before the Interstate Commerce Commission above referred to entitled "Investigation and Suspension Docket Number 5500, Unloading Charges on Fruits and Vegetables at New York and Philadelphia" and were complainants in docket number 31106, Florida Citrus Commission et al. vs. The Baltimore and Ohio Railroad Company et al. The- took part in and presented evidence and argument in Investigation and Suspension Docket Number 5500 and showed that the assessment of separate unloading charges on shipments of fruits and vegetables as applied by the railroads was unlawful and excessive inasmuch as the line haul rates include simple delivery and the charges specified as unloading charges actually cover the service to make the contents of the cars acceptable for simple delivery. In Docket Number 31106

intervenors Philadelphia Terminals Marketing Association and The Auction Receivers of Philadelphia joined with others in filing with the Commission a formal Complaint against separate unloading charges assessed by the railroads on fruits and vegetables delivered in Philadelphia and this Complaint, over objection of complainants, was denied and dismissed without hearing, to the unlawful damage and injury of the present intervenors.

10. The intervenors named in 3, 4, 5 and 6 hereof are representative of the many members of said Philadelphia Terminals Marketing Association and said The Auction Receivers of Philadelphia who handle and deal in fruits and vegetables in carlots shipped by rail from Florida and elsewhere to Philadelphia, Pennsylvania. They are compelled to pay and bear the unloading charges herein speci- [fol. 233] fied on their shipments unloaded by the delivering railroads at Philadelphia, Pennsylvania prior to the time when said shipments are made available to them by said railroads for delivery.

11. Intervenors, Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia; Dan Storey, Jr.; Max Feldbaum and Sons; A. Cancelmo Company; and B. M. Young support in full the position taken by plaintiffs in their Complaint in Civil Action Number 597 and concur in all contentions therein made. Accordingly, under authority of Rule 10(c) of the Rules of Civil Procedure, Philadelphia Terminals Marketing Association; The Auction Receivers of Philadelphia; Dan Storey, Jr.; Max Feldbaum and Sons; A. Concelmo Company; and B. M. Young adopt by reference sections 4, 5, 6, 7 and 8 of that Complaint in their entirety, together with the exhibits referred to in said sections and attached to said Complaint and rely upon them as if incorporated herein in full.

Wherefore, Philadelphia Terminals Marketing Association; The Auction Receivers of Philadelphia; Dan Storey, Jr.; Max Feldbaum and Sons; A. Concelmo Company; and B. M. Young pray:

(1) That this action be heard by a three-judge court as provided and required by Title 28, U. S. Code, Section 2284;

(2) That upon hearing the Court will enter an Order and Decree annulling and setting aside the said Order of May 7,

1952 in I. and S. Docket 5500 insofar as the same approves and authorizes the establishment of unloading charges of $1.05, $1.35 and $1.65 per ton, and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same and enjoining the operation of said Order insofar as it approves and authorizes the said unloading charges;

(3) That upon hearing the Court will enter an Order and Decree annulling and setting aside the said Order of December 15, 1952, dismissing the Complaint in Docket Num-
[fol. 234] ber 31106 and enjoining the defendants, their officers, employees, agents and agencies from enforcing the same and enjoining the operation of said Order; and

(4) That such other and further relief as is equitable and just may be granted.

(S.) M. W. Wells, Maguire, Voorhis & Wells, 1007 Florida Bank Building, P. O. Box 633, Orlando, Florida, Attorney for Philadelphia Terminals Marketing Association; The Auction Receivers of Philadelphia; Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, and B. M. Young.

[fol. 235] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION, DEFENDANT—Filed April 13, 1953

For answer to the complaint herein filed by the plaintiffs, the defendant Interstate Commerce Commission, hereinafter called the Commission, admits, denies, and alleges as follows:

I

The Commission admits the allegations stated in paragraphs 1, 2(a), 2(b), 2(c), 2(d), 2(e), 2(f), 3(a), 3(b), 4(a), 4(b), 4(c), 4(d), and 4(e) of the complaint, except the allegation in paragraph 2(f) to the effect that the plaintiffs

are compelled to pay and bear the said unloading charges. The Commission alleges on information and belief that said charges are paid by the consignees of said shipments, rather than by the plaintiffs.

II

The Commission neither admits nor denies the allegations in paragraphs 5(a) and 5(b), and respectfully alleges that the said allegations require no answer.

[fol. 236]

III

The Commission admits the allegations in paragraphs 6(a) and 6(b) to the effect that separate charges for unloading said commodities at New York and Philadelphia were not assessed by the said railroads prior to November 1, 1948, and denies the remaining allegations in said paragraphs.

IV

The Commission admits the allegations in paragraphs 6(c), 6(d), and 6(e).

V

The Commission neither admits nor denies the allegations in paragraphs 6(f) and 6(g) as to the railroads' operations at New York and Philadelphia in unloading and delivering carload shipments of fruits and vegetables, for the reason that the said allegations do not state all the facts and they contain many statements which are merely the conclusions of the plaintiffs. For a full and correct statement of the facts as to the said operations, the Commission respectfully refers the Court to Exhibit A to the complaint, which is a copy of the Commission's final report in the said proceeding (I. & S. Docket No. 5500).

VI

The Commission admits the allegations in paragraphs 6(h), 6(i), 6(j), 6(k), 6(l), 6(m), 6(n), 7(a), 7(b), 7(c), 7(d), 7(e), 7(f), 7(g), 7(h), 7(i), 7(j), 7(k), 7(l), (7m), and 7(n).

VII

The Commission denies the allegations in paragraph 8 and all sub-paragraphs thereof.

[fols. 237-238] VIII

Further answering the said complaint, the Commission alleges that the findings and conclusions in its report and orders here under attack were and are, and each of them was and is, fully supported and justified by the evidence submitted in the said proceedings; and that in making said report and the said orders the Commission considered and weighed carefully, in the light of its own knowledge and experience, each fact, circumstance, and condition brought to its attention by or on behalf of the parties to the said proceeding.

The Commission further alleges that the said report and orders were not made or entered either arbitrarily or unjustly, or without proof, or contrary to the relevant evidence, or without evidence to support them; that in making said report and orders the Commission did not exceed the authority conferred upon it by law; and the Commission denies each of and all the allegations to the contrary contained in the complaint, and denies that its said report and orders are invalid or illegal for any of the reasons set forth in the complaint, or for any other reason.

Wherefore, having fully answered, the Commission prays that the relief prayed for by the plaintiffs be denied and that the said complaint be dismissed.

Interstate Commerce Commission. By (S.) Leo H. Pou, Assistant Chief Counsel. (S.) Edward M. Reidy, Chief Counsel, Of Counsel.

[fols. 239-240] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION ET AL., AS INTERVENING PLAINTIFFS—Filed April 17, 1953

For answer to the complaint herein filed by United Fresh Fruit and Vegetables Association et al., as intervening plaintiffs, which complaint contains substantially the same allegations as the original complaint herein filed by Florida Citrus Commission et al., the defendant Interstate Commerce Commission hereby refers to and adopts its answer heretofore filed to the said original complaint; and the Commission prays that the relief prayed for in the said complaint in intervention be denied and that the said complaint be dismissed.

Interstate Commerce Commission, By: (S.) Leo H. Pou, Assistant Chief Counsel. (S.) Edward M. Reidy, Chief Counsel, Of Counsel.

[fol. 241] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF NEW YORK FRUIT AUCTION CORPORATION, ET AL., AS INTERVENING PLAINTIFFS—Filed April 17, 1953

For answer to the complaint herein filed by New York Fruit Auction Corporation et al., as intervening plaintiffs, the defendant Interstate Commerce Commission, hereinafter called the Commission, admits, denies, and alleges as follows:

1

The Commission admits the allegations in paragraphs I, II, and III of the said complaint.

2

The Commission admits the allegations in paragraph IV of the said complaint to the effect that the said intervening plaintiffs were members of said Industry Committee and that said Committee presented evidence and argument in said I. & S. proceeding No. 5500; but the Commission expressly denies the remaining allegations in the said paragraph.

3

For answer to paragraph V of said complaint, which by reference adopts paragraphs 4, 5, 6, 7 and 8 of the original [fol. 242] complaint herein filed, the Commission hereby adopts that part of its answer to the said original complaint which answers the said paragraphs 4, 5, 6, 7 and 8 thereof.

4

Further answering the said complaint in intervention, the Commission hereby refers to and adopts paragraph VIII of its answer to the said original complaint.

Wherefore, having fully answered, the Commission prays that the relief prayed for in the said complaint in intervention be denied and that the said complaint be dismissed.

Interstate Commerce Commission, By: (S.) Leo H. Pou, Assistant Chief Counsel. (S.) Edward M. Reidy, Chief Counsel, Of Counsel.

[fol. 243] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF PHILADELPHIA TERMINAL MARKETING ASSOCIATION, ET AL., AS INTERVENING PLAINTIFFS—Filed April 17, 1953

For answer to the complaint herein filed by Philadelphia Terminal Marketing Association et al., as intervening plaintiffs, the defendant Interstate Commerce Commission, here-

inafter called the Commission, admits, denies, and alleges as follows:

I

The Commission admits the allegations in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 10 of the said complaint.

II

The Commission admits all the allegations in paragraph 9 of the said complaint except the allegations that the said intervening plaintiffs "showed that the assessment of separate unloading charges on shipments of fruits and vegetables as applied by the railroads was unlawful and excessive inasmuch as the line-haul rates include simple delivery and the charges specified as unloading charges actually cover the service to make the contents of the cars acceptable for simple delivery", and that the said intervening plaintiffs suffered "unlawful damage and injury" [fol. 244] as the result of the Commission's action; which allegations the Commission expressly denies.

III

For answer to paragraph II of the said complaint, which by reference adopts paragraphs 4, 5, 6, 7 and 8 of the original complaint herein filed, the Commission hereby adopts that part of its answer to the said original complaint which answers the said paragraphs 4, 5, 6, 7 and 8 thereof.

IV

Further answering the said complaint in intervention, the Commission hereby refers to and adopts paragraph VIII of its answer to the said original complaint.

Wherefore, having fully answered, the Commission prays that the relief prayed for in the said complaint in intervention be denied and that the said complaint be dismissed.

Interstate Commerce Commission, By: (S.) Leo H. Pou, Assistant Chief Counsel. (S.) Edward M. Reidy, Chief Counsel, Of Counsel.

[fol. 245] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF CALIFORNIA CITRUS LEAGUE AND CALIFORNIA GRAPE AND TREE FRUIT LEAGUE AS INTERVENING PLAINTIFFS—Filed April 17, 1953

For answer to the complaint herein filed by California Citrus League and California Grape and Tree Fruit League, as intervening plaintiffs, the defendant Interstate Commerce Commission, hereinafter called the Commission, admits, denies, and alleges as follows:

I

The Commission admits the allegations in paragraphs 1, 2, 3, and 4 of the said complaint.

II

The Commission neither admits nor denies the allegations in paragraph 5, and respectfully alleges that the said allegations do not require an answer.

III

The Commission alleges that the allegations in paragraphs 6, 7, and 8 (including the sub-paragraphs thereof) of the said complaint are identical with or substantially the same as paragraphs bearing the same numbers in the original complaint herein filed by Florida Citrus Com- [fol. 246] mission, et al.; and for answer to the said paragraphs of this complaint in intervention the Commission hereby refers to and adopts paragraphs numbered III, IV, V, VI and VII of its answer to the said original complaint.

IV

Further answering the said complaint in intervention, the Commission hereby refers to and adopts paragraph VIII of its answer to the said original complaint.

Wherefore, having fully answered, the Commission prays that the relief prayed for in the said complaint in intervention be denied and that the said complaint be dismissed.

Interstate Commerce Commission, (S.) Leo H. Pou, by Leo H. Pou, Assistant Chief Counsel.

(S.) Edward M. Reidy, Chief Counsel, of Counsel.

[fol. 247] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF THE PORT OF NEW YORK AUTHORITY AS INTERVENING PLAINTIFF—Filed April 17, 1953

For answer to the complaint herein filed by The Port of New York Authority, as an intervening plaintiff, the defendant Interstate Commerce Commission, hereinafter called the Commission, admits, denies, and alleges as follows:

1

The Commission admits the allegations in paragraphs I, II and III of the said complaint.

2

The Commission admits all the allegations in paragraph IV of the said complaint except the allegations that the said intervening plaintiff "showed that the assessment of separate unloading charges on shipments of fruits and vegetables, as applied by the railroads, were unlawful and excessive" and that "the port of New York was injured by the assessment of such unlawful and excessive charges", which allegations the Commission expressly denies.

[fol. 248] 3

For answer to paragraph V of the said complaint, which by reference adopts paragraphs 4, 5, 6, 7 and 8 of the

original complaint herein filed, the Commission hereby adopts that part of its answer to the said original complaint which answers the said paragraphs 4, 5, 6, 7 and 8 thereof.

4

Further answering the said complaint in intervention, the Commission hereby refers to and adopts paragraph VIII of its answer to the said original complaint.

Wherefore, having fully answered, the Commission prays that the relief prayed for in the said complaint in intervention be denied and that the said complaint be dismissed.

Interstate Commerce Commission, (S.) Leo H. Pou, by Leo H. Pou, Assistant Chief Counsel.

(S.) Edward M. Reidy, Chief Counsel, of Counsel.

[fol. 249] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF THE CITY OF NEW YORK AS AN INTERVENING PLAINTIFF—Filed April 17, 1953

For answer to the complaint herein filed by The City of New York, as an intervening plaintiff, the defendant Interstate Commerce Commission, hereinafter called the Commission, admits, denies, and alleges as follows:

1

The Commission admits the allegations in paragraphs I, II, III and IV of the said complaint.

2

The Commission admits all the allegations in paragraph V of the said complaint except the allegations that the said intervening plaintiff "showed the assessment of separate unloading charges on shipments of fruits and vegeta-

bles as applied by the railroads were unlawful and excessive and that the consumers in the City of New York as well as business as a whole therein were injured by the assessment of such unlawful and excessive charges", and the allegation that the action of the Commission in the proceeding re-
[fol. 250] ferred to was unlawful; which allegations the Commission expressly denies.

3

For answer to paragraph VI of the said complaint, which by reference adopts paragraphs 4, 5, 6, 7 and 8 of the original complaint herein filed, the Commission hereby adopts that part of its answer to the said original complaint which answers the said paragraphs 4, 5, 6, 7 and 8 thereof.

4

Further answering the said complaint in intervention, the Commission hereby refers to and adopts paragraph VIII of its answer to the said original complaint.

Wherefore, having fully answered, the Commission prays that the relief prayed for in the said complaint in intervention be denied and that the said complaint be dismissed.

Interstate Commerce Commission, (S.) Leo H. Pou,
by Leo H. Pou, Assistant Chief Counsel.

(S.) Edward M. Reidy, Chief Counsel, of Counsel.

[fol. 251] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO COMPLAINT OF SECRETARY OF AGRICULTURE AS INTERVENING PLAINTIFF —Filed April 17, 1953

For answer to the complaint herein filed by the Secretary of Agriculture as an intervening plaintiff, the defendant

Interstate Commerce Commission, hereinafter called the Commission, admits, denies, and alleges as follows:

1

The Commission admits the allegations in paragraphs I, II, III, IV, V, VI, VII, VIII, and IX of the said complaint.

2

The Commission denies the allegations in paragraph X of the said complaint and each sub-paragraph thereof.

3

Further answering the said complaint in intervention, the Commission hereby refers to and adopts paragraph VIII of its answer to the original complaint herein filed by Florida Citrus Commission, et al.

[fol. 252] Wherefore, having fully answered, the Commission prays that the relief prayed for in the said complaint in intervention be denied and that the said complaint be dismissed.

Interstate Commerce Commission, (S.) Leo H. Pou, by Leo H. Pou, Assistant Chief Counsel.

(S.) Edward M. Reidy, Chief Counsel, of Counsel.

[fol. 253] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAILROAD INTERVENORS TO COMPLAINT OF THE PORT OF NEW YORK AUTHORITY—Filed April 24, 1953

Come now The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company, intervenors in support of defendants, and for answer

to the complaint of the Port of New York Authority herein respectfully state:

1. The allegations of Paragraphs I, II and III of the complaint are admitted.

2. The allegations of Paragraph IV of the complaint are admitted except the second sentence thereof, which is denied, although it is admitted that the Port of New York Authority presented evidence and argument in I. & S. Docket No. 5500.

3. In answer to the allegations of Paragraph V of the complaint, these intervening railroads adopt by reference and incorporate herein Paragraphs III through VII of the answer of these railroads to the complaint of the principal plaintiffs herein.

[fol. 254] Wherefore, these intervenors ask that the complaint of the Port of New York Authority be dismissed.

Respectfully submitted, Edward K. Goethe, Attorney for Intervening Railroads, 1-2 Dolive Bldg., Orlando, Florida.

Anthony P. Donadio, Francis L. Brown, Alfred W. Hesse, Jr., Paul V. Miller, M. C. Smith, Jr., of Counsel.

[fol. 255] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAILROAD INTERVENORS TO COMPLAINT OF THE SECRETARY OF AGRICULTURE—Filed April 24, 1953

Come now The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company, intervenors in support of defendants, and for answer to the complaint of the Secretary of Agriculture herein respectfully state:

1. These intervenors admit the allegations in Paragraphs I through IX of the complaint.

2. These intervenors deny the allegations in Paragraph X of the complaint.

3. Answering further, these intervenors allege that the findings and conclusions of the Commission's first report in I. & S. 5500, 272 I.C.C. 648, were proper; that the Commission was wholly correct in its order of November 16, 1950 denying petitions for cancellation of charges; that the Commission's second decision in I. & S. No. 5500, 288 I.C.C. 119, was not in error for the reasons stated by the Secretary; that the Commission properly dismissed the complaints in Docket Nos. 31105 and 31106; that the Commission has properly found that the charges are lawful whether or not they be considered in conjunction with the line-haul [fol. 256] rates; that there was substantial evidence showing that the total charges, including the unloading charges, were just and reasonable; and that there was ample evidence to justify the publication of like charges at New York and Philadelphia.

Wherefore, these intervenors ask that the complaint of the Secretary of Agriculture be dismissed.

Respectfully submitted, Edward K. Goethe, Attorney for Intervening Railroads, 1-2 Dolive Bldg., Orlando, Florida.

Anthony P. Donadio, Francis L. Brown, Alfred W. Hesse, Jr., Paul V. Miller, M. C. Smith, Jr., of Counsel.

[fol. 257] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAILROAD INTERVENORS TO COMPLAINT OF THE CITY OF NEW YORK—Filed April 24, 1953

Come now The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company,

intervenors in support of defendants, and for answer to the complaint of the City of New York herein respectfully state:

1. The allegations of Paragraphs I through IV of the complaint of the City of New York are admitted.

2. The allegations of Paragraph V of the complaint are admitted except the allegations describing the evidence and arguments presented by complainant in the proceedings before the Interstate Commerce Commission which are denied and with the further exception of the last sentence of Paragraph V as to which it is denied that the dismissal of the complaints referred to resulted in unlawful damage or injury to the City of New York.

3. In reply to Paragraph VI of the complaint, these railroads, intervenors in support of defendants, refer to and incorporate herein Paragraphs III through VII of their answer to the principal complaint in this proceeding.

[fol. 258] Wherefore, these intervenors ask that the complaint of the City of New York be dismissed.

Respectfully submitted, Edward K. Goethe, Attorney for Intervening Railroads, 1-2 Dolive Bldg., Orlando, Florida.

Anthony P. Donadio, Francis L. Brown, Alfred W. Hesse, Jr., Paul V. Miller, M. C. Smith, Jr., of Counsel.

[fol. 259] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAILROAD INTERVENORS TO COMPLAINT OF PHILADELPHIA TERMINALS MARKETING ASSOCIATION, THE AUCTION RECEIVERS OF PHILADELPHIA, DAN STOREY, JR., MAX FELDBAUM & SONS, A. CANSELMO, AND B. M. YOUNG—Filed April 24, 1953

Come now The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company,

intervenors in support of defendants, and for answer to the complaint of the Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum & Sons, A. Canselmo, and B. M. Young herein respectfully state:

1. The allegations of Paragraphs 1 through 8 of the complaint are admitted.

2. The allegations in Paragraph 9 are admitted except the second sentence thereof, which is denied.

3. The allegations of Paragraph 10 of the complaint are denied for the reason that these defendants do not know whether or not these intervenors are representative of other receivers of fruits and vegetables at Philadelphia and do not know whether they pay or bear the unloading charges referred to in the complaint.

[fol. 260] 4. In answer to Paragraph 11 of the complaint, these railroads, intervenors in support of defendants, adopt and ask to be incorporated herein Paragraphs III through VII of their Answer to the principal complaint in this cause as if those paragraphs were incorporated herein in full.

Wherefore, these intervenors ask that the complaint of the Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum & Sons, A. Canselmo and B. M. Young be dismissed.

Respectfully submitted, Edward K. Goethe, Attorney for the Intervening Railroads, 1-2 Dolive Bldg., Orlando, Florida.

Anthony P. Donadio, Francis L. Brown, Alfred W. Hesse, Jr., Paul V. Miller, M. C. Smith, Jr., of Counsel.

[fol. 261] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAILROAD INTERVENORS TO COMPLAINT OF THE UNITED FRESH FRUIT AND VEGETABLES ASSOCIATION, IDAHO SHIPPERS ASSOCIATION, INC., NATIONAL ONION ASSOCIATION, AND WESTERN GROWERS ASSOCIATION—Filed April 24, 1953

Come now The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company, intervenors in support of defendants, and for answer to the complaint of The United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association herein respectfully state:

1. The allegations of Paragraphs 1 and 2 of the complaint are admitted.

2. Since Paragraphs 3 through 8 of the complaint seem to be substantially identical with the similarly numbered paragraphs of the complaint filed on behalf of California Citrus League and California Grape and Tree Fruit League, leave is asked to incorporate herein the answers made by these railroads to those paragraphs of that complaint as if they were incorporated herein in full.

[fol. 262] Wherefore, these intervenors ask that the complaint of the United Fresh Fruit and Vegetable Association, Idaho Shippers Association, National Onion Association, and Western Growers Association be dismissed.

Respectfully submitted, Edward K. Goethe, Attorney for Intervening Railroads, 1-2 Dolive Bldg., Orlando, Florida.

Anthony P. Donadio, Francis L. Brown, Alfred W. Hesse, Jr.; Paul V. Miller, M. C. Smith, Jr., of Counsel.

[fol. 263] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAILROAD INTERVENORS TO COMPLAINT OF THE CALIFORNIA CITRUS LEAGUE AND CALIFORNIA GRAPE AND TREE FRUIT LEAGUE—Filed April 24, 1953

Come now The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company, intervenors in support of defendants, and for answer to the complaint of the California Citrus League and California Grape and Tree Fruit League herein respectfully state:

1. The allegations of Paragraphs 1, 2, 3, 4 and 7 are admitted.

2. The allegations of Paragraph 6 are admitted except the last sentence in Paragraph 6(a), the last sentence in Paragraph 6(b) and portions of Paragraphs 6(f) and (g). The portions of 6(f) and (g) which are denied are the allegations relating to the need for delivery at the pier stations, the scope of the line haul rates, the line haul transportation and delivery service, the adequacy of team track facilities at New York and Philadelphia and the scope of the line haul rates. As to those allegations, these defendants allege that the through line haul freight rates do not include all services provided in connection with the fresh fruit and vegetable shipments; that the compensation of the railroads did not include compensation for un-[fol. 264] loading prior to November 1, 1948; that the delivering rail carriers can and do make delivery of shipments of fresh fruits and vegetables consigned to New York, N. Y. at points other than the pier stations; that the unloading by the railroads is a service in addition to the line haul transportation, is not a part of the delivery and is not provided because of the absence of sufficient team tracks on Manhattan Island; that the delivering railroads provide sufficient team tracks to meet all the demands for sufficient facilities on Manhattan; and that the railroads are not

obliged to perform the unloading of this freight free of additional charges.

3. The allegations of Paragraph 8 of the complaint are denied.

4. Answering further, these defendants allege that the Interstate Commerce Commission lawfully approved the present unloading charges which are not unreasonable, discriminatory or otherwise unlawful; that the Commission properly dismissed the complaints in Docket Nos. 31105 and 31106; that the hearings in I. & S. 5500 gave full opportunity to these complainants to be heard as to the proper level of unloading charges; that these defendants fully sustained their burden of proof in the proceedings before the Commission; that there was ample evidence in the record before the Commission that the total charges assessed on these shipments, including both line haul rates and unloading charges, were just and reasonable; that the Commission considered all the evidence before it in I. & S. Docket 5500 and that that evidence fully justified its finding that the charges which it approved are just and reasonable; and that carriers may justly and lawfully assess additional charges for the unloading service.

[fol. 265] Wherefore, these intervenors ask that the complaint of the California Citrus League and California Grape and Tree Fruit League be dismissed.

Respectfully submitted, Edward K. Goethe, Attorney for Intervening Railroads, 1-2 Dolive Bldg., Orlando, Florida.

Anthony P. Donadio, Francis L. Brown, Alfred W. Hesse, Jr.; Paul V. Miller, M. C. Smith, Jr., of Counsel.

[fol. 266] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAILROAD INTERVENORS TO COMPLAINT OF NEW YORK FRUIT AUCTION CORPORATION AND THE UNITED FRUIT BUYERS' ASSOCIATION, INC.—Filed April 24, 1953

Come now The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company, intervenors in support of defendants, and for answer to the complaint of the New York Fruit Auction Corporation and The United Fruit Buyers' Association, Inc. herein respectfully state:

1. These intervenors admit the allegations in Paragraphs I through III of the complaint.

2. The allegations of Paragraph IV of the complaint are denied except that it is admitted that these intervenors are members of the Industry Committee for the Improvement of Washington Market and that that committee participated in the proceedings before the Interstate Commerce Commission referred to.

3. In answer to Paragraph V of the complaint, these defendants adopt and ask to be incorporated herein Paragraphs III through VII of their answer to the principal complaint in this cause as if those paragraphs were incorporated herein in full.

[fol. 267] Wherefore, these intervenors ask that the complaint of the New York Fruit Auction Corporation and The United Fruit Buyers' Association, Inc. be dismissed.

Respectfully submitted, Edward K. Goethe, Attorney for Intervening Railroads, 1-2 Dolive Bldg., Orlando, Florida.

Anthony P. Donadio, Francis L. Brown, Alfred W. Hesse, Jr.; Paul V. Miller, M. C. Smith, Jr., of Counsel.

[fol. 268] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF RAILROAD INTERVENING AS DEFENDANTS—Filed April 24, 1953

Come now The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company, intervening defendants in this cause, and for answer to the complaint herein respectfully state:

I. These intervenors admit the allegations in Paragraphs 1, 2, 3 and 4 of the complaint except for the allegations in Paragraph 2(f) as to which these intervenors deny that complainants are representative of other shippers; deny that complainants pay and bear the unloading charges; and further deny that those charges are paid prior to delivery of the goods.

II. These intervenors neither admit nor deny the allegations of Paragraph 5 of the complaint since those allegations are argumentative only and therefore require no answer.

III. These intervenors admit the allegations of Paragraph 6(c), 6(d), 6(e) and 6(h) through 6(n). The allegations in subparagraphs 6(a), 6(b), 6(f) and 6(g) are denied for the reason that the said allegations are only partially true, are inferences by the plaintiffs from the facts and are [fol. 269] in substance and effect in error. For a more correct statement of the matters referred to in these subparagraphs, these intervenors respectfully refer to the reports of the Commission, namely, Exhibits A and B attached to the complaint.

IV. These intervenors admit the allegations of Paragraph 7 of the complaint.

V. These intervenors deny the allegations of Paragraph 8 of the complaint.

VI. Answering further, these intervenors allege that the findings and conclusions in the reports of the Commission assailed herein were and are fully supported and justified

by the evidence submitted in the proceedings out of which they arose; that those reports accurately state the facts relating to the reasonableness of the charges under investigation; that they adequately state the reasons for the Commission's decision; that the ultimate conclusions are fully justified by the reasons so stated; that all the matters involved in those proceedings are matters purely within the exclusive jurisdiction of the Interstate Commerce Commission; and that the orders complained of were not arbitrary, unjust, unsubstantiated by evidence, or contrary to relevant evidence.

VII. As a further and separate defense, these railroads further allege that the orders of the Commission dismissing the complaints of the Florida Citrus Commission, et al., Dockets 31105 and 31106 were proper and wholly within the discretion of the Commission in refusing again to consider matters only recently decided. As to the orders in Unloading Fresh Fruits and Vegetables at New York and Philadelphia, I & S 5500, 286 I. C. C. 119, these intervenors say that since the orders in those proceedings required only that the proposed tariffs be cancelled and since those tariffs have been cancelled, there is no action which the Court might annul or enjoin.

[fol. 270] Wherefore, these intervenors pray that the relief sought in the complaint be denied and the complaint be dismissed.

Respectfully submitted, Edward K. Goethe, Attorney for Intervening Railroads, 1 & 2 Dolive Building, P. O. Box 1973, Orlando, Florida.

Anthony P. Donadio, Francis L. Brown, Alfred W. Hesse, Jr., Paul V. Miller, M. C. Smith, Jr., of Counsel.

[fol. 271] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES—Filed May 26, 1953

Now comes the United States, a defendant herein, and in answer to the complaint says:

I

By motion heretofore filed in this case, the Secretary of Agriculture of the United States has sought to intervene as a plaintiff and to have the orders and reports of the Interstate Commerce Commission here involved set aside, and leave so to intervene has been granted by the Court.

II

A situation is thus presented where one Government agency is a plaintiff in this case and another Government agency, the Interstate Commerce Commission, is a defendant. Under these circumstances, and in view of the fact that both Government agencies will have an opportunity to present their respective positions through their own counsel, it has been concluded that the United States should remain neutral in this case.

[fol. 272] III

Accordingly, the United States neither admits nor denies any of the allegations of the complaint.

James E. Kilday, Kenneth R. Harkins, Special Assistants to the Attorney General, Department of Justice, Washington, D. C., Attorneys for the United States of America, defendant; Stanley N. Barnes, Assistant Attorney General, Herbert S. Phillips, United States Attorney.

[fol. 273] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE UNITED STATES TO THE COMPLAINTS OF THE SECRETARY OF AGRICULTURE, THE CITY OF NEW YORK, THE PORT OF NEW YORK AUTHORITY, CALIFORNIA CITRUS LEAGUE AND CALIFORNIA GRAPE AND TREE FRUIT LEAGUE, PHILADELPHIA TERMINAL MARKETING ASSOCIATION, ET AL., NEW YORK FRUIT AUCTION CORPORATION AND UNITED FRUIT BUYERS' ASSOCIATION, INC., AND THE UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, ET AL.—Filed May 26, 1953

For answer to the complaints herein filed by the Secretary of Agriculture, the City of New York, the Port of New York Authority, California Citrus League and California Grape and Tree Fruit League, Philadelphia Terminal Marketing Association, et al., New York Fruit Auction Corporation and United Fruit Buyers' Association, Inc., and the United Fresh Fruit and Vegetable Association, et al., as intervening plaintiffs, the defendant United States says:

I

By motion heretofore filed in this case, the Secretary of Agriculture of the United States has sought to intervene as a plaintiff and to have the orders and reports of the [fols. 274-275] Interstate Commerce Commission here involved set aside, and leave so to intervene has been granted by the Court.

II

A situation is thus presented where one Government agency is a plaintiff in this case and another Government agency, the Interstate Commerce Commission, is a defendant. Under these circumstances, and in view of the fact that both Government agencies will have an opportunity to present their respective positions through their own counsel, it has been concluded that the United States should remain neutral in this case.

II-

Accordingly, the United States neither admits nor denies any of the allegations of the complaints.

James E. Kilday, Kenneth R. Harkins, Special Assistants to the Attorney General, Department of Justice, Washington, D. C., Attorneys for the United States of America, defendant; Stanley N. Barnes, Assistant Attorney General; Herbert S. Phillips, United States Attorney.

[fol. 276] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING MOTIONS TO INTERVENE—April 13, 1953

This cause came on for hearing upon motions to intervene filed by The Secretary of Agriculture of the United States, The City of New York, The Port of New York Authority, California Citrus League, California Grape and Tree Fruit League, Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, B. M. Young, New York Fruit Auction Corporation, United Fruit Buyers Association, Inc., United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association and it appearing that each of said parties is entitled to intervene [fol. 277] as of right pursuant to Section 2323, Title 28 U. S. Code, and that the said motions to intervene conform to Rule 24, and there being no objection to said motions,

It is thereupon Ordered that said motions to intervene be and the same are hereby granted, and the above named movants are made parties plaintiff to this proceeding.

It is further Ordered that J. F. Donelan, Esq., Preston B. Kavanagh, Esq., Dickson R. Loos, Esq., and Walter Hoffman, Esq., as attorneys for California Citrus League and California Grape and Tree Fruit League; Sidney Gold-

stein, Esq., Wilbur LaRoe, Jr., Esq., Arthur L. Winn, Jr., Esq., and Samuel H. Moerman, Esq., as attorneys for The Port of New York Authority; Denis M. Hurley, Esq., James J. Thornton, Esq., and G. Gary Sousa, Esq., as attorneys for The City of New York; Earl Jay Gratz, Esq., David B. Fitzgerald, Esq., and T. Ewing Montgomery, Esq., as attorneys for Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, and B. M. Young; Edward I. Kaplan, Esq., as attorney for New York Fruit Auction Corporation and United Fruit Buyers' Association, Inc.; and Wilmer A. Hill, Esq., as attorney for United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association, are hereby authorized to appear and participate herein as counsel of record for the respective intervening plaintiffs as appears upon the aforesaid motions to intervene.

Done and Ordered at Tampa, Florida, this 13th day of April, A. D. 1953.

(S.) William J. Barker, United States District Judge.

[fol. 278] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING MOTION TO INTERVENE—May 4, 1953

This cause came on to be heard upon the motion of The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company, and Reading Company, for leave to said companies to intervene and be made parties defendant in the above entitled suit, and it appearing that each of said parties is entitled to intervene as of right pursuant to Section 2323, Title 28, U. S. Code, and that the motion to intervene conforms to Rule 24 of the Federal Rules of Civil Procedure, and there being no objection to said motion;

It is thereupon Ordered that said motion to intervene be and the same is hereby granted, and the above named movants are made parties defendant to this proceeding; and it is further

[fol. 279] Ordered that the several answers attached to the motion to intervene filed by said movants shall stand as and for the answers of the said intervening defendants, namely, The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company, and Reading Company, to the complaints of the original and intervening plaintiffs herein respectively; and it is further

Ordered that Edward K. Goethe, Esq., Anthony P. Donadio, Esq., Francis L. Brown, Esq., Alfred W. Hesse, Jr., Esq., Paul V. Miller, Esq., and M. C. Smith, Jr., Esq., are hereby authorized to appear and participate as counsel of record for the intervening defendant railroads herein.

Done and Ordered at Orlando, Florida, this 4th day of May, A. D. 1953.

(S.) William J. Barker, United States District Judge.

[fol. 280] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, Chase and Company, Nevins Fruit Company, and Dr. P. Phillips Cooperative, Plaintiffs,

versus

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, Defendants

FINAL JUDGEMENT—August 31, 1953

The above styled cause having been submitted as on final hearing, and the Court having heard the parties, after due

notice, it is upon consideration of the record and arguments:

Ordered and Ajudged:

1. The relief sought by plaintiffs is denied, and the Complaint is dismissed at the cost of plaintiffs.

Done and Ordered, August 31, 1953.

(S.) Louie W. Strum, U. S. Circuit Judge (S.) William J. Barker, U. S. District Judge, Dozier A. DeVane, U. S. District Judge.

[fol. 281] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, Chase and Company, Nevins Fruit Company, and Dr. P. Phillips Cooperative, Plaintiffs,

versus

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, Defendants

DISSENTING OPINION—August 31, 1953

DEVANE, District Judge, dissenting:

The record in this case discloses it is the desire of the carriers affected to have the same unloading practices in effect at Philadelphia that are in effect at New York, and I will, therefore, confine this dissent to the situation at New York.

In my opinion the majority enlarges the authority of the Interstate Commerce Commission over specific freight rates to unprecedented and unauthorized limits. The Court in effect holds our review of the order of the Commission in this case is limited to the mere matter of due process; i. e., notice and hearing. In reaching this conclusion the court

brushes aside the following undisputed factual questions which, in my opinion, are controlling of the case:

1. Unloading at New York was originally inaugurated by the carriers concerned for their own convenience and benefit.

2. It is now and always has been the most economical way the carriers may make deliveries of freight at New York.

3. The line-haul rates were originally established to include and have always included compensation for unloading costs at New York. The Interstate Commerce Commission has so held in numerous cases.

4. When the unloading charges were made effective by the Interstate Commerce Commission the line-haul rates were then, and are now, in excess of just and reasonable rates based upon the cost of transporting and unloading fruits and vegetables at New York.

The first three points stated above are so thoroughly cov- [fol. 282] ered and completely presented by the report on rehearing proposed by Russell M. Brown and J. M. Walsh, Interstate Commerce Commission Examiners, and in the second report on further rehearing proposed by J. M. Walsh, Examiner, (Exhibits H and I to the complaint) that the Court considers it quite unnecessary to enlarge upon what the Examiners say on these points in the two reports. They concluded in each report that the carriers failed to meet the burden of proof that the assail charges were just and reasonable, and therefore failed to meet the requirements of Section 15(7) of the Interstate Commerce Commission Act. Having reached this decision, they concluded in the first report that it was unnecessary to consider whether there was also a violation of Sections 2 and 3 of the Act. In the second report Examiner Walsh also found and held that the proposed unloading charges were in violation of Section 3(1) of the Act.

In my opinion the carriers not only failed to meet the requirements of Section 15(7) of the Act, but the evidence in the case also clearly establishes a violation of Section 2 and 3(1) of the Act. Unloading is performed by the carriers of almost all perishable freight consigned to New

York. The unloading charges are made applicable only to fruits and vegetables, while other similar perishable products such as butter, butter solids, cheese, eggs, dressed poultry, fresh meat, fish, oysters and raw milk, are unloaded by the carrier without the imposition of any unloading charges. This, in my opinion, constitutes a clear violation of Sections 2 and 3(1) of the Act.

The fourth point enumerated above was not considered by the examiners or the Interstate Commerce Commission when this case was before the Commission. The examiners merely held that under Section 15(7) of the Act, the obligation rested upon the carriers to show the reasonableness of the line-haul rates and it was because of the carriers' failure to meet this burden that they recommended the proposed unloading charges be cancelled. The Interstate Commerce Commission simply brushed aside the question of the reasonableness of the line-haul rates and decided the case solely on the reasonableness of the unloading charges.

At the time the Commission had this case under consideration it also had under consideration a general application for an increase in freight rates (interstate and intrastate) [fol. 283] throughout the United States to meet rising costs and diminishing passenger revenue. As a result of the application for this general increase the Commission allowed a thirty per cent (30%) increase in freight rates, chiefly to make up for passenger operating deficits. 264 I. C. C. 695; 266 I. C. C. 537; 269 I. C. C. 33; 270 I. C. C. 81, 93, 403. The legality of this action on the part of the Commission was challenged in *King, et al.* vs. *United States of America, et al.*, 344 U. S. 254. On the record in that case the carriers frankly conceded that the railroads of this country by and large are making a substantial profit out of their overall freight service, and that considered alone, increases in freight rates could not have been justified in that case on the ground that the railroads needed the additional revenue to pay the cost of rendering freight services and a fair return on the property devoted to such services. The difference between that case and this case is of grave importance as to the power of the Interstate Commerce Commission over freight rates. In the former case there was a general increase made in freight rates to

cover the heavy losses resulting from passenger operations. Congress having authorized such action and the Interstate Commerce Commission having taken such action, the Court did not have the authority to override the same. In this case, however, the carriers have limited their efforts to secure increases in rates to a small segment of freight transportation and the Commission by its order has cast a burden upon this small segment of transportation that is not placed upon any other commodities. To hold that the Interstate Commerce Commission has the authority under the Interstate Commerce Act to so discriminate against frutis and vegetables or any other classes of commodities is to vest in the Commission authority not to be found in the Interstate Commerce Act. The decision in *King* vs. *United States*, supra, is so far reaching in its effect upon freight rates that a grave duty rests upon the Courts to restrict the carriers and the Commission to the principles announced in that case and where, as in this case, it appears that the line-haul rates are in excess of just and reasonable rates additional accessural charges limited to particular classes of freight should not be countenanced.

Assuming the carriers are entitled to additional compensation for the cost of unloading freight at New York and Philadelphia, their remedy, under the Interstate Commerce [fol. 284] Act, is to secure it by agreement with connecting carriers affected or make application to the Commission for a greater division of the line-haul rates to cover the needed additional costs instead of loading such costs on the farmers of this country.

In my opinion, the order of the Commission of May 7, 1952, 286 ICC 119, clearly violates Sections 2, 3(1) and 15(7) of the Interstate Commerce Act and, for this reason, is illegal and should be set aside.

(S.) Dozier A. DeVane, District Judge.

[fol. 285] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF FLORIDA, ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, Chase and Company, Nevins Fruit Company, and Dr. P. Phillips Cooperative, Plaintiffs,

versus

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, Defendants

Suit to enjoin and set aside orders of Interstate Commerce Commission

MAJORITY OPINION—Filed August 31, 1953

Before Strum, Circuit Judge, and Barker and DeVane, District Judges

STRUM, Circuit Judge:

The purpose of this suit is to set aside orders of the Interstate Commerce Commission relating to unloading charges on fresh fruits and vegetables at New York and Philadelphia, entered pursuant to the Commission's report on re-hearing, dated May 7, 1952, 286 I.C.C. 119.[1] See also 272 I.C.C. 648.

Plaintiffs are shippers of said commodities, and others interested in the marketing thereof. The Secretary of Agriculture of the United States intervened, as did also many marketing, transportation and terminal organizations, and public Commissions. The cause is submitted as on final hearing.

Substantially all carload shipment of fresh fruits and vegetables destined to New York City from the South and

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[1] Order dated May 7, 1952, in Investigation & Suspension Docket No. 5500; and orders dated December 15, 1952, in Florida Citrus Commission v. B. & O. R. R. Co., Docket Nos. 31105 and 31106.

West are brought to the Jersey side of the Hudson River, and the freight cars, with there cargoes intact, are then ferried across the river on car floats. There are two methods of delivery on the New York side. One is to switch the railroad cars from the car floats to team tracks located on land in lower Manhattan, where the consignees unload [fol. 286] the railroad cars and place the cargo directly onto trucks. There is no separate charge for these deliveries.

By the other method, with which we are here concerned, the railroad cars are not switched to land tracks, but remain on the car floats which are placed alongside unloading piers where the carriers unload the cars, placing the contents on the floor of the pier station, where they are picked up by the consignees. The consignees are not allowed to unload the freight cars themselves, as they do on the team tracks, as it is physically impossible to place the consignee's trucks alongside the car floats. The carriers therefore unload the cars, the consignees having access to shipments only after they have been unloaded and placed on the floor of the pier stations. Approximately 75% of the total traffic is handled in this manner, as the team tracks can accom-odate only about 25% of the traffic, and it is not feasible to expand them.

For this unloading service the railroads, since November 1, 1948, have been authorized to make additional charges, over and above the line haul rates, at designated pier stations in Manhattan, First those proposed by the railroads and approved by the Commission, October 4, 1948, effective November 1, 1948, 272 I.C.C. 648, and later the lower rates approved by the Commission, May 7, 1952, 286 I.C.C. 119, here under attack. No delivery charges are imposed for other types of commodities unloaded at the pier stations in like manner as fresh fruits and vegetables. Prior to November 1, 1948, the carriers also unloaded fresh fruits and vegetables at pier stations without additional charges.

In Philadelphia, unloading operations are generally similar to those at New York, except that no car floatage is now performed, and the team tracks are more adequate, but there are designated stations at which the carrier performs the unloading before the consignee has access to the goods.

When certain carriers proposed to establish separate unloading charges at pier stations, effective June 1, 1947, many shippers, including most of the plaintiffs here, protested. The Commission thereupon suspended operation of the schedules to December 31, 1947, and ordered an investigation to determine the lawfulness of the proposed charges. This proceeding is known as Investigation & Suspension Docket No. 5500, the final order in which, dated May 7, 1952, is one of the orders here under attack. See 286 I.C.C. 119.

[fol. 287] Following a hearing before a Commission examiner, at which much evidence was presented by the carriers and opposing parties, and after oral argument and re-arguments, the Commission on October 4, 1948, issued its report in which it found that the proposed unloading charges were just and reasonable. 272 I. C. C. 648. The Commission thereupon vacated the Suspension order and authorized unloading charges of $1.95, $2.28 and $2.60 per net ton, effective November 1, 1948, on designated groups of said commodities at designated pier stations, in addition to the through line haul rates.

The Commission concluded that these additional charges for unloading service are in substantially the same category as those for switching, transit, refrigeration, and other specific services for which charges are authorized, and that the then expense of unloading was such that the carriers should no longer be required to furnish the service without compensation.

Upon the petitions of many protestants, the Commission thereafter reopened the proceedings for a rehearing. Extensive further evidence was taken by two Commission examiners, who recommended that the charges be held unlawful, but the Commission overruled these recommendations, and entered its final report on May 7, 1952, in which it held that unloading costs should be borne in part by shippers and in part by the carriers, and that not exceeding $1.05, $1.35 and $1.65 per ton would be reasonable charges to be paid by shippers. The Commission thereupon cancelled the existing higher charges, "without prejudice to the establishment of charges in conformity with the views expressed" in the report of May 7, 1952. The charges thus

approved represented only a portion of the actual unloading costs.

On September 22, 1952, certain shippers again attacked the unloading charges approved on May 7, 1952, Docket No. 31105 referring to New York and Docket No. 31106 referring to Philadelphia, asserting that the charges were unjust and unreasonable, enabling the carriers to make two charges for a single service. The Commission dismissed these proceedings by its order of December 15, 1952, which is also here under attack, holding that these petitions assailed the order on substantially the same grounds previously considered and overruled on May 7, 1952 in I. & S. Docket No. 5500.

In this action, brought pursuant to 28 U.S.C.A. 1336, 1337, 1398, 2284 and 2321-25, plaintiffs seek to enjoin and set aside the orders above mentioned. They contend that [fol. 288] the line haul rate includes delivery to the consignee at destination, that no additional charge for unloading is justified when no additional service is rendered, and that none is rendered here. Plaintiffs further contend that in authorizing these charges, the Commission acted arbitrarily, unreasonably, unlawfully and contrary to the evidence; that the Commission could not consistently approve the additional unloading charges without first examining the line haul rates as to their adequacy to cover the unloading charges; that plaintiffs were denied an opportunity to be heard as to the justification for and reasonableness of the unloading charges of $1.05, $1.35 and $1.65, which were finally allowed; and that the Commission failed to give effect to sec. 15(7) of the Interstate Commerce Act, which places the burden of proof in these matters upon the carriers.

The fact finding and policy making authority in these matters is the Interstate Commerce Commission, in whom Congress has reposed the duty and authority to determine whether charges of this character are appropriate, reasonable, and just. Arizona Grocery Co. v. A. T. & S. F. R. Co., 284 U. S. 370 76 L. Ed. 348; Penn. R. Co. v. International Coal Mining Co., 230 U. S. 184, 196, 57 L. Ed. 1446, 1451; Mississippi Valley Barge Co. v. United States, 292 U. S. 282, 78 L. Ed. 1260. It is not our function to review the

Commission for mere error, nor are we authorized to reverse its findings even though, as original finders of fact, we might have reached a different conclusion on the evidence. It is for us to consider and decide only whether the Commission has acted within its statutory authority, has proceeded in accordance with the essential requirements of due process, has acted upon adequate findings, and whether in the record considered as a whole there is substantial evidence to support those findings. Rochester Tel. Corp. v. United States, 307 U. S. 125, 139, 83 L. Ed. 1147, 1157; I. C. C. v. Inland Waterways Corp. 319 U. S. 671, 691, 87 L. Ed. 1655, 1668; I. C. C. v. Illinois Cent. R. Co., 215 U. S. 452, 470, 54 L. Ed. 280, 288.

The point at which a carrier's line haul service begins or ends is a question of fact to be determined by the Commission, not by the courts. The commissions's findings on that question will not be disturbed by the courts if supported by evidence. United States v. Wabash R. Co., 321 U. S. 403, 408, 88 L. Ed. 827, 831; I. C. C. v. Hoboken R. Co., 320 U. S. 368, 88 L. Ed. 107; United States v. American Tin Plate Co., 301 U. S. 402, 81 L. Ed. 1186; United States v. Pan Amer. Pet. Co., 304 U. S. 156 82 L. Ed. 1262; B. & O. R. Co. v. United States, 305 U S. 507, 525, 83 L. Ed. 318, 329; Swift & Co. v. United States, 316 U. S. 216, 86 L. Ed. 1391; A. T. & S. F. R. Co. v. United States, 295 U. S. 193, [fol. 289] 79 L. Ed. 1382; Armour & Co. v. Alton R. Co., 312 U. S. 195, 85 L. Ed. 771.

Whether a terminal service, such as this unloading operation, shall in the circumstances involved be treated as in addition to, or as a part of, the service covered by the line haul rate, is a question upon which the findings of the Commission are conclusive, if supported by substantial evidence. Adams v. Mills, 286 U. S. 397, 410, 76 L. Ed. 1184, 1193. In the last cited case, the additional charge was disapproved. Although the historical aspects of that case bear a noticeable resemblance to this, and the additional charges were there disallowed, those are circumstances to be resolved by the Commission. A prior existing custom of performing the additional service without charge is not controlling. United States v. Smelting Co., 339 U. S. 186, 94 L. Ed. 750.

It is not essential that the Commission first review in detail the line haul rates before allowing the unloading charges under consideration. What the Commission is really deciding here is, not the adequacy or inadequacy of line haul rates to cover the unloading service, but where the carrier's line haul service ends, and whether unloading is a justifiable additional service, of value to the consignee, for which he should pay at least a part of the cost. As we have seen, determination of these matters is confided by Congress to the Commission, whose decision, if supported by substantial evidence, is conclusive on the courts, as these are discretionary administrative matters in a specialized field, recognized as such by Congress. While the Commission is not precluded from considering the through rate, it is not *required* to consider it in determining the reasonableness of a separately stated accessorial charge. Barringer v. United States, 319 U. S. 1, 87 L. Ed. 1171, where the Supreme Court said: "But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism."

The Commission has found that the level of line haul rates to New York and Philadelphia is no higher than the rates to other consumer points where shippers unload or where charges are assessed for unloading. It has also found that unloading is an additional service, wholly distinct from delivery; that pier station unloading by the carrier in New [fol. 290] York is essential, as the team tracks are inadequate, can not be enlarged, and there are no physical means by which the consignee's trucks may reach the car floats; that this method of unloading saves the payment of switching charges by the consignee, avoids traffic congestion, and facilitates deliveries; and that it is beneficial to consignees, for the additional reason that in taking delivery on the pier station floor, the consignee has the advantage of displaying the entire contents of a car to prospective buyers, and of using the pier station facilities as a sales place. Comparable benefits accrue at Philadelphia.

Based upon these findings, which are amply supported by evidence, the Commission found that the line haul service terminated when the cars reached the pier station, just as they found it terminated at the interchange yards in the Tin Plate and Pan American Petroleum cases, supra, in which the Supreme Court accepted the Commission's findings as conclusive. The evidence also supports the Commission in finding that unloading by the carrier is a desirable and justifiable accessorial service, of value to the consignee, and that he should pay a part of the costs, and that conditions have materially changed since the time when the carrier performed that service without charge.

Plaintiffs assert that they were not given an opportunity to be specifically heard upon the reasonableness of the reduced rates of $1.05, $1.35, and $1.65 per ton, and claim that they were thereby denied due process. But the Commission had just concluded, not one but two, exhaustive and comprehensive investigations of the entire subject of unloading charges at these points, based upon the higher rates then in effect, during which plaintiffs, and others, were afforded a full opportunity to be heard upon all phases of the subject. As a result of these hearings, the Commission found the existing rates too high, but that the reduced rates above mentioned would be reasonable, and that the charge was justified as for an additional service.

Instead of merely setting aside the old rates, thus leaving the matter undetermined, the Commission brought the controversy to a close by setting the old rates aside "without prejuduce to the establishment of charges in conformity with the views expressed herein," that is, in the Commission's report. The carriers then put the reduced rates into effect.

Having just completed a thorough investigation of the [fol. 291] entire subject, during which plaintiffs were fully heard, it would have been a work of supererogation to conduct a further hearing upon these lower rates, the reasonableness of and justification for which was already shown by the evidence. It was clearly within the Commission's power not only to condemn the then existing rates as unreasonable, but at the same time and upon the evidence already taken to fix rates that would be just and reasonable.

In this, there was no denial of due process to plaintiffs. Plaintiffs were fully heard upon the entire matter. The situation is the same in principle as where a plaintiff demands $1,000 of a defendant, the court finding that he is not entitled to $1,000 but that on the evidence he is entitled to $500, and awards that sum. In these circumstances the defendant could not complain of a denial of due process because he was not again heard on his liability for $500. Akron C. & Y. Ry. Co. v. United States, 22 Fed. (2) 199, 203.

Nor does it appear to us that the Commission erroneously relieved the carriers of the burden of proof cast upon them in these matters by sec. 15(7) of the Interstate Commerce Act. The Commission's "notice" of October 10, 1950, that the "record is deficient" as to certain evidence, and assigning the case for futher hearing as to the comparative cost of team track and platform delivery, merely extended the evidence into an additional field of inquiry. Nothing appears in this procedure which tends to shift the burden of proof to others than the carriers.

In disposing of this matter, the Commission has clearly acted within its statutory authority; its proceedings have been conducted consistently with due process; its findings are adequate and supported by substantial evidence. In these circumstances, the relief sought by plaintiffs must be denied, and the complaint dismissed at the cost of plaintiffs.

Dismissed.

(S.) Louie W. Strum, U. S. Circuit Judge. (S.) William J. Barker, U. S. District Judge. Dozier A. DeVane, U. S. District Judge.

[fol. 292] [Filed endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed October 29, 1953

The Secretary of Agriculture of the United States, being an intervening plaintiff in this action and considering himself aggrieved by the final order, judgment, and decree of

this Court entered on August 31, 1953, hereby petitions that an appeal be allowed to the Supreme Court of the [fol. 293] United States from said final order, judgment, and decree, and from each and every part thereof; that a citation be issued according to law; and that, because of the great expense involved in preparing copies of the record which must be submitted to the Supreme Court, the original certified copies of proceedings before the Interstate Commerce Commission filed in evidence herein be transmitted to the Supreme Court; and that the material parts of the record, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, Karl D. Loos, Solicitor; Neil Brooks, Associate Solicitor; Donald A. Campbell, Attorneys for the Secretary of Agriculture.

Dated: October 23, 1953, Washington, D. C.

[fol. 294] In the United States District Court

[Title omitted]

Assignment of Errors and Prayer for Reversal—October 23, 1953

The Secretary of Agriculture, intervening plaintiff in the above-entitled action, in connection with his appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which he will rely in prosecuting his appeal from the final order, judgment, and decree of the District Court entered on August 31, 1953.

[fol. 295] The District Court erred:

1. In holding and concluding that the Commission has authority to approve charges by the delivering railroad carriers, for unloading fruits and vegetables at New York and Philadelphia, without determining whether the line-haul rates plus the unloading charges, *i. e.*, the entire charges for

the transportation, including delivery, are just and reasonable.

2. In holding and concluding that the unloading charges on fruits and vegetables at New York are not an unjust discrimination and an undue and unreasonable prejudice or disadvantage in violation of sections 2 and 3(1) of the Interstate Commerce Act inasmuch as no similar charge is imposed on any other freight unloaded by the carriers at New York, including other similar perishable agricultural commodities, *e. g.*, butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk.

3. In holding and concluding that substantial evidence on the record as a whole supports the findings by the Commission.

4. In holding and concluding that adequate findings support the orders by the Commission.

5. In holding and concluding that the orders of the Commission, establishing identical unloading charges at New York and Philadelphia even though it is conceded that unloading costs at Philadelphia are substantially lower than at New York, are supported by substantial evidence and adequate findings.

6. In holding and concluding that the Commission found: (a) that unloading is an additional service, wholly distinct from delivery; (b) that the method of unloading at New York saves the payment of switching charges "by the consignee"; and (c) that the line-haul service, prior to November 1, 1948, terminated when the cars reached the pier station.

7. In failing to suspend, enjoin, annul, and set aside the orders of the Commission issued on October 4, 1948, May 7, 1952, and December 15, 1952.

Wherefore, the Secretary of Agriculture of the United States petitions that the final order, judgment, and decree of the District Court be reversed, that judgment be entered suspending, enjoining, annulling, and setting aside the [fol. 296] orders issued by the Interstate Commerce Commission on October 4, 1948, and May 7, 1952, in Investigation and Suspension Docket No. 5500, and on December 15, 1952, in Investigation and Suspension Dockets No. 31105

and 31106, and for such other relief as the Court may deem proper.

Respectfully submitted, Karl D. Loos, Solicitor; Neil Brooks, Associate Solicitor; Donald A. Campbell, Attorneys for the Secretary of Agriculture.

Dated: October 23, 1953. Washington, D. C.

[fols. 297-332] Citation in usual form showing service, omitted in printing.

[fols. 333-334] Statement Required by Paragraph 2, Rule 12, of the Rules of the Supreme Court—(Omitted in Printing)

[fol. 335] [File endorsement omitted]

In the United States District Court

[Title omitted]

Petition for Appeal—Filed October 29, 1953

Considering themselves aggrieved by the final judgment of this Court, entered on August 31, 1953, Florida Citrus Commission, Growers and Shippers League of Florida, Chase and Company, Nevins Fruit Company, Dr. P. Phillips Cooperative, The City of New York, The Port of New York Authority, California Citrus League, California Grape and Tree Fruit League, Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, B. M. Young, New York Fruit Auction Corporation, United Fruit Buyers' Association, Inc., United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and [fol. 336] Western Growers Association, plaintiffs and intervening plaintiffs herein, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final judgment; that citation be issued in accordance with law; that an order be made with respect to the appeal

bond and the amount thereof; that the original certified copies of proceedings before the Interstate Commerce Commission filed in evidence herein be transmitted to the Supreme Court; and that the material parts of the record, duly authenticated, be sent to the Supreme Court in accordance with the rules in such case made and provided.

Respectfully submitted, (S.) M. W. Wells, Maguire, Voorhis & Wells, 1007 Florida Bank Building, Orlando, Florida, Attorney of record for the Plaintiffs and Intervening Plaintiffs Named.

Florida Citrus Commission, Growers and Shippers League of Florida, Chase and Company, Nevins Fruit Company, and Dr. P. Phillips Cooperative, M. W. Wells, of Counsel, Maguire, Voorhis & Wells, 1007 Florida Bank Building, Orlando, Florida.

The City of New York, Dennis M. Hurley, Corporation Counsel; James J. Thornton, G. Gary Sousa, Sidney Brandes, Municipal Building, New York, N. Y.

California Citrus League, California Grape and Tree Fruit League, John F. Donelan, Preston B. Kavanaugh, Dickson R. Loos, 707 Munsey Building, Washington 4, D. C.; Walter Hoffman, Balboa Building, San Francisco, California.

The Port of New York Authority, Sidney Goldstein, General Counsel; Francis A. Mulhern, 111 Eighth Avenue, New York 11, N. Y.; Wilbur La Roe, Jr., Arthur L. Winn, Jr., Samuel H. Moerman, Investment Building, Washington 5, D. C.

New York Fruit Auction Corporation, United Fruit Buyers' Association, Inc., Edward I. Kaplan, 280 Broadway, New York, N. Y.; Julius Blumenfeld, 320 Broadway, New York, N. Y.

Philadelphia Terminals, Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, and B. M. Young, Earl J. Gratz, David B. Fitzgerald, 1421 Chestnut Street, Philadelphia, Pa.; T. Ewing Montgomery, 123 South Broad Street, Philadelphia, Pa.

United Fresh Fruit and Vegetable Association, Idaho Shippers Association, National Onion Association, and Western Growers Association, Wilmer A. Hill, Ames, Hill & Ames, Transportation Building, Washington, D. C.

[fol. 337] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—October 28, 1953

Florida Citrus Commission, Growers and Shippers League of Florida, Chase and Company, Nevins Fruit Company, Dr. P. Phillips Cooperative, The City of New York, The Port of New York Authority, California Citrus League, California Grape and Tree Fruit League, Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, B. M. Young, New York Fruit Auction Corporation, United Fresh Fruit Buyers' Association, Inc., United Fresh Fruit and Vegetable Association, Idaho Shippers Association Inc., National Onion Association, Western Growers Association, and The Secretary of Agriculture of the United States, all of the plaintiffs and intervening plaintiffs herein, having made and filed their petitions praying for an appeal to the Supreme Court of the United States from the final judgment of this Court entered in this cause on August 31, 1953, and having presented and filed their assignments of errors and jurisdictional and other statements pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided,

Now, Therefore, It is hereby Ordered that said appeal be and the same is hereby allowed as prayed for.

It is further Ordered that the appeal bond may be executed by Growers and Shippers League of Florida, one of the plaintiffs herein, and that the amount thereof be and the same is hereby fixed in the sum of Two Hundred Fifty Dollars with good and sufficient surety, and shall be conditioned as may be required by law.

It is further Ordered that citation shall issue in accord-
[fol. 338] ance with law, and that the Clerk of this Court do transmit to the Clerk of the Supreme Court of the United States the original certified copies of proceedings before the Interstate Commerce Commission on file herein together with duly authenticated transcript of record of proceedings before this Court as provided by the rules.

Done and Ordered this 28th day of October, 1953.

(S.) Dozier A. DeVane, U. S. District Judge.

[fol. 339] Citation in usual form showing service omitted in printing.

[fol. 340] Cost-Bond on Appeal for $250.00 approved and filed October 29, 1953 omitted in printing.

[fols. 341-371] Statement Directing Attention to Provisions of Paragraph 3 of Rule 12 of the Rules of the Supreme Court (omitted in printing)

[fol. 372] [File endorsement omitted]

In the United States District Court

[Title omitted]

Assignment of Errors—Filed October 29, 1953

The Florida Citrus Commission, Growers and Shippers League of Florida, Chase and Company, Nevins Fruit Company, Dr. P. Phillips Cooperative, The City of New York, The Port of New York Authority, California Citrus League, California Grape and Tree Fruit League, Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey Jr., Max Feldbaum and Sons, A. Cancelmo Company, B. M. Young, New York Fruit Auction Corporation, United Fruit Buyers' Association, Inc., United

Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association, plaintiffs herein, in connection with their appeal to the Supreme Court of the United States hereby file the following Assignment of Errors upon which they will rely in their prosecution of the said appeal from the Final Judgment of the District Court, entered on August 31, 1953.

The District Court erred:

1. In entering the final judgment herein dated August 31, 1953.

2. In dismissing the Complaint herein.

3. In denying the relief sought by plaintiffs.

4. In concluding and finding that the Commission's "findings are adequate and supported by substantial evidence."

5. In concluding and finding that the Commission "acted within its statutory authority."

6. In concluding and finding that the Commission's "proceedings were conducted consistently with due process."

[fol. 373] 7. In finding that the Commission did not erroneously relieve "the carriers of the burden of proof cast upon them by section 15(7) of the Interstate Commerce Act, the Commission having determined by its Notice of October 10, 1950, that the record was deficient as to certain evidence, which notice the District Court erroneously concluded "merely extended the evidence into an additional field."

8. In finding that the Commission found that unloading by the carrier was "a desirable and justifiable accessorial service."

9. In concluding that the Commission "found that unloading is an additional service, wholly distinct from delivery."

10. In concluding that the Commission found that "this method of unloading saves the payment of switching charges by the *consignee.*"

11. In finding and holding that interstate shippers and receivers of carlot shipments of fresh fruits and fresh vegetables can be required lawfully to pay unloading charges in addition to the line-haul freight charges, despite the facts that the delivery to the consignee cannot be made until after unloading by the carrier, "unloading by the carrier in New York is essential, as the team tracks are inadequate, cannot

be enlarged, and there are no physical means by which the consignee's trucks may reach the car floats", "the consignees are not allowed to unload the freight cars themselves, as they do on the team tracks, as it is physically impossible to place the consignee's trucks alongside the car floats", "the carriers therefore unload the cars, the consignees having access to shipments only after they have been unloaded and placed on the floor of the pier stations", "no delivery charges are imposed for other types of commodities unloaded at the pier stations in like manner as fresh fruits and vegetables", and prior to the unloading charges assailed herein "the carriers also unloaded fresh fruits and vegetables at pier stations without additional charges" over and above the line-haul rates.

[fols. 374-401] 12. In failing to give legal effect to the Commission's failure to apply the standards of the Interstate Commerce Act which require that shippers and receivers be accorded equal and uniform line-haul service under the line-haul freight rate, viz: a delivery of the freight without the imposition of charges additional to the line-haul charges.

(S.) M. W. Wells, Maguire, Voorhis & Wells, 1007 Florida Bank Building, Orlando, Florida, Attorney for the plaintiffs named above.

[fols. 402-408] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 409-410-410a] Order of May 28, 1947 Omitted. Printed side page 173 ante.

[fol. 410b] Report of the Commission Omitted. Printed side page 54 ante.

[fols. 410c-412] BEFORE THE INTERSTATE COMMERCE COMMISSION

ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 4th day of October, A. D. 1948.

Investigation and Suspension Docket No. 5500

Unloading Charges Fruits & Vegts.—New York & Phila.

It appearing, That by order dated May 28, 1947, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules to and including December 31, 1947, and that the operation of said schedules has been voluntarily deferred by respondents pending disposition of this proceeding;

It further appearing, That a full investigation of the matters and things involved has been made, and that the Commission, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof, and has found that the proposed schedules are just and reasonable:

It is ordered, That the order heretofore entered in this proceeding, suspending the operation of said schedules, be, and it is hereby, vacated and set aside as of November 1, 1948, and that this proceeding be discontinued.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 413] BEFORE THE INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 5500

Unloading Charges Fruits and Vegetables—New York and Philadelphia

PETITION FOR RECONSIDERATION BY FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, AND FLORIDA CITRUS COMMISSION—Filed December 6, 1948

Protestants, Florida Railroad and Public Utilities Commission, Growers and Shippers League of Florida and Florida Citrus Commission, hereby petition the Interstate Commerce Commission to reconsider its decision in this proceeding wherein the Report of the Commission bearing date as "decided October 4, 1948" was filed and copies thereof mailed to parties from Washington, D. C., on October 21, 1948 (copy thereof being received by undersigned attorney M. W. Wells on October 25, 1948), and upon such reconsideration to vacate the order entered herein effective on No-
[fol. 414] vember 1, 1948, and to enter an order cancelling the suspended schedules.

These Protestants respectfully urge a consideration of the following grounds and matters:

1. The majority of the members of the Commission, who concurred in the aforesaid Report of the Commission, failed to consider and give appropriate legal effect to the statutory burden of proof of section 15(7), viz:

> At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, * * * the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, * * *

For example, on sheet 12 of the mimeographed report, the Commission reverses the burden of proof, viz:

> The record contains no satisfactory explanation why these particular weeks were selected for the cost studies,

> but there is no indication of record that other weeks would have produced materially different results.

It is obvious that the burden of establishing that the test periods were representative is upon respondents, and they should establish by evidence that other weeks would not produce substantially different results. The Commission cannot, legally, require protestants to prove that "other weeks would have produced materially different results."

In our brief, it was stated that Respondents' cost figures "are not entitled to any weight in determining the average cost of that service, for in each instance the particular test [fol. 415] period was hand-picked, by instruction from a superior (who did not testify) and the witness could not give the factors causing the use of such test period nor show any facts by which the representative character of the figures could be determined" (Brief p. 5).

2. Since November 1, 1948, respondents have been charging at New York, N. Y., (Pier 29) $1.95 per net ton for unloading citrus fruit from their cars onto the piers where delivery could be made to consignees. The Report of the Commission herein stated "Charges as follows are proposed for addition to the line-haul rates: Citrus Fruits, per net ton $1.50" (sheets 1 and 2 mimeographed). There is nothing in the Report of the Commission to indicate any authorization for a higher charge than the $1.50 initially proposed and set out in the suspended schedules. Yet, the respondents are now charging the proposed $1.50 plus 30 percent added thereto. On page 424, of the Report of the Commission on Further Consideration, in Ex Parte No. 166, Increased Freight Rates, 1947, decided July 27, 1948, 270 ICC 403, it was specifically stated:

> Two important proceedings referred to in our 61st annual report, for 1947, at pages 44 and 45, concerning * * * proposed increases in certain unloading charges on docks at New York and Philadelphia are pending before us. *We do not now take them into account, as we confine our consideration* and present statement of sources of revenue *to those that are in effect.* (Emphasis added.)

Therefore, without any evidence and without any consideration by the Commission, either in Ex Parte No. 166 or in I&S No. 5500, the Respondents have added to the suspended [fol. 416] charges the 30 percent authorized in Ex Parte No. 166 to be added to certain other charges.

3. It is emphasized on Sheet 2 of the Mimeographed Report that "Respondents' proposals reflect an effort on the part of the delivering lines to secure increased revenues from the fruit and vegetable traffic terminated at New York and Philadelphia." However, the Commission does not give consideration to the principle recently stated in I&S No. 5476, Peaches from the South to Official Territory, decided June 29, 1948, 270 ICC 573, at page 582:

> The most recent increase cumulative upon the rates effective January 1, 1947, was that of 10 percent, maximum 20 cents per 100 pounds, authorized by the Commission as an interim increase on October 6, 1947, and subsequently modified, by authorization of December 29, 1947, and April 13, 1948, to permit an increase of 25 percent, maximum 22 cents per 100 pounds. These increases in the rates on fresh peaches were included in general increases which this Commission authorized *for the purpose of providing the additional revenue which the railroads needed and to which they were entitled.* It does not appear, therefore, that at the present time the increased rates on peaches here proposed are warranted on the ground of respondents' revenue requirements. (Emphasis supplied.)

4. There is no valid reason why the charges (if any) should be the same at Philadelphia as at New York, nor why the unloading charges on citrus fruits should be the same as on vegetables. We neither recognize nor accept the conclusion that "the practical necessities of this broad grouping are recognized and accepted" (sheet 3). No facts are considered in the Report as justification for the con- [fol. 417] clusion that any unloading charges should be grouped. It is stated on sheet 3 that:

> The same schedule of charges was published for application at both New York and Philadelphia because of the long-standing competitive relation between those

> cities. * * * Tariff complexities would result if a different charge were maintained for each of the respective commodities. * * *

No one has advocated "a different charge" for *each* commodity. However, if there is to be any unloading charge surely the shipper or consignee of a carload of citrus fruit to New York should not be forced to pay the same charges as a shipper or consignee of a carload of fresh vegetables to Philadelphia.

The Report itself shows that the suspended schedules proposed one charge on "citrus fruits," a different charge on "fresh fruits (other than citrus)", a separate charge on "Vegetables, fresh or green, not cold pack or frozen," and a still different charge on "Melons (including cantaloupes)" and "Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used." (sheet 2). There cannot be any "tariff complexity" from the publication of one charge on citrus and a different charge on fresh vegetables, any more than there is from publishing separately the same amount of charge on each group.

Sheet 10 states: "Table I of the appendix shows respondents' computation of the combined costs at New York and Philadelphia average $1.20 for citrus fruits, $1.73 for other fresh fruits, $1.73 for vegetables not top iced, * * * The combined costs in this table for New York and Philadelphia are $1.39 for all citrus fruits and vegetables, not top-iced, * * *".

[fol. 418] Table I shows that if the charges were based thereon, and stated separately for citrus fruits and fresh vegetables, respectively at New York and Philadelphia, it would cost the shipper or consignee of citrus fruits at New York $1.25 per net ton, but only $1.04 per net ton at Philadelphia. Why should the grower of the citrus fruit that is unloaded at New York be required to lose 25 cents per net ton—the difference between $1.25 supposed cost and the $1.50 approved charge? And why should he be required to pay 46 cents more than the cost, if unloaded at Philadelphia? Similarly, there is no legal justification for charging the grower of fresh vegetables $1.50 per net ton for unloading his vegetables at Philadelphia, when the weighted average cost thereof as shown by Table I is only 98 cents.

5. The Commission failed to give legal effect to the finding that "Fresh or green vegetables, particularly those not top iced, frequently reach the consignee without prior sale at the piers" (Sheet 6). The proposed unloading charge imposes upon the grower, shipper and receiver of fresh vegetables that charge without any resulting benefit whatever.

6. The Commission failed to give any wieght to its finding on Sheet 7 that "These (team track and private siding) facilities are not sufficient to handle all of the great bulk of fruits and vegetables received at New York."

7. The Commission failed to give any legal effect to the finding on sheet 7 that:

> A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is [fol. 419] ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. It is clearly indicated that it is impracticable for the shippers to perform the actual unloading operations.

8. The Commission failed to give any weight to the finding on sheet 5 that "In no other manner could these commodities be unloaded and delivered to consignee in the short space of time available."

9. The Commission finds, but fails to give legal effect thereto, that "No charges such as those proposed have applied on this traffic in the past" (sheet 2). "Loading and unloading by the railroads, without charge, was continued at the port cities for some years thereafter" (sheet 3). (Note: This should be "without charge, *in addition to the line-haul rates*"). It is further said on sheet 13:

> Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates.

The Commission should have found specifically that:

> 2. The delivery of fruits and vegetables at the Manhattan piers and at the Philadelphia auctions including unloading has heretofore been made under the line-haul rates.
>
> 3. The line-haul rates cover the service of transportation, and were established to comprehend all costs of rendering transportation, including the unloading here [fol. 420] involved. (Our Brief p. 29).

10. There is no factual nor legal basis for the statement on sheet 13 of the Report:

> For the purpose of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates. The establishment of specific charges for unloading at New York and Philadelphia, without reference to the levels of the line-haul rates is justified.

In the first place, there was no attempt by the Respondents to justify the level of the line-haul rates or the total charges. Next, the burden is not upon protestants to "convince" the Commission that "adequate compensation for these unloading services is" included in the line-haul rates. The statute places the burden upon the Respondents to convince the Commission that the line-haul rates do not include adequate compensation, if that be a fact. Furthermore, if "adequate compensation" is not included, then the proper remedy would be to adjust properly the line-haul rates. In any event, it is most extraordinary that the Commission should use as a justification for a new and additional charge the supposition (not based on evidence in the record) that sufficient or adequate compensation is not included in the line-haul rate. If the present rate includes *any* compensation for unloading, a separate and additional charge for unloading cannot lawfully be assessed, in any event, unless or until the amount for unloading be taken out of the line-haul rate.

11. The Commission failed to give any consideration to I&S 1420, Fruits and Vegetables to Duane St., N. Y., 66 ICC

[fol. 421] 135, decided in 1922, where it was specifically found that:

> As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane Street under the line-haul rates. * * *

12. The Commission failed to give any consideration to I&S 3596, Allowances for Stacking Fresh Fruits and Vegetables at New York, N. Y., decided in 1931, 179 ICC 780, where it was found:

> Carload freight is ordinarily required by tariffs to be loaded and unloaded by the shipper, but such unloading of the traffic described is impracticable at respondent's New York piers. Fruits and vegetables destined to New York City over respondent's line are carfloated from the "railhead" on the New Jersey shore to respondent's produce terminal in New York City, comprising about 9.5 acres of concrete-floor space on Piers 27, 28 and 29, North River, for delivery and for private sale or auction. Under appropriate tariff authority the cars are there unloaded by respondent * * *
>
> This record does not show that the shippers render any transportation service or furnish any instrumentality for use in such service. On the contrary, it shows that instead of requiring the consignees to unload the shipments from the cars, as ordinarily required on carload shipments, respondent undertakes to make delivery in spaces assigned to the consignees on the piers, and its stevedores stack the packages in those spaces. It appears from this record that at that point respondent has fulfilled his legal obligation as to delivery. The subsequent restacking, in which the packages are sorted as to brand, size, etc., appears to be solely for consignees' benefit, and is apart from the transportation in connection with which allowances for services [fol. 422] are contemplated or authorized by section 15(13) of the act.

13. The Commission failed to give any consideration to I&S 5179, Unloading Lumber to New York Harbor, 256 ICC 463, where it was found:

> The unloading here considered is required in order to make delivery * * * The nature and incidents of the unloading service here considered established beyond a doubt that it is inextricably bound up with the line-haul service. * * *

14. The Commission erred in stating on sheet 13:

> Such (unloading) charges are in substantially the same category as those for switching, transit, refrigeration and various other special services for which separate charges are published.

In I&S 1420, Fruits and Vegetables to Duane St., N. Y., 66 ICC 135, it was found:

> The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane Street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point.

The unloading at New York must be performed by the carrier before the consignee can take delivery from the pier floor. He has no option, he has no rail facilities available from which he can take team-track delivery, he either takes delivery from the pier floor after unloading by the railroad or he cannot obtain completion of the transportation for which he has paid in his line-haul rate.

[fol. 423] There are no special charges for "switching, transit, refrigeration," or any "other special services", except where such is performed in addition to the transportation. Switching to a team-track is included in the line-haul rate; it is only when there is additional switching, such as to a private siding, that there can be legally an additional switching charge. Transit is charged only when it is requested by the shipper and furnished by the carrier in addition to the transportation. The shipper may obtain refrigeration service, if he so desires, but he pays for the

additional service only when that is in addition to the transportation. In fact, there are no "special services" for which a charge is made, except where such are in addition to the transportation. In this proceeding, the unloading is a part of the transportation, for there can be no delivery without carrier unloading,—and transportation includes delivery.

15. The Commission on sheet 14 apparently seeks to sustain approval of unloading charges at Philadelphia by a consideration of the fact that "no separate charge for special sorting and stacking is made at that point,"—the statement being:

> The cost of service is less at Philadelphia than at New York, but no separate charge for special sorting and stacking is made at that point.

Yet, on sheet 7, reference is made to Allowances for Stacking, 179 ICC 780, where it was specifically held that sorting, etc., after delivery, was not a part of transportation, and it is there said: "Services not contemplated as part of those for which the unloading charges are proposed, include sorting of the packages, according to brand, grade and size." Is it intended that the unloading charge at New York [fol. 424] will include a different service than at Philadelphia? There is nothing in the published tariff to so indicate.

Also, the Commission refused to consider the charges and costs at New York for sorting service,—see sheet 12:

> Another claimed defect in the cost studies is the lack of proper consideration to the sorting service for which charges are paid to the railroads when that service is performed by them on the New York piers. This service is something beyond the delivery required for the full performance of the transportation service.

16. The Commission failed to consider and apply the legal principle of the Los Angeles Switching Case, Interstate Commerce Commission v. Atchison, Topeka & Santa Fe Ry. Co., 58 L. Ed. 1319, 234 U. S. 294, viz:

> On the contrary, it was undisputed that the line-haul carload rate comprehended receipt and delivery on team tracks or at freight sheds.

> The Commission conceded the right of the carrier to charge for any terminal service that was accessorial. But it was held that an additional charge was not justified if additional service was not in fact rendered.

Here, as in the Los Angeles Switching Case, 18 ICC 317, 318:

> An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a side track delivery, which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which [fol. 425] has not been given. A carrier may not so construct its rates as to compel an extra charge, for like service, and this, in our judgment, the defendants at Los Angeles have done.

17. The Commission erred in the statement on sheet 13 and 14:

> Protestants allege that sections 2 and 3 of the Interstate Commerce Act would be violated if charges are made for unloading fresh fruits and vegetables at the respective piers, while continuing the free unloading of other commodities at the same locations. Circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables.

There is no legal basis for assuming that it is the duty of the protestants to assume the burden of proving to the satisfaction of the Commission that the conditions and circumstances are similar. However, the evidence does so show, and there is no basis of fact for assuming that there may be differences in material respects. On the other hand it is specifically found on sheet 2:

> It is provided that the unloading service will be performed only at designated stations. At the present time there are no charges for unloading fruits, vege-

> tables, or other descriptions of traffic at the stations specified. The proposed charges would apply only on fruits and vegetables and not on other traffic. The substance of respondents' explanation for this seeming disparity of treatment is that since fruits and vegetables constitute the bulk of the shipments received at these [fol. 426] stations, it was considered appropriate in the first instance to institute charges for unloading these perishables and to defer publication of similar charges on other traffic. It is indicated that consideration is being given to the establishment of unloading charges on traffic other than fruits and vegetables but that no definite conclusion has been reached. (Sheet 2 and 3).

Thus it is seen that not even the Respondents have made any claim that "circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables." On the contrary, the Respondents' position, as stated above in the quoted portion of Sheets 2 and 3, is merely that the first unloading charge will be assessed against fruits and vegetables, and that "consideration is being given to the establishment of unloading charges on traffic other than fruits and vegetables." Sheet 9 of the Report quotes from Exhibit 65 the figure of 72,753 carloads (also shown on Exhibit 3) of fruits and vegetables unloaded in 1946 on the New York piers, but the Report fails to indicate the also important figure on Exhibit 65 that 96,939 carloads of all freight were unloaded on the same piers in the same period, or 24,186 carloads of freight other than fruits and vegetables.

18. The Commission failed to give any weight to the Respondents' failure to submit data concerning costs incurred in making team-track deliveries, data with respect to the costs of special sorting and stacking service for which a charge is now made at New York, and the items of costs not properly chargeable to the unloading service. For example, on sheet 12, it is shown that no weight was given to [fol. 427] certain of these items, although it is said:

> All of the New York cost exhibits take into consideration costs for sweeping and cleaning the piers. All,

with the exception of the Erie, include charges for watchmen. Protestants refer to the fact that these piers are railroad premises and that it is a part of the transportation duty of the railroads to keep the premises clean and to afford adequate police protection. The exhibits also show costs for delivery clerks. Protestants assert, with some force, that these are terminal costs and would be incurred in connection with any delivery at any railroad terminal.

19. There is no basis in the record for the statement on sheet 12:

> While they may be subject to certain infirmities, some of which have been called to our attention by protestants, these are more than offset by several items of cost which have been omitted from the studies, as previously explained herein, some of which might well have been included.

The other "items of cost" having been omitted and not being shown, it is somewhat difficult to understand how it can be determined whether they are proper items, or whether sufficiently large to "more than offset" the pointed out deficiencies. Apparently, the "previously explained" reference is to the following on sheets 10 and 11:

> Respondents explain that the basic cost items used in their studies were restricted to the wages of employees directly engaged in unloading these commodities. They point to the fact that other cost items could have been included, but perhaps due to the controversial nature of [fol. 428] some of them they made no specific computations therefor. These items include the cost of furnishing equipment used in unloading, the cost of heating and lighting the terminals, additional costs for garbage removal, rental charges, and amortization costs. Considering these additional factors as well as the costs directly related to unloading, respondents reach the conclusion that the suspended charges are no higher than necessary to meet the expenses which the carriers incur in performing the unloading service.

It is impossible to determine from the Report what items of cost, or the basis thereof, were considered by the Commission.

20. If it be proper or lawful to assess any unloading charges at the New York piers, such charges should not be any greater than the additional cost of such type of delivery, i.e. whatever excess, if any, there be over team track delivery. It is recognized by the Report (sheet 11) that "Respondents' computations do not take into account various expenses which would be incurred in connection with team-track delivery which are not present in the case of pier delivery."

> The record indicates that cars of fruits and vegetables destined to team tracks in New York would be floated from the New Jersey side in the same manner as other cars intended for pier delivery. Up to the arrival at the float bridge on the Manhattan side the operations performed and therefore the costs are substantially the same, except that *it takes a somewhat longer time to float to points near the team-track stations than to the piers. Thereafter, there are substantial differences.* The cars must be switched off the float and then transported to the station yard. At that point they must be spotted on designated team tracks. After unloading [fol. 429] they must be switched from the team tracks and then back to the float bridge where they are loaded on the car float. There is no expense for switching at the piers. Protestants assert that the cost of switching to and from the team tracks should have been taken into consideration in respondents' cost studies, since there is no switching at the piers. They claim that this respresents a saving to the carriers, as pier delivery is substituted for team-track delivery. Another factor which they say should be given consideration is the allowance for free time at team tracks. There is no detention of equipment when shipments are handled at the piers. *No studies have been made concerning these switching costs or of the savings from more effective utilization of equipment as the result of pier delivery.* (Emphasis supplied.)

Legally, there is no basis for the next succeeding statement, which is contrary to the facts above outlined: "In any event it is not appropriate to consider these matters as affecting the costs, as such, of unloading at the piers." No one has ever contended that such factors affect the "costs, as such, of unloading at the piers," but it appears elemental that the *additional* cost to the carrier of any *additional service at the piers* cannot be determined unless from the gross cost be deducted the savings, the difference *only* being the net cost of the additional service.

Actually, of course, the facts as shown of record and the facts as disclosed by the Report show conclusively that the carrier unloading onto the pier is merely a delivery service, substituted for team-track delivery, and without which carrier unloading there cannot be a practical and efficient delivery on Manhattan Island.

[fol. 430] 21. The Commission failed to give any weight to the facts found on sheet 8 as follows:

> When cars are unloaded at the pier terminals the owners of the produce must truck the contents of the cars from the pier floor to their destination in New York, either at Washingon Market or some other location. A similar trucking operation occurs when the cars are unloaded at team tracks. However, at these latter points the shipper usually loads the truck direct from the car.

The facts stated emphasize the point of delivery, at the car door on a team-track or at the pier floor when there is pier delivery. In either event, the owner of the fruits and vegetables must load his truck—in the case of team-track delivery, by unloading the car; and in the case of pier delivery, by unloading the pier. The interim act of the carrier at the pier in unloading the car onto the pier is of no benefit whatever in addition to being an integral part of the transportation, i.e. getting the commodity to a point where the owner may take delivery.

22. The Commission erroneously confuses unloading as a part of delivery with other factors coming into existence after unloading. For example, on sheet 8, it is stated:

> Pier delivery affords consignees the advantages, not available in connection with team-track delivery, of displaying their produce to prospective purchasers and the added privilege of auction sales of a considerable portion of the traffic in question, both at convenient locations.

It would be a brand-new "principle" of transportation law, if it be held that a shipper or consignee must pay for privileges available to him, though not used. The Report [fol. 431] itself shows (which is well established in the evidence) that no vegetables are sold at auction, some citrus fruit is sold at auction but other citrus fruit is not sold at auction, and a considerable volume of the fruits and vegetables delivered at the pier are not "displayed" to prospective purchasers. Some of it has been bought before it is shipped from the producing area. There is already a sorting charge to cover the terminal service of display and auction, etc., occurring *after* unloading and after delivery becomes available. There is no sound reason why the consignee who does not desire display and does not use the auction, should be compelled to pay, in the guise of an unloading charge, toward those available "advantages" which he does not want and does not use.

For example, there are refrigeration charges in the tariff for the special added refrigeration service available to all shippers. But, no shipper is required to pay any refrigeration charge unless he requests and uses some refrigeration service. So, also, the consignee should not be compelled to contribute toward the cost of display privileges or "the added privilege of auction sales" unless he requests or uses those privileges. The unloading service is a part of transportation and is something which must be accomplished at the piers before delivery can take place.

23. The Commission failed to consider or give any weight to the evidence of protestants that the transportation charges, if increased, will be in excess of maximum reasonable rates and will be otherwise unlawful. The primary concern of the growers and shippers of Florida citrus fruit and vegetables is the aggregate transportation charges, i.e. the line haul rates plus the additional proposed unloading

[fol. 432] charge. As set forth on page 30 of our Brief, it is and has been consistently our position that:

> The respondents may not now segregate a component of the line-haul or transportation service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable; and there has been no showing that the present through charge is less than a maximum reasonable charge.

It is our position that the Commission cannot lawfully approve proposed unloading charges, unless or until there has been a consideration of the lawfulness of the through charge. The Respondents are required, as a matter of law, to carry the burden of proving the lawfulness of the through charge—i.e. the charge produced by the present line haul rate plus the proposed unloading assessment. Not only was there no showing whatever in this respect by the Respondents but also the evidence of these Protestants affirmatively shows that the through charges will be unlawful.

Wherefore, these Protestants respectfully petition the Commission to reopen and reconsider this proceeding and that upon such reconsideration the Commission may find that the proposed unloading charges, published in the schedules heretofore under suspension herein, have not been justified and are unlawful, and thereupon enter appropriate orders herein vacating the order of October 4, 1948, and [fols. 433-438] cancelling the said schedules.

Respectfully submitted, Florida Railroad and Public Utilities Commission, by Fred Pettijohn, Director, Commerce Dept. Growers and Shippers League of Florida, and Florida Citrus Commission, by Gordon Stedman. Lewis W. Petteway, General Counsel, Florida Railroad and Public Utilities Commission, Tallahassee, Florida. M. W. Wells, Attorney, 1007 Florida Bank Bldg., Orlando, Florida.

December 6, 1948.

[fol. 439] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. No. 5500

Unloading Charges Fruits and Vegetables—New York and Philadelphia

PETITION FOR REOPENING AND RECONSIDERATION IN BEHALF OF THE PORT OF NEW YORK AUTHORITY—Filed December 6, 1948.

Statement

On October 21, 1948, there was served upon petitioner, The Port of New York Authority, copy of a report in the above-entitled proceeding decided some days prior to that date in which majority findings are made that "the schedules under investigation are just and reasonable". By accompanying order dated October 4, 1948, the suspension order theretofore entered was vacated. On or about October 28, 1948, promptly following service of the said report and order, petitioner submitted its pleading expressing its desire to appeal from the findings and orders of the majority [fol. 440] and praying, among other prayers for relief, that the effective date of the order vacating and setting aside the suspension order as of November 1, 1948, be postponed for a period of at least thirty days to the end that petitioner might have fair opportunity to plead further "during maintenance of the status quo." By letter addressed to undersigned counsel La Roe, dated October 29, 1948, counsel were advised by the Acting Secretary of the Commission that the 60-day rule for appeal was available, wherefore it appeared that no formal action by the Commission on the petition for extension of time within which to submit petition for reconsideration was necessary. The protested schedules were permitted to become effective and petitioner was therefore denied opportunity to plead "during maintenance of the status quo." Petitioner does not here complain of the failure to rule seasonably upon its petition as tendered. However, it submits that the Commission should take proper notice of its diligent effort in that connection and that effectiveness of the said schedules subsequently to the filing of its said petition should not be permitted to

operate to its disadvantage in the consideration of the present pleading.

The majority findings and order in this proceeding, approving the action of respondents in reversing a commercial practice in the transportation and distribution of the fruit and vegetable traffic that had been maintained consistently by the carrier respondents over a period antedating the birth of this Commission, came with enormous impact upon the protesting parties, not excepting this petitioner which is charged under the statute governing its functions with the protection of the commerce of the Port of New York and with effectuation of a statutory plan to [fol. 441] which the practice in issue has heretofore conformed.

Although there is no dispute on this record concerning the salient facts with reference to the transportation of the tonnage in issue and the practices of the respondents in that connection, there are factual errors of serious proportion on the majority report and those errors have doubtless served to divert the administrative course and distort the judgment in the ultimate determination of the issue. On the law side of the case, the conclusions and findings of the majority are in serious part opposed to the rule of the governing statute as it has been administered by this Commission and defined by the courts over the years dating back to the early period of common carrier regulation. Over these many years this Commission has fixed and adhered to a standard of common carrier service in the New York terminal area.* That standard has withstood the critical

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* Among the leading cases are:

New York Produce Exchange v. *Baltimore & O. R. Co.*, 7 I. C. C. Rep. 612 (1898).

In the Matter of Differential Rates, 11 I. C. C. Rep. 13 (1905).

Chamber of Commerce of N. Y. v. *N. Y. C. & H. R. R. Co.*, 24 I. C. C. 56 (1912).

Lighterage and Storage Regulations at New York, 35 I. C. C. 47 (1915).

The New York Harbor Case, 47 I. C. C. 643 (1917).

New York Harbor Facilities Applications, infra (1925).

City of Newport News v. *Aberdeen & R. R. Co.*, 159

test of administrative and judicial review and both industry and carriers have prospered accordingly.

The majority findings and orders in the present proceeding, conceived in error throughout as petitioner confidently believes and respectfully submits, would override the set- [fol. 442] tled law and the standards fixed by this Commission and observed by the carriers over a period of no less than fifty years. The adverse effect of imposing upon this major tonnage of food items an increased transportation cost of approximately $3 million annually, is indeed serious, but the duties and interest of The Port of New York Authority as a congressionally approved agency of the states of New York and New Jersey extends far beyond the interest of any individual or group of individuals. Under the direct mandate of the two sovereign states and the congressional enactment * the Port Authority is charged with the duty of protecting the commerce of the port district, coordinating its terminal and other transportation facilities and providing for the economic operation thereof in the interest of a port area populated by some 10 million persons who are vitally dependent, in one form or another, upon public transportation facilities and operations. While it is true that the functions of the Port Authority are conducted under a public resolution that reserves to the United States such rights or jurisdiction as it may have over the affected region, it is equally true that the burden imposed upon it in the public interest and the objectives to be accomplished by its creation are in complete harmony with the similar burden imposed upon this Commission under the declaration of national transportation policy and the statutes enacted for its effectuation, a policy that requires, among other things, cooperation "with the several States and the duly authorized officials thereof."

Every proposal that has been made over the years to split the Port of New York, and there have been a number

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I. C. C. 159 (1929), cited and followed in *Lighterage Cases*, 203 I. C. C. 481 (1934)), citing and following *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U. S. 294 (1913).

Unloading Lumber at New York Harbor, infra (1943).

* Public Resolution No. 17—67th Congress; S. J. Res. 88.

[fol. 443] of them, has met with defeat at the hands of this Commission. The pertinent cases, including those cited on the brief of protestant in this proceeding and the additional authorities cited herein, date back to and beyond the lighterage cases of 1915. Yet a single group of terminal carriers, detaching themselves from their partners in the line haul, have now proposed to destroy by one fell swoop the very principle of port integrity upon which they have prospered and grown and upon which this great metropolitan district has been served in conformity with the statutory standard. Having thus driven the entering wedge, in the pursuit of their wholly selfish, offensive and short-sighted proposal, there can be no doubt that the respondents will seek the aid of this Commission in driving other and similar wedges aimed at further destruction of established standards.* This is no mere idle forecast. We quote from Sheet 2 of the majority report in this proceeding—

> . . . The proposed charges would apply only on fruits and vegetables and not on other traffic. The substance of respondents' explanation for this seeming disparity of treatment is that since fruits and vegetables constitute the bulk of the shipments received at these stations, it was considered appropriate in the first instance to institute charges for unloading these perishables and to defer publication of similar charges on other traffic. It is indicated that consideration is being given to the establishment of unloading charges on traffic other than fruits and vegetables but that no definite conclusion has been reached.

[fol. 444] All pertinent authority supports the conclusion that the only sound and reasonable administrative course must be found in an adherence to the statutory standard as it has been defined by this Commission over the years. Certainly no justification has been shown for departure

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* While petitioner denies that the said report or order may be properly employed as establishing a precedent, the carriers respondent will undoubtedly cite it as such in treating other classes of traffic, resulting in endless litigation.

from that fair and reasonable standard and petitioner is confident that the Commission has at no time contemplated such departure, the ultimate findings and orders having resulted from factual errors of misleading scope and a consequent failure of adherence to the settled law.

While the protested schedules have been in effect for only a short time, serious injury to the New York district and its interests has been already suffered and the situation becomes increasingly grave. Petitioner is informed and believes that the volume of movement to the New York district has decreased substantially since the said schedules became effective and that numerous carloads of this traffic have been, and continue to be, diverted to other markets by reason of the added charges imposed by the carriers for the pier station deliveries.

Wherefore, comes now petitioner, The Port of New York Authority, to submit its petition for reopening and reconsideration in the above-entitled proceeding and in support thereof to respectfully say:

The Errors of Fact and Law

1. At Sheet 2 of the report it is said that "at the present time there are no charges for unloading fruits, vegetables, or other descriptions of traffic at the stations specified." The statement is erroneous since the charges paid for the through transportation of which the unloading service has been recognized as a part for a period of more than fifty [fol. 445] years include compensation for that service. Common carrier transportation service without compensation therefor is legally impossible under the provisions of the Interstate Commerce Act, more particularly Section 6(7) of that statute. It is submitted that the quoted sentence should be reformed to read substantially as follows: "At the present time no separate charge, in addition to the applicable joint through charges, is made for unloading fruits, vegetables, or other descriptions of traffic at the pier stations."

2. The first complete paragraph at Sheet 3 of the majority report is in error in its failure to recognize the vital distinction between the duty of shippers to unload carload

freight where delivery of the car to the consignee has been accomplished, ordinarily on team or industrial tracks, and the duty to unload where, in order to accomplish delivery under the transportation contract, such unloading is essential, as in the case of the New York pier deliveries. Petitioner does not question at all the duty of the shipper to unload a carload of freight delivered to a consignee in a car placed upon team or industrial tracks; but it does contend that the common carrier must not only carry the property from point to point but must provide terminals for its delivery and must place the property in a position of accessibility to the consignee.

3. The statement at the same place that New York and Philadelphia are exceptions to the general rule (Rule 27) that the obligation of unloading carload freight rests with the shippers, is erroneous as is also the further statement, to the same effect, that "New York and Philadelphia remained the sole exceptions" after the adjustments follow-[fol. 446] ing 1925. The error is doubtless attributable to confusion of established practices at the harbor terminals with the wholly different conditions existing at the land stations, at which said land stations property is made available to shippers in cars placed on the team or industrial tracks. The carrier practice of unloading fruits and vegetables without added charge over the line-haul rates has not only been consistently followed by the carriers in the delivery of property at the pier stations under consideration, but is also in effect today on fresh fruits and vegetables for export, coastwise and intercoastal movements and on import shipments.

The report is further in error in its statement that the "difference in treatment" there referred to "was due principally to water competition". There is no substantial evidence that the practice at New York, adopted even before the time of common carrier regulation was adopted because of water competition. The entire history of the practice at New York refutes any possible claim that water competition played any significant part in the adoption by the carriers of the unloading practices in the New York port district. The truth of the matter is that by reason of physical conditions, economy of operation, inadequacy of

team tracks, and a clear recognition by the carriers of their obligation to accomplish delivery of property transported by them, the practice of unloading at the pier stations was adopted and has been, for like reasons, consistently followed by the carriers over a period of half a century or more.

Further reference to the so-called general rule (Rule 27) and the numerous essential exceptions thereto at the harbor stations, will be made in the discussion that follows. [fol. 447] There can be no successful controversy concerning the legal duty of the railroads to make delivery of freight transported by them under their published tariff schedules. Nor can there be any substantial dispute concerning the proposition that it is factual error to accord weight to a comparison of the Chicago practice, for example, in unloading carload property delivered to the consignee in the car with the unloading at New York pier stations of property as to which the consignee does not have access to the car and with reference to which unloading is required in order to make the property accessible to the said consignee.

4. In the description of unloading operations appearing at Sheet 5 of the report it is said, correctly as petitioner believes, that "in no other manner could these commodities be unloaded and delivered to consignees in the short space of time available." There is a clear recognition of the necessity for unloading to make delivery to the consignee and there is a clear conclusion on the report that such unloading must be accomplished by the carriers. There is also a clear recognition, as petitioner reads the discussion, of the duty of the railroads to provide the terminal facilities essential for such an unloading operation. The failure of the factual discussion and of the conclusions and findings made to conform to those established facts is erroneous.

5. The comment and conclusions at Sheet 13 of the report concerning compensation for these unloading services are in error because of failure to recognize the fact that the line-haul rates, constructed and maintained over a period of many years in contemplation of all required trans- [fol. 448] portation services in the through routes, have included such compensation and do in fact include such compensation as to current traffic. Petitioner respectfully submits, further, that the conclusion at Sheet 13 that the es-

tablishment of specific charges for unloading at New York without reference to the levels of the line-haul rates is justified is erroneous. While the burden of proof is upon respondents, the record will be searched in vain for evidence of any substantial character even indicating inadequacy of the line-haul rates as including the unloading service which is a part of the through transportation. In the absence of such evidence the position of respondents is manifestly untenable. The level of the line-haul rates cannot be brushed aside as immaterial and this is supported further by reference to the heavy increases superimposed upon the line-haul rates during the past two years or more which said increases were designed to compensate the carriers for whatever increased costs may be incurred in transportation services.

6. At Sheet 13 of the majority report it is stated further that charges for the unloading service in issue at New York "are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published." The conclusion of fact is in error. Switching is a service in the movement by rail of cars from one point to another, ordinarily within a tariff-defined switching district. Where such services are rendered, by a carrier engaged in switching operations or by a line-haul carrier, a switching charge may or may not be assessed depending upon circumstances and conditions with which the Commission is quite familiar [fol. 449] and which are altogether unrelated to the unloading of carload freight. Transit is a special privilege extended to a shipper in connection with the publication of line-haul rate schedules under the provisions of which, for example, grain may move into a milling point and the product thereof moved thence to destination at the balance of the published through rate on grain or, for further example, logs may be moved into a transit point and lumber moved out at the balance of a published through rate. Refrigeration is a protective service required in the transportation of certain forms of perishable freight and line-haul tariffs may or may not include an additional charge for refrigeration service. The categories compared on the report are in every instance within the sphere of accessorial services that

ordinarily would not be required as a part of the transportation service. Receivers at New York are not accorded any such extra or accessorial services but are merely insisting upon their right to the full transportation service required of the carriers which service includes availability of the property transported through a proper tender of delivery. No such services, or any "special" service is rendered by the carriers in making delivery at the pier stations of freight transported by them in interstate commerce.

7. The conclusion at Sheet 13 of the majority report that "concurrence of carriers other than destination lines * * * is not a prerequisite to the establishment of the proposed unloading charges" is opposed to the specific provisions of Section 6 of the Interstate Commerce Act and the tariff regulations of this Commission prescribed in conformity with the statutory rule. The issue concerns transportation under joint through rates and over through routes from California, Florida and other states to New York, N. Y., in-[fol. 450] cluding not only the team track facilities at New York, where available, but also the pier stations which are provided to augment the inadequate team track facilities. Section 6(4) of the statute is specific in its requirement that "the names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission."

8. At Sheet 14 of the report it is stated, erroneously as petitioner contends, that the proof is not convincing that there would be other situations where undue prejudice and preference would be created, particularly with respect to pier delivery as compared with team track delivery, wherefore there is no showing of violations of either Sections 2 or 3 of the Act. The discussion and conclusions referred to at this point indicate a serious misconception of the facts. Certainly there can be nothing more conclusive than the carriers' published rules making exception to Rule 27 of the Consolidated Freight Classification under which all types of freight are loaded and unloaded within the New York port district by the carriers at the line-haul rates.

There is attached hereto and made a part hereof for convenient reference excerpts from tariff schedules of the carriers on file with the Commission under Agent C. W. Boin's I. C. C. A-856, repeatedly referred to of record.

9. The conclusion of the majority report that "respondents have justified their proposals" is contrary to the record and to the settled law of the case, as petitioner verily believes. Although the burden of proof is on the carriers, [fol. 451] there is no evidence of record concerning the reasonableness and lawfulness otherwise of the increased rates and charges for the through transportation. For like reasons, the conclusion of the majority report that the schedules under investigation are "just and reasonable" is devoid of record support and therefore arbitrary and void. In the complete absence of evidence with reference to the lawfulness of the charges for transportation of which these unloading services are an integral part, there is no fair alternative to reversal of the findings heretofore made in this proceeding and the entry of appropriate orders requiring cancellation of the offending schedules.

10. At Sheet 14 of the report, it is said that in reaching findings there made the evidence with respect to cost of service has been "particularly" considered. Petitioner submits that approval of the suspended schedules on evidence with respect to cost of service is erroneous for the reason that there is no evidence concerning that element or factor as applied to the through transportation with reference to which a proper tender of delivery is essential. And here again, it is pertinent to observe that the line-haul rates covering the through transportation, including delivery, have been already increased sharply to include such increased costs as may have been incurred.

11. In its statement at Sheet 14 that "The protesting shippers have also received worthwhile benefits", the majority report is in error because of its failure to recognize the clearly-established fact that the said "benefits" are none other than those inherent in the right to the full transportation service required under the tariff schedules of the carriers, including a tender of the property for delivery at a location where the consignee or owner may have access to it.

[fol. 452] 12. The further conclusion at Sheet 14 that "the present expense of unloading is such that respondents should no longer be required to furnish this service without adequate compensation" is erroneous since, as already pointed out, the line-haul charges of the carriers have been repeatedly increased to provide full and fair compensation for increased costs, including such costs as may be incurred in making a proper delivery of property transported.

Argument

The conclusions and findings referred to are opposed to the settled law.

The errors of the majority report are attributable to factual and legal misconceptions which are basic. From the factual viewpoint the report is in error because of confusion of operating practices at New York with the wholly different operating practices at interior and other points in the unloading of carload freight. This is in turn attributable in part to the confusion of the unloading operation required to make delivery at the pier stations with a transit privilege or with the refrigeration of perishable freight. From a legal viewpoint the basic error occurs in the failure to recognize and apply the law of the case as it has been defined and applied by Commission and Court over a period of fifty years or more and which holds firmly to the proposition that a valid delivery of property transported in interstate commerce requires, as was stated succinctly in *Bills of Lading*, 52 I. C. C. 671, four requisites, viz., delivery (1) to the right person, (2) at a reasonable time, (3) at a proper place and (4) in a proper manner; in other words, a delivery at a time and place when and where the consignee can [fol. 453] have convenient access to the property. That access is provided with reference to New York pier deliveries when the property is placed on the pier and not before, since no one other than the carrier has access to the cars standing on the car floats and there are no delivery tracks on the piers. Since the cars cannot be moved onto their piers, and since the property must be delivered at a place accessible to the consignee, there is no alternative to placement of the freight on the pier where the consignee can take delivery and possession.

If, as petitioner contends, this delivery service at the New York pier stations is a part of the service required of the carrier under the through transportation contract—a proposition concerning which there can be no successful dispute—it is then perfectly apparent that the burden of proof is upon the carriers in the through route, many of which are not even represented in this proceeding, to show that the proposed increase of charges for the transportation is justified under the pertinent provisions of the Interstate Commerce Act. That has not been done and as a result the record is completely barren of evidence to support the finding of reasonableness or justification.

It does not help the position of the respondents to suggest that this unloading service should be viewed in the category of transit or like services since it is nothing of the sort. It is a service which the carriers must perform in order to accomplish delivery of property entrusted to them for transportation in the same sense that they would have to brace or secure a shifting load in the course of transportation or otherwise service the property in conformity with their common carrier obligations. It is altogether impossible as a [fol. 454] legal proposition for the carriers to withhold delivery of property which they have transported; otherwise they would be constantly subject to suits for conversion. They must therefore provide facilities and service essential for the placement of property transported by them at a place where the consignee can get to it and take delivery. In the case of the fruit and vegetable traffic here in issue the pier stations are provided since team or other tracks are unavailable or inadequate and those pier stations, rather than the railroad car, are the places to which alone the consignee has access. No transportation is involved in the unloading operation other than the service of delivery which is a part of the undertaking of the carrier when the shipment left the point of origin. The unloading service at the pier stations in New York Harbor as a part of the service included within the line-haul rates has been so considered and observed by the carriers and by pertinent reviewing authority over all these many years as clearly shown on the present record and by the conclusions and findings of the cases herein cited—no contrary assumption or practice hav-

ing existed at any time since the passage of the Interstate Commerce Act or even prior thereto.

Unloading service at the pier stations, essential to make a valid delivery, is a common carrier service included under the line-haul rates. No justification for increase of those rates or charges in connection therewith has been shown.

At Sheet 7 of the report it is observed that "a reasonable and proper conclusions as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for [fol. 455] actual delivery to the consignee." It is there said further, and correctly, that "the shippers are not permitted access to the cars and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. It is clearly indicated that it is impracticable for the shippers to perform the actual unloading operations." Manifestly, therefore, there is a clear recognition on the report that delivery is not accomplished until the property is unloaded from the cars and placed on the pier floor where alone the consignee has access to it. That delivery is a duty and function of the carrier and there can be no successful argument to the contrary. The respondents have always recognized it as such—over a period of several decades—and the pertinent decisions, findings and conclusions of this Commission in the cases that have gone before, cited on the brief of protestant, clearly recognize and apply the controlling principle of law upon which petitioner here relies.

In the *Los Angeles case* * the Commission observed that "the rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling, but the charge for the terminals at both ends of the line." Clearly distinguishing those ancillary and additional services for which separate charges may be stated, such as switching, for example, the Commission stated very clearly

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* *Associated Jobbers of Los Angeles* v. *Atchison, T. & S. F. Ry. Co.*, 18 I. C. C. Rep. 310.

that the said separate charges are those for services other than terminal delivery; i.e., to quote further from the report, [fol. 456] "it was not intended that the carriers should be required to separately state what are known in the English law as station terminals—that is to say, that they shall state separately the hauling charge between the stations and the charge for the use of the terminals at both ends of the line." The Commission said further that the terminal charges referred to in Section 6 to be appropriately set forth in the carrier's tariff are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching and cartage. It observed further that "this construction of the act is borne out fully by its history and has been formally accepted by railroad counsel in advising the carriers. The railroads recognize their duty to make delivery under the rates stated in their tariffs * * *." It will be recalled that the order of the Commission in the *Los Angeles case* was temporarily enjoined in the court below (*Atchison, T. & S. F. Ry. Co.* v. *Interstate Com. Com.*, 188 Fed. 229) and that on appeal to the Supreme Court of the United States the decree of the lower court was reversed and the case remanded with instructions to dismiss the bill.

In *Lighterage and Storage Regulations at New York, supra*, the Commission observed that, in general, custom had largely determined what is a reasonable delivery. "It has determined that it is the duty of a railway company to afford the shipper desiring its service a reasonable opportunity to deliver his freight for shipment, to transport the freight with reasonable dispatch and safety, and to place it in a reasonably accessible place for the consignee to receive. The service also includes care of the freight, after the actual movement, for a time sufficient to afford consignee a reasonable opportunity to remove it" (p. 52). Find-[fol. 457] ing in that case that a proposal substantially similar to that here approved by the majority was not justified the Commission said—

> It is evident * * * that the real subject of controversy is not the carriers' responsibility, but the proposal to charge shippers 12 cents per ton for the loading or unloading. The Commission finds that this rule is not justified, for the following reasons: (a) It would be

discriminatory as between the shippers of different commodities. Although the average cost of loading or unloading lighterage freight is about 12 cents per ton, some commodities, such as salt and cement, can be handled for much less than 12 cents, whereas the handling of others, lumber, for example, costs much more. (b) The assessment of any charge for terminal handling, the service having heretofore been performed under the freight rate, would have the effect of increasing that rate; and proper justification of such an increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate. There is no evidence to warrant any finding upon the adequacy of the compensation now received by the carriers for their complete service. It is shown that freight lightered requires more handling than freight floated to pier stations; that lighters are usually loaded far below their capacity and also suffer considerable detention for unloading at piers; hence, the proposed additional charge on lightered freight. To what extent these expenses in handling freight by lighter are offset by the costs of operating the pier stations where other freight is handled is left to conjecture. We make no finding as to the adequacy of the present rates on any of this freight; our finding is that an increase in rates has not been justified by the carriers in this proceeding, and that the method of increase proposed is improper.

[fol. 458] THE COMMISSION STRONGLY FAVORS THE ANALYSIS OF SERVICE AND RATES AS AN AID TO THEIR MEASUREMENT AND COMPARISON. BUT IT HOLDS THAT, WHERE A TERMINAL SERVICE HAS HERETOFORE BEEN TREATED BY THE CARRIERS AS A PART OF THE TRANSPORTATION SERVICE COVERED BY THE FREIGHT RATE, AND REGULARLY PERFORMED BY THEM, THEY MAY NOT NOW SEGREGATE THAT SERVICE AND ASSIGN TO IT A SEPARATE CHARGE WITHOUT TAKING INTO CONSIDERATION, IN ORDER TO JUSTIFY SUCH CHARGE, THE ENTIRE THROUGH SERVICE OF WHICH IT FORMS A PART AND THE COMPENSATION HERETOFORE RECEIVED FOR SUCH THROUGH SERVICE. (Emphasis supplied.)

The record shows that the proposed charge of 12 cents for unloading would be equivalent to advances of from

> 4 to 8 per cent in the through rates on certain commodities handled in large volume. The additional charge would increase the cost to the city of New York for structural steel and other materials for its proposed new subway by approximately $100,000. The citation of this testimony is sufficient to emphasize the great importance of terminal service as a transportation factor.

The law of the case was thus stated on a substantially similar legal point. That interpretation, announced by the Commission in 1915, has been followed in all the pertinent decisions over the intervening period of more than thirty years. It is the interpretation applied in the recent cases already cited including the *Lumber Unloading case* * from which the following quotation is taken:

> The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor. In *New York Harbor Facilities Applications*, 100 I. C. C. 383, the Commission found that [fol. 459] lighterage and car floatage in New York Harbor are equivalent to necessary extensions of the rail lines of the various railroads. This conclusion was reached also in *Lighterage Cases*, 203 I. C. C. 481. The nature and incidents of the unloading service here considered established beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, 61. As such a showing was not made respondents have not met the requirements of the statute in that respect and accordingly have not sustained their burden as to the reasonableness of the proposed charge.

Throughout the proceedings, extending over a period of many years, the Commission has condemned every proposal to split the Port of New York. As it well knows, nature has

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* *Unloading Lumber at New York Harbor*, 256 I. C. C. 463.

so formed the harbor and the waterfront of the New York port area as to necessitate methods of terminal delivery that are without parallel at other terminal points. In *The New York Harbor case*, *supra*, the Commission observed that "the conditions under which freight is transported from one side of the harbor to the other at New York are without exact parallel anywhere in this country." And in the lighterage cases to which petitioner has referred it stated that "the water areas intersecting and adjoining New York City and the crowded condition of Manhattan Island have resulted in the adoption by the carriers of terminal services peculiar to that city" and that "many of the circumstances and conditions which affect the transportation service at New York have no counterpart in the United States."

[fol. 460] The carriers have therefore provided for years equivalent extensions of their rails by the employment of lighterage and floating service across the harbor. As was said in *Lighterage Cases*, *supra*, "lighterage and car floatage in New York are equivalent to necessary extensions of the rail lines of the various railroads." See also *New York Harbor Facilities Applications*, 100 I. C. C. 383.

Conclusion

The errors of fact and law which have impelled petitioner to submit this appeal will be readily apparent to the Commission from the foregoing discussion. The errors in chief are attributable to a subordination of basic rate-making principles to the detail of a cost formula covering only a segregated part of a through transportation service, with complete disregard of sharply increased rates authorized by recent findings and orders of this Commission to compensate for increased cost of transportation, including all instrumentalities and services connected therewith. The splitting of the port of New York district through the establishment of varying charges for transportation to points within the terminal area, contrary to the decisions of this Commission extending over a period that dates back to almost the beginning of common carrier regulation, is among the serious consequences of the conclusions and findings of the report.

The failure to find that the unloading service is essential

to make a proper delivery under the applicable tariff rates and that the carriers are now compensated fully for that service, including large increases of the transportation rates which have admittedly always included the unloading serv- [fol. 461] ice; the confusion of essential port terminal facilities and services with carload deliveries on tracks at inland points; the erroneous conclusion in that connection that New York and Philadelphia are exceptions to the general rule with reference to unloading; the comparison of carload delivery required to complete the transportation contract with ancillary services of a special character such as refrigeration and transit of which there is none here; the lifting of the burden of proof by approval of a plan by which terminal carriers in a through route are permitted to increase their proportion of the through charges without compliance with the concurrence rules; the failure of conformity with the declaration of national transportation policy, and other errors pointed out in the foregoing discussion—all are of serious effect and almost certainly threaten interminable litigation if permitted to continue effective.

Therefore, with reference to the basic considerations, it is submitted that the findings and orders appealed from are opposed to the rule of the statute as it has been consistently interpreted and applied by this Commission over the years, and for the following reasons, among others above suggested:

1. They would impose upon the shipper or consignee extra or penalty charges for a delivery service for which the carriers have been compensated under the line-haul rate schedules.

2. They would apply a theory of accessorial services such as switching and transit notwithstanding there is no such service and no fair analogy thereto of the delivery operation here in issue.

3. They would recognize as valid the independent action of a single group of carriers in the through [fol. 462] service in detaching themselves from their partners in the through routes and joint rates and making effective an upward revision of rates for a part of the through transportation, thereby overriding the concurrence rule of the statute and the tariff reg-

ulations of the Commission while at the same time serving to relieve the non-concurring line-haul carriers of the burden of proof specifically imposed upon them by the statute.

4. They would split the Port of New York with respect to the tonnage in issue through the establishment of varying charges within the terminal area, contrary to all conclusions, findings and orders of this Commission, extending over a period of many years.

5. They would accept as a sufficient basis for such drastic and unprecedented action a record of factual detail concerning no substantial element other than the cost of performing a service essential to make a valid delivery notwithstanding such delivery and the cost thereof are, and have always been, compensated for in the level of charges for the through service of which they are a part.

Wherefore, petitioner prays that the said proceeding may be reopened and reconsidered and that upon such reconsideration the Commission may find that the said additional charges published in tariff schedules heretofore under suspension in the said proceeding are unlawful, reversing the findings heretofore made and thereupon enter its appropriate orders vacating its said order of October 4, 1948, [fol. 463] and requiring cancellation of the offending schedules.

Respectfully submitted, The Port of New York Authority, by Leander I. Shelley, 111 Eighth Avenue, New York 11, N. Y., General Counsel, Wilbur La Roe, Jr., Frederick E. Brown, Arthur L. Winn, Jr., Samuel H. Moerman, Investment Building, Washington 5, D. C., Attorneys.

Dated at Washington, D. C., December 6, 1948.

[fol. 464] APPENDIX

to

Petition of The Port of New York Authority for Reopening and Reconsideration in I. & S. No. 5500—Unloading Charges Fruits & Vegts.—New York & Phila.

Excerpts from Carriers' Tariff Schedules (Agent C. W. Boin's I. C. C. A-856)

Item No. 4635

Loading and Unloading Carload Freight at Rail Termini:

Carload "Lighterage Free" freight (Note) except Lumber (See Rule No. A-208), received directly from or delivered directly to barges, lighters or vessels, not owned or controlled by the carrier, at stations shown in Note 15, will be received at or delivered to string piece or platform and loaded to or unloaded from cars by the carrier when New York, N. Y., rates, that include free lighterage, are assessed.

(Note:—Provisions of this item will also apply to Automobiles, unboxed, in carloads, for delivery to barges, lighters or vessels.)

Item No. 4645:

Rule No. A-201—Exception to Rule 27 of Consolidated Classification

Loading and Unloading Carload Freight

Freight in carloads, other than bulk freight, carried at carload rates, received or delivered at stations in Note 19 (Notes A and C) through carriers' warehouses or sheds, or over carriers' piers or platforms, will be loaded into or unloaded from car by carriers (Note B).

Note A.—Not applicable on shipments received from or delivered in carload lots to public storage warehouses served directly by B. & O. tracks at 26th Street and 11th [fol. 465] Avenue, New York, N. Y., or C. of N. J., West 26th Street Station, New York, N. Y.

Note B.—Except as otherwise specifically provided in Rule No. A-215, no instructions will be accepted from ship-

per, owner or consignee to withhold unloading by carrier.
Note C.—Not applicable at Bush Terminal R. R. station.

Item No. 2525:

(e) On import, export, intercoastal or coa*st*wise traffic (Note B), rates to or from New York, including free lighterage on articles entitled to free lighterage, will include loading or unloading of lighters, barges or cars on carfloats in lieu of lighterage (subject to Rule No. A-60) at place of receipt or delivery by these companies, except as otherwise provided in this tariff.

Item No. 4370:

Rule No. A-155—Loading and Unloading of Carload Freight in Lieu of Lighterage

(For account of B. & O. only)

(a) In lieu of lighterage service, The B. & O. will, at its option, provide for the loading or unloading of carload property, entitled by this tariff to free lighterage, tendered to this Company for lighterage movement to or from piers or warehouses of the American Dock Company or the Pouch Terminals, Inc., and for the handling of such property in cars from or to this Company's rail terminal at St. George Lighterage, S. I., N. Y., at the same charges that would apply if the shipment were handled by lighter.

(b) In lieu of lighterage service, The B. & O. will, at its option, provide for the loading or unloading of carload property, entitled by this tariff to free lighterage, tendered to this Company for lighterage movement to or from the Municipal Piers, located at and between Tompkinsville and Clifton, S. I., N. Y., when such piers are served by tracks [fols. 466-467] from the S. I. R. T. (B. & O. Sys.), and for handling such property in cars from or to this Company's rail terminal at St. George Lighterage, S. I., N. Y., via the S. I. R. T. (B. & O. Sys.), at the same charges that would apply if the shipment were handled by lighter.

Item No. 3273:

(For account of Erie and N. J. & N. Y. only)

(c) Applicable at Mid-Hudson Warehouse, Inc., Jersey City, N. J. In lieu of lighterage service, the Erie or N. J. & N. Y., will, at its option, provide for the loading or unloading to or from cars of carload freight entitled by this tariff to free lighterage, tendered to the carrier for movement to or from warehouses of the Mid-Hudson Warehouse, Inc., Jersey City, N. J., and for the handling of such property in cars at the same charges that would apply if the shipments were handled by lighter.

The provisions of this rule will not apply on property stored in transit as provided in this tariff.

Item No. 4375:

(For account of P. R. R. only)

In lieu of lighterage service, the P. R. R. will, at its option, provide for the loading or unloading to or from cars of carload freight entitled by this tariff to free lighterage, tendered to this Company for movement to or from warehouses of the Harborside Warehouse Company, Inc., Jersey City, N. J., and for the handling of such property in cars at the same charges that would apply if the shipment were handled by lighter.

The provisions of this rule will not apply on property stored in transit as provided in Rule No. S-57 and Item No. 9735.

[fol. 468] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. 5500

Unloading Charges Fruits and Vegetables at New York and Philadelphia

PETITION BY THE SECRETARY OF AGRICULTURE FOR REOPENING AND RECONSIDERATION—Filed December 6, 1948.

Preliminary Statement

This proceeding involves the transportation of fresh fruits and vegetables from all origins to the great consuming markets of New York and Philadelphia. The Commis-

sion by its report of October 4, 1948, has approved a proposal by the five delivering railroads to assess an unloading charge which would be in addition to the applicable line-haul rates.

For decades the railroads unable to reach Manhattan by direct track connections have overcome this geographical disability by the use of car floats. Inherent in such expedient is the immediate necessity for unloading the cars when they reach the Manhattan piers. The railroads accordingly have unloaded the cars and afforded to the consignees a delivery on the piers in lieu of the regular team-track delivery which would be available to them at other destination points. During this time the shippers, receivers, and distributors of fresh fruits and vegetables have accommodated themselves to this geographical disability of the railroads, and their water-borne solution thereof, and a [fol. 469] tremendous volume of these necessities of life has thus been delivered to consumers in New York.

This flow of commerce, of course, has been beneficial to all concerned, including the receivers of the produce, who, as emphasized by the railroads, actually conduct part of their business on the piers. The amount of the rent paid by the produce receivers to the railroads for the use of the auction rooms and the amount of the rent paid by the railroads to the City of New York for the use of the piers are not of record, nor are they pertinent in this proceeding. By the proposals herein approved by the Commission the railroads serving New York would arbitrarily redistribute the benefits and the burdens of this important part of the Nation's commerce. They would not discontinue the arrangements which have developed over the years as a result of, and in adjustment to, their geographical disability; but they contend they are entitled to a larger portion of the benefits of this traffic. The people of New York would continue to eat the same produce! the receivers and distributors would continue to handle it in the same way; the originating and intermediate railroads would receive the same compensation; there would be no disruption of the channels of commerce; the only change would be that the compensation of the delivering railroads would be enhanced by over two million dollars a year, which would be borne in part by the American farmer and in part by the consumer of his

products. The delivering railroads, standing at the last portal through which the flow of traffic must move, would thus transform a geographical disability into a source of additional revenue.

[fol. 470] At Philadelphia the background is substantially different but the proposals of the delivering railroads are the same. The charges for unloading apply at the two produce terminals which were erected over 20 years ago. As in New York, commerce has adjusted itself to the facilities thus provided, and the public is faced with the choice of either an increased price for transportation of the necessities of life or disruption of the channels through which these necessities move.

The questions at issue in this proceeding are, first, whether the delivering railroads have established, in principle, a right to special and separate compensation for the same unloading service they have performed for decades as part of their duty under the line-haul rates, and second, assuming they have proved such a right, what is the reasonable measure of the special and separate charge.

A majority of the Commission has decided that the proposals of the delivering railroads have been justified.* We

* Chairman Lee, Commissioners Atchison, Splawn, and Alldredge dissented. Commissioner Patterson, being necessarily absent, did not participate in the disposition of this proceeding.

believe that the decision is in error, as we will point out in particular below.

Exceptions

1. *Exception is taken to the Commission's finding that a separate charge for unloading at New York and Philadelphia is justified.*

In the third paragraph on sheet 13 of its report the Commission states:

> "For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates. The establishment of specific charges for unloading at New York and Philadelphia, without refer-

ence to the levels of the line-haul rates is justified. Such charges are in substantially the same category as those for switching, transit, refrigeration, and various [fol. 471] other special services for which separate charges are published. Concurrence of carriers other than the destination lines, respondents herein, is not a prerequisite to the establishment of the proposed unloading charges."

The quoted paragraph is contrary to the weight of the evidence and is diametrically opposed to the prior decisions of the Commission.

In *Fruits and Vegetables to Duane St., N. Y.* 66 I. C. C. 135, the Commission had for consideration the propriety of a terminal charge to cover the unloading of this same traffic by one of the present respondents at New York. In finding the proposed charge not justified the Commission stated (p. 139):

"The terminal charges present a somewhat different problem. It is proposed that they shall apply on all fruit and vegetable traffic delivered at Duane street station. As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane street under the line-haul rates. Since 1920, a charge based on actual cost, ranging from $2 to $8 per car, has been made for the assorting service under an agreement between respondent and the representatives of the trade, and no objection is made by protestants to the publication of these charges in tariff form. The proposed terminal charges would range from $6 to $12 per car and include the assorting charge. Respondent states that these charges are to cover the excess in the cost of handling fruits and vegetables over the cost of handling other freight. While it is proposed that this charge shall apply on all shipments of fruits and vegetables delivered at the Duane street station, including those upon which the proportional rate above discussed is paid, some of respondent's cost figures submitted in support of the terminal charge are duplications of, and cover the same services as, those offered in support of the proposed proportional rate, and a number of the items cover services rendered prior to

arrival of the shipments at Duane street station. The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic, merely pointing out that the rates on California fruit are blanketed to all territory east of the Colorado common points and that 15 [fol. 472] years ago, when the traffic began to be handled in the manner above described, no corresponding increase was made in the through rates. This blanket has been voluntarily maintained by the carriers for many years and appears to have been satisfactory to all concerned. We find that the establishment of terminal charges higher than the present assorting charges has not been justified."

A more recent decision also directly in point is *Unloading Lumber at New York Harbor*, 256 I. C. C. 463, wherein the Commission stated (p. 468):

"The present rates on lumber within official territory, and from other territories into official territory, include the services for which charges are here proposed. . .

"The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor. In *New York Harbor Facilities Applications*, 100 I. C. C. 383, the Commission found that lighterage and car floatage in New York Harbor are equivalent to necessary extensions of the rail lines of the various railroads. This conclusion was reached also in *Lighterage Cases*, 203 I. C. C. 481. The nature and incidents of the unloading service here considered established beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage*

Regulations at New York, 35 I. C. C. 47, 61. As such a showing was not made respondents have not met the requirements of the statute in that respect and accordingly have not sustained their burden as to the reasonableness of the proposed charge."

The Commission's report in the present proceeding contains no explanation as to why these prior decisions should be overruled.

The Commission in its report overlooks the legal obligation of the carriers to perform a reasonable delivery at no charge in addition to the line-haul rate. The undisputed evidence in this proceeding shows that for decades the delivering railroads have unloaded fresh fruits and vegetables on the New York piers and at the Philadelphia terminals in lieu of and as a substitute for team-track deliv- [fol. 473] ery; that the compensation for such unloading has been embraced by the line-haul rate; and that there is and can be no delivery at all of this produce until such unloading has been performed. Indeed, the Commission states at sheet 7 that "Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor."

At the hearing the respondents' witness Hodkinson submitted a series of exhibits (Nos. 4 to 12 inclusive, Tr. 17-28) which show that the line-haul rates are blanketed to apply to extensive destination areas. The implication was that receivers of fresh fruits and vegetables at New York and Philadelphia are now accorded something extra (the unloading service) which is not available to receivers at other points in the same destination areas, although the latter receivers pay the same line-haul rates. There is nothing in this record to show the extent that the team-track delivery accorded receivers at other points (or at team tracks in New York or Philadelphia) is more or less expensive to the railroad or more or less valuable to the receiver than is the service here under consideration. In this connection it is interesting to compare the present contentions of the respondents with their contentions in *Lighterage Cases*, 203 I. C. C. 481, 496-7, where they essayed to show that team-track deliveries at New Jersey points are as costly as, or more costly than, pier deliveries. We submit that a proper

conclusion upon this record would be that the receiver of fresh fruits and vegetables is entitled to a reasonable delivery by the railroads at no charge in addition to the line-haul rate, and that at New York and Philadelphia the service now performed by the railroads is no more than such a reasonable delivery.

[fol. 474] 2. *Exception is taken to the Commission's findings as to the measure of the proposed charges.*

At sheet 14 the Commission's report states:

> "Respondents have justified their proposals. In reaching this conclusion we have given due consideration to all pertinent facts of record, particularly the evidence with respect to the cost of the service. Admittedly, respondents have derived substantial benefits from the concentration of traffic at their New York and Philadelphia produce terminals and from the line-haul revenue received by them from this traffic, but these factors are in no sense controlling in the determination of the issues now before us. The protesting shippers have also received worthwhile benefits. The present expense of unloading is such that respondents should no longer be required to furnish this service without adequate compensation. The cost of service is less at Philadelphia than at New York, but no separate charge for special sorting and stacking is made at that point. Furthermore, the record indicates the desirability of a parity of charges for unloading at New York and Philadelphia. We conclude that the charges for unloading should be the same at both points."

First, as to "the desirability of a parity of charges for unloading at New York and Philadelphia," the record reflects only the desires of the respondents to assess the same charges at both points and their unsupported reference to "the long-standing competitive relationship between those two cities" (Respondents' Brief, p. 10). In *Vegetables and Avocados, South to Official Territory*, 269 I. C. C. 409, the respondents' proposal to increase their rates to New York by 10 cents and to Philadelphia by 7 cents was approved.

That case and the instant case were both heard in July of 1947 and initially argued in the same week of October 1947, at which time the inconsistency of their contentions and proposals was pointed out. The cost studies in the present proceeding, for what they are worth, indicate that unloading charges at Philadelphia in the same measure as those to be applied at New York are unjustifiable.

[fol. 475] Upon brief and at the argument and reargument your petitioner and protestant California Citrus League, as our assignments in the division of the case for the protestants, endeavored to analyze and to prove unworthy of credence by the Commission, the respondents' exhibits relating to the cost of performing the unloading service. These exhibits (Nos. 23, 30, 31, 33, 35, and 36) purport to be resumés of cost studies conducted by four of respondents' witnesses.

With respect to this evidence the Commission concludes (sheet 12):

> "Careful consideration of these cost studies and of the testimony of qualified witnesses who explained them leads to the conclusion that the studies were carefully prepared and sufficiently prove the facts therein set forth. While they may be subject to certain infirmities, some of which have been called to our attention by protestants, these are more than offset by several items of cost which have been omitted from the studies, as previously explained herein, some of which might well have been included."

We do not feel that this conclusion of the Commission can be supported. The first requisite of a cost study is that it must contemplate a representative period. Only one of the six exhibits (No. 23) was stated by Witness Root to be for a "representative test period" (Tr. 206). The other witnesses, as shown on pages 22 and 23 of our brief, could not make similar statements. There are highly questionable items on exhibits 30 and 36 which have not yet been explained, as pointed out in the oral arguments, in our brief (p. 24) and upon cross-examination of the respective witnesses (Tr. 376-9, 497-503, 513-6). These are the high-cost exhibits and their acceptance tends to inflate the average costs. For example, during the test week the subject of Ex-

hibit 30 the Pennsylvania Railroad paid to the Penn Stevedoring Company $17,000 for performing unloading services at New York and another $10,000 as a profit. We think that [fol. 476] this indicates why the Pennsylvania's cost of unloading top-iced vegetables is claimed to be $4.24 a ton, which is more than double the costs as shown by the Erie and New York Central. Yet, the Commission has accorded full credence to all of the cost studies.

As to the matter of representativeness, the Commission observes, at sheet 12:

> "The record contains no satisfactory explanation why these particular weeks were selected for the cost studies, but there is no indication of record that other weeks would have produced materially different results."

This suggests that the protestants rather than the respondents have been remiss in this matter, since the cost studies notwithstanding this fundamental infirmity have been accepted at full face value. We respectfully submit that the Commission has here overlooked the fact that the burden of proof is by law placed upon the respondents.

The three tables reproduced in the appendix to the Commission's report were taken bodily from pages 60 and 61 of respondent's brief. Likewise the respondent's explanation of these tables, as stated on pages 12, 13, 14 and 37 of their brief, is paraphrased on sheets 10 and 11 of the report. We take strong exception to the theories and treatment of the cost studies which have been adopted by the Commission. At the first argument before Division 3, counsel for respondents stated (Tr. 799):

> "The main reliance of respondents in this case is upon the Erie study. It was made in four separate weeks, taking one out of each season throughout the year. The studies made by the other carriers were submitted as corroborative evidence to support that thoroughgoing study."

[fol. 477] Compared with the other cost studies, we readily concede that the Erie study (Exhibit 23), covering their operations at the Duane Street pier, is the most reliable.

It is also the study which shows the lowest per ton costs for performing the unloading service in New York.

The respondents' brief, however, and the Commission's report arbitrarily divide the tonnage figures shown in the Erie study by 4 in averaging the costs shown in that study with those shown in the less reliable and highly questionable cost studies of the other carriers. Such treatment obviously serves to minimize the most reliable cost data supplied by the respondents and to produce inflated average cost figures, and is therefore unsound. A preferable treatment was used in *Freight Forwarder Investigation*, 243 I. C. C. 411. In that case the Commission said (pp. 415-6).

> "The averages o fall the cost figures which appear to be based on the same factors and may be regarded as comparable, omitting those embracing less-than-carload traffic and those failing to include pay-roll taxes, are approximately as follows: At Chicago, forwarder traffic $1,324, nonforwarder traffic 91.5 cents, team-track handling 47 cents; at St. Louis, forwarder traffic 90 cents.
>
> "These figures do not represent a weighted-average cost on this traffic but are composed of the averages of the costs, where comparable, on each line regardless of the number of test periods shown by the individual lines or the number of freight stations at which loading and unloading takes place, and are the most representative combined figures obtainable from the record."

Further in this connection, reference is made to the rule of rate making contained in section 15 a (2), as follows:

> "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors; to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the *lowest cost* consistent with the furnishing of such service; and to the need of revenues [fol. 478] sufficient to enable the carriers, under hon-

est, economical, and efficient management to provide such service." (Emphasis supplied.)

We submit that under the above rule of rate making the Commission should give primary emphasis to the lowest cost of performing the unloading service, which, for New York, is the cost shown by the Erie cost study. Similarly, for Philadelphia, primary emphasis should be accorded the Pennsylvania cost study. The studies which reflect the higher costs are out of line with the "economical and efficient management" contemplated by section 15 a (2). In view of the substantially different situations at New York and Philadelphia we submit there is no justification for combining and averaging the costs of unloading at these two points.

At sheet 11 of the Commission's report recognition is given to the fact that "respondents' computations do not take into account various expenses which would be incurred in connection with team-track delivery which are not present in the case of pier delivery." The paragraph ends with the Commission's conclusion that "In any event it is not appropriate to consider these matters as affecting the costs, as such, of unloading at the piers." The qualifying words "as such" do not save this conclusion from being substantial and prejudicial error. The respondents through witness Hodkinson, as previously pointed out, emphasized the fact that New York and Philadelphia are points within widespread destination rate groups and that the rates to New York, for example, apply also to a number of points in the same group. If it is a fact that pier delivery at New York is more costly to perform than team-track delivery at the other points in the same destination rate group, the special rate to be paid for the pier delivery should not exceed the [fol. 479] difference between the cost of the team-track delivery and the cost of the pier delivery.

3. *Exception is taken to the Commission's failure to give adequate consideration to the Agricultural Marketing Act of 1946.*

As stated in our brief and upon argument, the Secretary of Agriculture is principally opposed to these unloading

charges because they will be borne for the most part by the American farmer (Tr. 588-9, 593, 614, 636-7, 666, 675, 677, 685, 716). The measure of this added transportation burden is approximately $2,000,000 a year on produce unloaded at New York and $373,000 on produce unloaded at Philadelphia, *plus* the Ex Parte 166 increases. The respondents contend that these charges will be passed on to the consumers (Tr. 32, 86, 100), which may be true to a certain extent (Tr. 614); but it is clear that these charges will widen the spread between the prices received by the producer and the price paid by the consumer (Tr. 86). The widening of this spread is contrary to the intent of Congress as stated in the Agricultural Marketing Act of 1946 (7 U. S. C. 1621, *et seq.*) (Tr. 613). Section 202 of that statute declares that its objectives are to be obtained by, among other methods, "an integrated administration of all laws enacted by Congress," which we submit includes the Interstate Commerce Act.

Wherefore, your petitioner prays that the Commission will reopen and reconsider this proceeding and upon reconsideration will find (1) that the respondent carriers have failed to justify any separate unloading charge, (2) that, if a separate unloading charge is justifiable, the published charges are excessive and unlawful, (3) that the Commission's order of October 4, 1948 should be vacated, and (4) that the respondents' tariff schedules stating the unloading [fol. 480-538] charges should be ordered cancelled.

Respectfully submitted, by direction of the Secretary of Agriculture of the United States.

Chas. B. Bowling, Chief.

J. L. Pease, Transportation Specialist, Transportation Rates and Services Division, Marketing Facilities Branch

Charles W. Bucy, Associate Solicitor

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United States Department of Agriculture, Washington, D. C.

[fol. 539] BEFORE THE INTERSTATE COMMERCE COMMISSION

Unloading Charges Fruits and Vegetables—New York and Philadelphia.

I. & S. Docket 5500.

CARRIERS' REPLY TO PETITIONS FOR REOPENING AND RECONSIDERATION—Filed December 30, 1948

Come now the carriers who were respondents in the above proceedings and reply to the petitions for reopening and reconsideration filed on behalf of the following parties:

(a) The Florida Railroad and Public Utilities Commission, The Growers and Shippers League of Florida and the Florida Citrus Commission (hereafter referred to as the Florida interests),

(b) International Apple Association, National League of Wholesale Fresh Fruit and Vegetable Distributors and United Fruit and Vegetable Association (hereafter referred to as Apple Association),

[fol. 540] (c) The California Citrus League (hereafter referred to as California Citrus),

(d) The Port of New York Authority (hereafter referred to as the Port Authority),

(e) The Secretary of Agriculture (hereafter referred to as the Secretary),

(f) The New York Carload Receivers Committee (hereafter referred to as the Carload Receivers),

(g) The Philadelphia Terminals Marketing Association (hereafter referred to as the Philadelphia Terminals), and

(h) The Auction Receivers of Philadelphia (hereafter referred to as the Auction Receivers).

All of these petitions except the two last named were filed on or about December 6, 1948, and the last two were filed on or about December 15, 1948. The reply of the carriers to all of them has been combined in this one Reply because the major contention advanced is the same in all of them and the minor contentions overlap in most instances.

All the petitions are alike in that they do no more than

repeat the contentions of the various parties made in briefs and at the oral arguments. None of them present any arguments which have not been fully stated in previous documents submitted to the Commission nor do they contain any [fol. 541] matter of consequence which has not been fully considered by the Commission as reflected in its report dated October 4, 1948.

In these circumstances, the carriers submit that no useful purpose can be served by a reopening of this proceeding and further review of arguments already exhaustively presented. The transcript of the hearing covers 720 pages and 71 exhibits were received. Appearances were entered on behalf of 25 parties. Briefs totalling 278 pages were filed. The proceeding was orally argued twice—once before Division 3 and once before the entire Commission, the argument covering 183 pages. Since it is abundantly clear that a full record was made and extensive argument was had, the carriers respectfully request that the petitions be denied. Presumably the purpose of assigning the proceeding for further argument before the entire Commission was to decide the case finally in one report rather than issue a Division report and thereafter grant reconsideration by the entire Commission. In effect, therefore, the proceeding has already been subject to the further consideration sought in the petitions.

Notwithstanding the fact that these petitions contain no new matter not already considered by the Commission, this reply will proceed to answer fully each of petitioners' contentions. Although the contentions in the various petitions [fol. 542] are closely similar, the variation in the arrangement of the argument is such as to make it impracticable to attempt to arrange this reply in the same order as that used by the various petitioners. For convenience, however, references will be made to the various petitions where practicable to do so.

I. The publication of charges for unloading carload freight separate from the line-haul rates is not unlawful.

The major contention of petitioners is to the effect that the line-haul rates in effect on these commodities were so fixed as to include within their scope the unloading services

at New York and Philadelphia and that carriers may not now publish separate charges for the performance of services for which they already receive compensation out of the line-haul rates. The argument is presented in three forms; the first consisting of references to previous rulings of the Commission, the second an attempt to show that these services have been covered by the line-haul rates, and the third an argument supported solely by petitioners' concepts of the implications of the carriers' obligations to effect delivery.

[fol. 543] A. The Decision in I. & S. 5500 is not Contrary to Previous Decisions.

As to the argument based on previous decisions, petitioners have claimed that it has become the "settled law" and the "standard of common carrier service" (Port Authority, pp. 3, 14 and Carload Receivers, p. 11) that carriers perform the unloading service. The support cited in the petitions for this conclusion consists of a number of cases involving port differentials between various North Atlantic ports, one case involving lighterage, storage and carfloatage services in New York Harbor and several cases involving unloading operations wholly dissimilar from that involved in I. & S. 5500. Obviously, the issues as to port differentials are remote from the issue as to the reasonableness of the approved charges. Similarly, the circumstances involved in lighterage, storage and carfloatage services are entirely different from those involved in determining the issue as to the reasonableness of unloading charges. As previously explained in the brief filed by the respondents in I. & S. 5500 (pp. 18, 19), the separate publication of charges for the services involved in *Unloading Lumber at New York Harbor*, 256 I. C. C. 463, involves considerations foreign to I. & S. 5500 since those services were performed in the course of the line-haul movement of the property from origin to [fol. 544] destination. That decision, therefore, may not properly be compared with the terminal unloading considered in I. & S. 5500.

As to *Fruits & Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, the charge there under suspension was a "terminal

charge" designed to cover a variety of services not defined in the report except that they were said to represent the excess of cost of handling this traffic as contrasted with other freight. The charge was for a variety of services, some performed prior to and some after lighterage and carfloatage. It does not appear from the report whether or not the unloading service was included. A report which does not define the services performed but only indicates that the services were different from those considered here should not be relied on as a precedent. It clearly does not support the conclusion which petitioners seek to draw from it.

Further, even if petitioner's argument were taken at face value, all the cases cited except the lumber unloading case were decided by the Commission more than 25 years ago. The differences in the economics of transportation which the intervening years have wrought, particularly the enormous increases in the costs of terminal operations, to which Eastern lines have been particularly subject, have so changed the considerations involved in the issue as to the [fol. 545] propriety of the publication of a separate charge as to render such precedents unreliable even if they were intrinsically in point. Obviously, decisions which are not in themselves controlling which were decided at a time when transportation conditions were significantly different, cannot be relied on to establish a standard of administrative practice such as would be convincing in deciding the issue presented in I. & S. 5500.

In contrast with these dissimilar proceedings, the Commission has in recent years found lawful and proper the action of the carriers in publishing separate charges for the performance of unloading services. During the years since 1925 it has become the usual practice that at all points where the carriers unload carload freight they receive compensation for such unloading services in the form of separate charges. The doctrine of the Commission in approving the separate publication of such charges is stated in *Loading and Unloading Carload Freight*, 101 I. C. C. 394, 413, in which, after referring to the fact that the Commission did not consider the unloading service in fixing the line-haul rates and the further fact that the same rates applied

whether or not the unloading was performed, the Commission said:

> "All of these facts indicate that the general measure of the rates to and from the points in question are not [fol. 546] unreasonable for the line-haul service alone and warrant the conclusion that if the carriers justify the charge for the loading and unloading service they have borne their burden of proof under the law."

In a similar proceeding, *Charges for Loading and Unloading Carload Freight*, 269 I. C. C. 25, the Commission reaffirmed its earlier findings and stated that the only objection to the charges there under investigation was that they were perhaps too low. Thus, in every instance in which the Commission has had occasion to rule on the lawfulness of terminal unloading charges since 1925 it has approved the action of the carriers in publishing separate charges. In conformity with those decisions, the carriers have progressively extended to all points at which they unload carload freight tariff provisions providing for a separate charge. Thus, both doctrine and practice confirm the lawfulness of the separate publication of unloading charges.

B. The Unloading Service is not Within the Scope of the Line-Haul Rates.

The second aspect of the major argument of the petitions is the contention that the line-haul rates include the unloading service. The pertinency of the argument to the issue in I. & S. 5500 is nowhere stated in the petitions. Presum- [fol. 547] ably, it is directed to the provisions of Section 6 which require that tariffs shall show "all the rates, fares and charges for transportation" and shall "state separately all terminal charges * * * and all other charges which the Commission may require." The argument is material to the issues in I. & S. 5500 only if it tends to show that it is unlawful for carriers to maintain separate charges for the unloading service. Nowhere do petitioners actually meet this issue. Instead, the argument assumes its own conclusion and consists only of a repetition of that conclusion.

The real issue as to the justification for the separate publication of unloading charges depends upon the extent to

which the unloading service was considered in fixing the level of the line-haul rates and the extent to which, in the opinion of the Commission, proper standards of ratemaking require that these services be performed without a separate charge. Petitioners have previously unsuccessfully attempted to show that the unloading service was considered by the Commission in determining the level of the line-haul rates. Neither the record in this proceeding nor the decisions of the Commission in cases involving rates on these commodities support the conclusion contended for by petitioners.

In justification for the separate publication of unloading charges, respondents showed in I. & S. 5500 that the cost [fol. 548] of providing the service, like most terminal costs, had increased at a much more rapid rate than the general increases in the costs of their operations; that the high cost had raised a very serious question as to whether it was proper to continue to perform the service without a separate charge; that it was unfair to require the general traffic of the carriers to continue to bear the cost of so expensive a gratuity to a small segment of traffic and that it was unfair not to require receivers at New York and Philadelphia to bear the burden of such costs when separate charges are concurrently assessed at other points. The carriers submit that these considerations constitute the real justification for the separate publication of charges and that the dry logic on which petitioners have relied both during the course of I. & S. 5500 and again in their petitions, falls far short of an adequate justification for reopening that proceeding.

C. Unloading is not an Integral Part of Delivery.

The dry logic referred to above is the main reliance of the petitioners in the third aspect of their major argument. The argument proceeds as a syllogism which consists of a major premise that the carriers are obligated to effect delivery under the line-haul rates, a minor premise that [fol. 549] unloading is necessary to effect delivery and the conclusion that unloading is within the obligation of the carriers under the line-haul rates.

The argument not only fails to comprehend the practical

economies of the situation but fails also to recognize that none of these propositions tends to show that carriers may not properly assess a separate charge for providing extraordinary services in the course of the performance of their contract of transportation. It further fails to recognize that the unloading service is not, in fact, integrated with the details of effecting delivery to the owner of the goods. Moreover, the studies of the costs of performing the unloading service included none of the cost of effecting delivery. In determining the cost of the unloading service, no portion of the cost of maintaining ordinary agency forces or ordinary stationhouse facilities were included in the cost studies or referred to by the carriers as items of additional cost. The cost justification relied wholly on the expense of the extraordinary services performed by the carriers in unloading these commodities and the unusual station costs incident to that operation which would not be incurred in maintaining facilities for the delivery of ordinary freight.

Petitioners have contended that switching, transit and refrigeration are not similar to the unloading service. Those [fol. 550] services were referred to in I. & S. 5500 only because they are services separate and apart from the line-haul services just as the unloading of fruits and vegetables at New York and Philadelphia is a separate service and should be performed only in consideration of charges separate from the line-haul rates. They are, therefore, valid precedents for the publication of separate charges for the unloading service. The petition of the Carload Receivers (p. 4) also compares the services provided by concessionaires at passenger stations with the unloading service. Carriers suggest that if there is anything in passenger service similar to unloading, it is the service provided by the Red Caps in handling hand baggage. It is common knowledge that separate charges are made for that service.

The Carload Receivers (p. 12) have also referred to the service of the carriers in providing bracing and blocking for carload shipments. This comparison further confirms the contentions of the carriers since separate charges are made for such services also.

The Port Authority has contended that the circumstances at New York are not similar to those at Chicago, Buffalo,

Pittsburgh and other points at which carriers unload carload freight (Port Authority, p. 8). There is no difference in the nature of the service provided and the Commission has [fol. 551] properly found that a separate charge should be made for its performance. Moreover, if the contention of that petitioner (pp. 4-5) and of the Carload Receivers (pp. 16-17) that the Commission should not divide the metropolitan area is valid, the carriers have been in error in the past by reason of the separate publication of unloading charges at metropolitan points such as Jersey City and Newark, N. J. and Brooklyn, N. Y. while concurrently failing to publish such charges at the pier stations.

Further, if all points within the New York metropoliton area are to be included in a single terminal area, the situation at New York is in no material respect dissimilar from that at Chicago, Buffalo, Pittsburgh and like points since within that single terminal area, receivers have the option to avail themselves of the team track facilities on the Jersey side, the team track facilities on Manhattan or the pier station facilities.

The petitioners have also referred to the current citrus divisions case (Carload Receivers, p. 13). This reference is wholly outside the record in Docket 5500, but since it has been made carriers feel justified in directing attention to the fact that the amount of the charges approved were taken into consideration by the Northern carriers in presenting their case in support of increased divisions on that traffic. [fol. 552] In any event the percentages whereby revenues are divided among carriers are not of material weight in determining the reasonableness of rates and charges published in tariffs. This is particularly true in a case where, as here, the charge is for a service unrelated to the line-haul revenues to which the percentage divisions are applied.

A number of petitions have referred to the following language of the Commission's report at p. 13: "For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates." The petitioners have argued that this language is inaccurate in apparently raising the question as to the *adequacy* of the line-haul rates to cover the unloading service. A fair reading of the lan-

guage does not justify the interpretation contended for. The emphasis should be placed not on the word "adequate" but on the word "compensation." The Commission in that language was not referring to the question as to whether compensation for unloading services is included in the line-haul rates. It was merely stating its conclusion that the line-haul rates do not include the adequate compensation to which carriers are entitled for performing the unloading services.

Further, this language does not tend to infer that the burden of proof is on petitioners. The statute provides [fol. 553] for the separate publication of charges. The burden of proof in I. & S. 5500 is the burden of proving that it is lawful to publish unloading charges separate from the line-haul rates. The language of the report is properly framed in conformity with the nature of the issue when it states that the Commission is not convinced that the suspended schedules were unlawful.

The foregoing discussion treats in particular with every contention of petitioners which is allied with the main burden of their argument. The remainder of this reply will treat with the subsidiary contentions advanced in the various petitions.

II. The Cost Studies Fully Justify the Level of the Charges.

Although most of the petitions are concerned only with the issue as to the lawfulness of the publication of a separate charge for unloading, a number of the petitioners have raised the additional issue as to the reasonableness of the charges approved (California Citrus, pp. 13-18, Secretary, pp. 7-12, Philadelphia Terminals, pp. 5-6, Auction Receivers, pp. 8-10).

The major objection is the contention that the cost studies submitted by the carriers failed to justify the charges as [fol. 554] approved. One of the contentions in this regard is that the studies failed to take a deduction for the cost of the switching services not performed in connection with pier deliveries which are provided in connection with team track delivery on Manhattan. The argument assumes that freight rates and charges are and can be precisely determined with relation to the precise quantum of service ren-

dered in connection with particular segments of traffic. Obviously, rate making is not an exact science and rates and charges never have been fixed with such precision.

This contention is not directed solely to the cost studies but is also a part of petitioners' contentions in connection with the line-haul rate argument, previously referred to. Since, as shown above in this reply and in the report, the carriers may lawfully publish separate charges for unloading, the justification for the level of such charges must be limited to that quantum of service which is rendered in performing the unloading. The cost studies, therefore, were properly restricted to labor and facilities necessary to the unloading service without including any of the cost which would be incurred irrespective of the unloading operation. To make a deduction from the costs so determined in the amount of the cost of switching cars to Manhattan team tracks would be to confuse services [fol. 555] performed in connection with line-haul transportation with those which are restricted to the unloading service. There is no more reason for deducting the cost of switching on Manhattan Island from the cost of performing the unloading than exists for including in the unloading charges the cost of all services performed in effecting delivery on Manhattan as contrasted with the team track delivery on the Jersey side. In both cases, the line-haul rates are identical so that if freight rates and charges were fixed with the expectation that costs of particular segments of service would be precisely reflected, it would be proper to add to the gross charges at Manhattan, something more than applies on the Jersey side. It is obvious, however, that no such attempt is made in fixing the level of line-haul rates. There is, therefore, no justification for deducting any part of the cost of line-haul services from the cost of an unloading service of the sort which has for many years been given separate treatment. The Commission properly disposed of this argument at sheet 11 of its report.

Other objections to the cost studies are objections to particular cost accounting techniques. Thus, in the California Citrus petition (pp. 12, 13), the petitioner points out the difference between the method followed in the

Pennsylvania cost study of disregarding the cost of sorting [fol. 556] and stacking in contrast with method followed in the Erie study of deducting the amount of the stacking revenue. Both are reasonable devices for separating costs. Both methods resulted in comparable figures. The results obtained by substituting one method for the other would not have a substantial effect on the results of the studies. The Commission has properly concluded, therefore, that either of these methods was proper.

A second objection to the studies is the inference that the periods of time covered by the studies were not representative (California Citrus, pp. 13-14, Secretary, p. 9, Florida, p. 2). There is no evidence to support the allegation that they were hand picked. There is evidence that the weeks chosen were representative.

For example, the Erie cost witness stated the following at the hearing (R. 207):

> "One week in each season was selected for a test period because of the seasonal movements of the commodities and the effect of volume on the efficiency of unloading operations."

Later he was asked why he selected "these particular four weeks", and he replied (R. 244):

> "Because we wanted to have a period which would give us a fair cross-section of the annual volume, and of the various types of commodities that would be handled."

[fol. 557] Once again he said (R. 245):

> "According to the experience of Mr. Haney and Mr. Hart, these four test weeks were selected as they would give us an accurate sample of the year."

Furthermore there is the internal evidence—the similarity of the supporting studies to the results of the broader-based Erie study—that the particular weeks chosen were representative. Thus, there is ample evidence to support the conclusion that the cost studies reasonably reflect the actual costs of performing the service.

III. The Application of Like Charges at New York and Philadelphia Is Proper

A second ground of attack on the level of the charges approved by the Commission is the similarity in the charges published for application at Philadelphia and at New York, it being petitioners' contention that the lower costs at Philadelphia should be reflected in the amount of the charges (California Citrus, pp. 15-18, Florida interests, pp. 4-5, Secretary, p. 7, Philadelphia Terminals, pp. 5-6, Auction Receivers, p. 9). As is stated in the Commission's report, the reason for publishing like charges at both points [fol. 558] is the desirability of maintaining a parity of charges at competitive markets.

The weakness of petitioners' objections on this ground is attested by their own contentions. Thus, the New York interests (Port Authority, p. 6, Petitions for Intervention filed by the City of New York, p. 2 and by the Industry Committee for the Improvement of Washington Market, p. 3) object to the charges on the ground that they will provide a competitive advantage to Newark and Jersey City. In fact, unloading charges are in effect at both those points and the charges now in effect at the pier stations serve only to require New York receivers to make contributions to carrier's costs of the same sort which have long been made at Jersey City and Newark. The Philadelphia interests (Philadelphia Terminals, pp. 3-4, Auction Receivers, pp. 8-9) object on the ground that they will be placed at a competitive disadvantage as against Baltimore and Pittsburgh receivers.

In thus stating their contention that these charges will be unfair, the petitioners have themselves confirmed the evidence submitted at the hearing and have provided convincing proof that, were different charges assessed at these two nearby and highly competitive cities, serious dislocations in the movement of these commodities would result.

[fol. 559] Further, the carriers expressly deny the allegation at p. 6 of the petition filed on behalf of the Port Authority and state that in fact the volume of traffic moving to the pier stations since the charges became effective has increased rather than diminished. They further deny that

there has been any diversion from the pier stations resulting from the unloading charges. To require detailed proof of the circumstances which justify the application of like charges at these two highly competitive cities located in such close proximity to one another before an informed administrative tribunal is to require proof of the obvious. When the nearest large produce markets are located at Baltimore, Pittsburgh and Buffalo, it cannot be seriously contended that a lower charge at Philadelphia would not have a serious effect upon the competitive position of the two markets in an extensive consuming area.

IV. Petitioners' Miscellaneous Objections to the Charges Are Without Merit

Among the miscellaneous arguments advanced by petitioners in attacking the Commission's decision, it is alleged that increases in rates have already been authorized which are adequate to provide compensation for the unload- [fol. 560] ing service. The primary answer to this argument is that given by Commissioner Atchison at the argument (R. 855-6), namely, that the carriers and the Commission in the general increase proceedings took into consideration the charges involved in I. & S. 5500 and the revenue aspects of that proceeding in determining the amount of the increase which should be approved.

I. & S. 5500, of course, was not primarily a revenue case. It involved the determination of the apportionment of carrier costs as between various groups of shippers. The tariffs under suspension had been filed pursuant to the admonition of the Commission in various cases that carriers should review their tariffs and eliminate the "low spots". This gratuitous service at New York and Philadelphia, being out of line with practices followed at other points, was obviously a case in point. Circumstances which may have justified a gratuitous service in past years do not warrant its continuance. The severe impact of increases in costs, particularly at large metropolitan terminals, makes it imperative that extraordinary services of this nature shall bear their proportionate share of the burden.

The revenue aspects of I. & S. 5500 were, however, sub-

stantial. At Sheet 2 of the decision dated October 4, 1948, the Commission said:

> [fol. 561] "Respondent's proposals reflect an effort on the part of the delivering lines to secure increased revenues from the fruit and vegetable traffic terminated at New York and Philadelphia."

Furthermore, the comparison of the costs reflected in the cost studies submitted in I. & S. 5500 with those on which the decision in *Ex Parte* 166 was based shows that it is in all respects proper to increase the charges approved in I. & S. 5500 by the amount of the increase authorized in *Ex Parte* 166. The Erie cost study covered four different weeks, one in each quarter, the last one being the week of February 4, 1947 (R. 207). The Pennsylvania cost studies were made for the week of February 1-7, 1947, at New York and the week of June 8-13, 1947, at Philadelphia (Ex. 30, 31) and the B. & O. and New York Central studies were made at similar periods (Ex. 33, 35, 36). Thus, speaking generally, the costs shown in these studies reflect the level of cost as of the time of the Commission's final report in *Ex Parte* 162 which authorized a general increase effective January 1, 1947. Thus, since the cost figures submitted by the carriers in support of the charges reflect the level of costs prior to the cost increases which justified the rate increase authorized in *Ex Parte* 166, it is to be expected that the charges approved in I. & S. 5500 would receive the same measure of [fol. 562] increase as that accorded to other rates and charges, all of which were increased to meet the carrier's need for increased revenue resulting from factors occurring after January 1, 1947.

In the light of the costs of performing unloading shown in Exhibit 36 and the increases in costs incurred subsequent to that time, shown in *Ex Parte* 166, it is obvious that petitioners have been misinformed and that the cost of unloading at the Philadelphia B. & O. terminal is substantially above $20.00 per car (California Citrus, p. 18, Auction Receivers, p. 10).

No objection was raised in *Ex Parte* 166 against the railroads' proposal to increase the unloading charges as initially published, along with freight rates and charges

generally to help meet their revenue needs. This unloading service, which the Commission found results in "worthwhile benefits" to the protesting receivers, should make a fair contribution to the railroads' revenue needs along with freight services generally. The produce receivers actually conduct part of their business on the piers, using railroad premises for the display and sale of the bulk of the perishables. The Commission's decision fully and accurately describes how this is done, indicating beyond doubt that full consideration was given thereto. That these charges were intended to come within the scope of the authoriza-
[fol. 563] tion of the Commission in *Ex Parte* 166 is clearly shown by Finding 1 of the report in that case (270 I. C. C. at pp. 456-7).

Several of the petitioners have objected to the language of the report on the ground that it infers that the Commission was placing the burden of proof upon petitioners. The objection is raised most often in connection with the language at Sheet 14 that "on this record it is not shown that there would be violations of either sections 2 or 3 of the act." Petitioners have alleged that the charges result in undue preference of team track receivers and of receivers of commodities other than fresh fruits and vegetables at the pier stations.

The proof that the charges will not result in undue prejudice consists of the showing that at all other points in Official Territory domestic carload traffic is unloaded by the consignee or at his expense (R. 12-13), that that expense was borne by the consignee at the adjacent team tracks (R. 15), and that the line-haul rates were made without regard to whether the cost of unloading was borne by the consignee or carrier (R. 19-30, Ex. 4-13). Thus, the carriers have shown that these charges have placed these receivers at New York and Philadelphia in the same position as those at other points and have made a more equitable
[fol. 564] adjustment in charges as between receivers at the pier stations at which this unusual service is provided and receivers at team tracks for whom no such services are rendered. Thereby they have not only met their burden of proof of showing an absence of undue preference but have shown positively that the charges have created a fairer distribution of the burden of the cost of providing this serv-

ice by shifting it from the general shipping public to those who enjoy the benefits of the service.

The comparison with team track receivers is not helpful. It would not be fair to require team track receivers to pay a portion of the cost of unloading at the pier stations, when pier station receivers have an equal opportunity to use the ample team track facilities available within the New York metropolitan area. There is, therefore, no inference of undue preference in the comparison with team track receivers.

The comparison with the receivers of other freight at the pier stations does not show undue prejudice. It has been shown that these tariffs embody the same practice which has been applied at other points for many years. The Commission was fully informed as to the carriers' intentions with respect to carload freight other than fruits and vegetables and has properly concluded that the establishment of charges for unloading fruits and vegetables without con- [fol. 565] currently applying them on fruits and vegetables does not violate the Act.

The proof of the facts recited above rebuts the whole of petitioners' objections to the report as to the burden of proof and Sections 2 and 3 and the petitions have made no reference to any circumstance outside the scope of this evidence. Petitioners' claims actually amount to no more than a refusal to recognize the force of the proof presented and an unwillingness to bear, as other receivers similarly placed have long borne, their share of the cost of this service.

It was noted above that petitioners' objection to the report on the basis of the burden of proof is only a matter of words. It makes little difference whether the Commission's conclusion is stated in negative or positive language. The carriers showed that these charges are reasonable and not unduly preferential or prejudicial. All parties concerned are well aware that the burden of proof is on the carriers and the mere form of words in the report cannot seriously be construed to be a denial of the plain terms of the Act.

Petitioners have also objected to the report's reference to the benefits received by the receivers using the pier stations and produce terminals. Not all produce moving

through those stations are sold at auction and the benefits [fol. 566] derived by receivers of produce not sold at auction are not identical with those enjoyed by receivers selling at auction. There are, nonetheless, substantial benefits enjoyed by such receivers. The non-auction receivers take advantage of the unloading to make a close inspection of the goods while they are being unloaded (R. 273, 289-90). Many of them enjoy the use of the platforms as a sales area (R. 273, 285). Receivers of top-iced vegetables are relieved of the difficult work of breaking through ice encrusted in the car, removing ice from packages and handling icy, wet boxes. For all receivers there is the advantage of the use of the commodious platform space at the stations as compared with the close confines of a refrigerator car. Thus, whereas not all receivers benefit identically from the unloading service, the plain fact is that all do receive the actual service of unloading from the cars and the conclusion in the report is sound that the receivers do obtain distinct advantages.

Further, if the receivers represented by the petitioning organizations were not satisfied with the benefits received from the carriers' performance of the unloading, they are free to avail themselves of the ample team track facilities in New York and its metropolitan area and at the Produce Terminals in Philadelphia where they can perform the unloading themselves.

[fol. 567] Petitioners have also referred to the carriers' suggestion that the unloading be performed in the name of the receivers rather than by the carriers (Carload Receivers, pp. 9, 10). The telegrams quoted refer only to petitioners' eleventh-hour reference of the proposal in their requests for postponement of the effective date of the order of October 4, 1948. As noted in the telegrams, the trade did not, throughout the fifteen months between the date of the hearing and the date of the order, present any plan for performing the unloading service. No such plan has yet been submitted. Obviously the organization of unloading by the trade at the pier stations is too complicated a problem to be settled summarily.

Other petitioners (Philadelphia Terminals, p. 4, Apple Association, p. 2) have protested that the carriers at Phila-

delphia have refused since November 1, 1948 to permit receivers themselves to unload vegetables on the platforms at the produce terminals. The refusal of the carriers to permit this practice was based not only on the language of the tariff, but also on the thought that no fair distinction could be made between receivers who should be permitted themselves to perform the unloading and those whose freight could be unloaded only by the carriers. Extensive investigation was made to determine whether it would be possible to permit all the unloading at Philadelphia to be performed [fol. 568] by the receivers themselves and it was found that, at least with respect to the proposal then under consideration, the outstanding agreements between the carriers and their employes made it impossible to adopt the proposal. Since the requests of the auction receivers could not be complied with, the carriers did not feel free to permit unloading by other receivers.

V. Petitioners Have Not Justified Their Request for Further Hearing

A number of the petitions (Apple Association, p. 5, California Citrus, p. 18, Philadelphia Terminals, p. 7, Auction Receivers, p. 10) have requested that further hearings be had with respect to the application of the charges at Philadelphia. The factual matters which petitioners wish to have reviewed at such hearings are nowhere clearly stated. In the light of the exhaustive investigation already completed, there is no justification for granting a further hearing in the absence of a clear specification of the nature of the evidence to be adduced. Further, so far as appears from the petitions and the suggestions and inferences of fact contained in them, there is no reason to expect that petitioners have [fol. 569] available any evidence which would be of such importance as to justify a further hearing.

The inadequacy of the petitions in this regard is shown by their failure to comply with Rule 101 (b) of the Commission's Rules of Practice, which reads as follows:

> "(b) *Rehearing or further hearing.*—When in a petition filed under this rule opportunity is sought to introduce evidence, the evidence to be adduced must be

stated briefly, such evidence must not appear to be cumulative, an explanation must be given why such evidence was not previously adduced."

VI. Conclusion

It was noted in the early pages of this reply that the petitions to which this reply is directed are not concerned with any material matters which have not already received the full course of administrative handling by the Commission after a full hearing at which a full opportunity was given for the presentation of evidence and after briefing and argument. The petitions do no more than restate arguments already considered and reconsidered. This reply has further shown that none of these arguments is meritorious. Thus the petitions present no justification for a reconsid- [fol. 570] eration of the decision of October 4, 1948. Accordingly the carriers respectfully request that the petitions be denied.

Respectfully submitted, Francis L. Brown, A. P. Donadio, Lockwood Fogg, M. C. Smith, Jr., Paul V. Miller, Counsel for Carriers.

[fol. 571] Before the Interstate Commerce Commision

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C.

Order Reopening Proceeding for Rehearing—June 9, 1949

Investigation and Suspension Docket No. 5500 Unloading Charges Fruits & Vegts.—New York & Phila.

Upon further consideration of the record in the above-entitled proceeding, and upon consideration of petitions for reopening and reconsideration by the Florida Railroad and Public Utilities Commission, the Growers and Shippers League of Florida, and the Florida Citrus Commission; International Apple Association, National League of Wholesale Fresh Fruit and Vegetable Distributors, and United Fruit and Vegetable Association; the California Citrus

League; The Port of New York Authority; the Secretary of Agriculture; the New York Carload Receivers Committee; the Philadelphia Terminals Marketing Association; and the Auction Receivers of Philadelphia, protestants; and petition for reconsideration by California Grape and Tree Fruit Association, and California Growers and Shippers Protective League; and for good cause appearing:

It is ordered, That the above-entitled proceeding be, and it is hereby, reopened for rehearing at a time and place to be hereafter fixed.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 572] BEFORE THE INTERSTATE COMMERCE COMMISSION, WASHINGTON

Investigation and Suspension Docket No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

NOTICE OF OCTOBER 10, 1050 FOR FURTHER HEARINGS

Upon further consideration of the record in the above-entitled proceeding, it appears that the record is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing.

At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruit and vegetables at railroad team tracks on Manhattan Island and in Jersey City, N.J. Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded pier delivery and those accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist

at Philadelphia, as betwen carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate.

The above-entitled proceeding will be assigned for further hearing at times and places hereafter to be announced.

By the Commission. W. P. Bartel, Secretary.

[fol. 573] BEFORE THE INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 5500

Unloading Charges, Fruits and Vegetables
New York and Philadelphia

PETITION OF CITY OF NEW YORK FOR FURTHER HEARING—Filed October 27, 1950

Comes now your petitioner, The City of New York, intervenor, and respectfully states:

1. That pursuant to the Commission's notice, dated October 17, 1950, The City of New York advises that it is ready to proceed in this matter and urges that an immediate further hearing be held without delay.

2. That the City's right to rebut any additional evidence adduced by the respondent Railroads, pursuant to the Commission's notice of October 10, 1950, be reserved, and that the City of New York be afforded an opportunity for presenting rebuttal testimony and further evidence.

3. That the respondent Railroads be directed to serve upon the City at least 15 days before the date upon which the hearing is to be held, such cost studies and exhibits [fol. 574] thereon as it has made for the purpose of submission in this proceeding.

4. That the burden of proof in Investigation and Suspension cases is upon the Railroad to substantiate and justify the charge it seeks to impose.

5. That in Investigation and Suspension cases the Commission must suspend such charge, rate or tariff until the

Railroad has adduced complete evidence sufficient to permit a Commission determination for or against such charge, rate or tariff.

6. That a deficiency exists in the record of this proceeding, as indicated in the Commission's Notice of October 10, 1950, which states as follows:

> "Upon further consideration of the record in the above-entitled proceeding, it appears that the record is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing."

7. That notwithstanding this deficiency, the unloading charges have been permitted to become effective and have been and are being collected.

[fol. 575] 8. That the continued imposition of these charges during the pendency of this proceeding has caused and will continue to cause grievous irreparable pecuniary loss and damage to your protestants.

9. That the continued imposition of these charges seriously affects the economic welfare of the inhabitants of the City of New York and threatens the stability of its competitive relationship with other cities, and is delaying and endangering a program of pier modernization in the City of New York.

10. That during the pendency of this proceeding the unloading charges should be suspended or, in the alternative, such charges upon being collected should be ordered impounded until a final determination has been made by this Commission.

11. The City of New York reiterates its contention that the respondents are not legally entitled to an added charge (unloading charge) for a line haul rate where delivery has not been made, and the City does not by this petition waive or abandon this contention.

Wherefore, the petitioner, The City of New York, respectfully requests this Commission order as follows:

[fol. 376] **I. An order fixing an immediate date for further hearing.**

2. An order reserving to the City of New York the right to rebut any testimony or evidence submitted by the respondents pursuant to the Commission's order of October 10, 1950, and further affording the City the opportunity to rebut same.

3. An order directing the respondent railroads to serve upon the City at least 15 days before the date of hearing such cost studies and exhibits as the railroads intend to submit in this proceeding.

4. An order suspending these charges in this proceeding; or

5. An alternative order impounding these charges during the pendency of this proceeding.

Dated at New York, N. Y., October 26, 1950.

The City of New York
By John P. McGrath, Corporation Counsel, Municipal Building, New York 7, N. Y.

[fol. 577-578] *Duly sworn to by John P. McGrath jurat omitted in printing.*

[fol. 579] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

PETITION TO CANCEL OR SUSPEND CHARGES OR REQUIRE SEPARATE ACCURATE ACCOUNT OF CHARGES—Filed October 27, 1950.

By International Apple Association, National League of Wholesale Fresh Fruit and Vegetable Distributors, United Fresh Fruit and Vegetable Association, Carload Receivers Committee of New York.

To the Commission:

Petitioners and protestants herein represent shippers throughout the United States and most of the receivers in

New York, N. Y. and Philadelphia, Pa. who pay and bear the unloading charges approved by the Interstate Commerce Commission in the original order in this proceeding, and which have been in effect since November 1, 1948, and are vitally concerned with the eventual outcome of this case.

Accordingly, they now present to the Commission this petition to do one of three things, either: cancel the unloading charges approved by the Commission by the first order in this case pending final decision; suspend the unloading charges approved in the first order in this case pending final decision; require the interested carriers to keep accurate account of all amounts received by reason of the imposition of the unloading charges, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision by further order require the interested carrier or carriers to refund, with interest, amount due the persons in whose behalf such amounts were paid, such portions of such increased charges as by its de- [fol. 580] cision shall be found not justified.

The basis for this petition, and the requests above made, are based substantially on the following reasons: Under its order reopening the case for further evidence, the Commission in substance concedes that its original order approving the unloading charges was made upon insufficient evidence or without evidence necessary to reach a just and reasonable decision, and, if this be so, it then follows necessarily that the charges assessed since November 1, 1948 are unjust and unlawful, and should be cancelled.

It further follows that by its order reopening the case for the receipt of further cost studies the Commission necessarily admits question as to whether its original order of approving such unloading charges was made upon an adequate record and, if this proves to be true, the result will be that the charges have imposed an unreasonable and unlawful burden upon the persons paying such charges, and has and will continue to cause an irreparable injury in the past, and an irreparable injury for the future unless such charges are stopped pending final decision.

Finally, the order reopening the proceeding is an admission by the Commission that it has not had before the necessary and adequate evidence upon which it made its orginal decision approving the unloading charges, which decision

has caused the payment of unloading charges questionable as to their lawfulness and reasonablness as to their continued imposition, and, pending final decision, protestants paying these charges should be protected by having such charges for the future set aside in the event that the Commission finds ultimately that these have not been justified.

These petitioners, the shippers and receivers involved, assume as a matter of course that had the Commission been fully satisfied with the adequacy of the evidence submitted in the two hearings held in this case, that it would not [fol. 581] have found it necessary to have proceeding reopened for the receipt of additional evidence which in effect it specified is necessary.

Without prejudice to respondents these petitioners may properly assume that such said respondents will feel it incumbent on them to take as much time as they believe necessary and desirable to accumulate, compile and prepare for submission such evidence as is called for concerning alternate costs of delivery as between the present railroad terminals and adequate terminal track facilities which would be necessary in the absence of such produce terminal facilities, which, in consequence, would subject petitioners to the continued imposition of the unloading charges and to continue the irreparable injury unless relief is anticipated and forthcoming.

For nearly two years these parties, either as shippers or receivers, contend that they have been subject to irreparable injury by the imposition of the charges approved in the original decision of this Commission, and if the proceeding is prolonged for a matter of days, weeks, months or years will continue to be subject to irreparable injury through the imposition and payment of these or other charges for unloading.

Under Section 15, Paragraph (7)[illegible] statutory provision is made by Congress for the handling and disposition of controversial rates or charges during the pendency of the proceeding; therefore, we submit that between the reopening of this case and final decision, this proceeding is pending decision.

The petitioners are seeking one or the other of three

alternative reliefs. Acceptance pending a final decision does not in any manner mean that these petitioners abandon or retract their position that the decision in this case should have rested on a proper and clear definition of the obligation of railroad respondents to complete the trans-[fol. 582] portation of commodities consigned to one or the other of the railroad facilities at New York or Philadelphia where the charges are imposed by making the commodity physically available to the consignee without additional charge and without regard to any costs or additional costs incurred by the carriers in making such delivery under the published rates to the destinations authorized in the carriers' "open and prepaid list".

Finally, may we reiterate our plea that the railroad respondents be admonished to submit the evidence necessary to a final decision in this proceeding with as much dispatch as is reasonable and consistent with the protection of their interests, whether the Commission adopts one or the other of the alternative measures requested above.

Respectfully submitted, International Apple Association. By: Samuel Fraser, Secretary, National League of Wholesale Fresh Fruit and Vegetable Distributors. By: John R. Van Arnum, Secretary. United Fresh Fruit and Vegetable Association. By: Durwood Seals, Traffic Manager. Dated at 512 F. Street N. W., Washington 1, D. C., October 26, 1950.

[fol. 583] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. Docket No. 5500.

Unloading Charges, Fruits and Vegetables at New York and Philadelphia.

PETITION ON BEHALF OF THE PORT OF NEW YORK AUTHORITY FOR A SPECIFIC FINDING AS TO THE INADEQUACY OF THE RECORD AND FOR OTHER RELIEF.—filed October 27, 1950

Comes now The Port of New York Authority and respectfully submits this its petition for a specific finding as to

inadequacy of the record and for relief from charges which unduly burden the Port of New York and its commerce.

The Commission's notice of October 17 herein makes it clear that the Commission considers the record herein to be "deficient in respect of certain evidence which seems to be important," with particular reference to cost data. Since the railroads built their case mainly on cost, it follows that the Commission considers their main case deficient. This means that they have failed to sustain the burden of proof. [fol. 584] Section 15(7) of the Act contemplates a finding in such a situation that the burden of proof has not been sustained and an order cancelling the schedules.

Here we have a situation where respondents have made an inadequate showing as to their main case, and where the Examiner has recommended that the charges be found not justified, yet the parties to the proceeding receive from the Commission merely a public notice that the record is deemed insufficient. Meanwhile, the burdensome charges are continued, in apparent violation of the letter and spirit of Section 15(7).

In the event that the above prayer is not granted, the petitioner asks that respondents be required to keep a separate record of the unloading charges assessed and collected pendente lite, as contemplated by Section 15(7) where, as here, charges are being exacted which have not been justified. The present situation differs in no important respect from one in which the Commission is not able to reach a conclusion prior to the expiry date of a suspension order. Congress very definitely provided for relief to the shipping and consuming public under such circumstances through the keeping of detailed records as to the charges collected.

This petition is not to be construed as waiving any of our contentions in this proceeding, including the contention that the unloading service is necessary to effect reasonably convenient delivery and is covered in the line-haul rates; the contention that this is in reality a charge for merely making the goods reasonably accessible to consignees; the contention that such a charge may not lawfully be authorized for a service which has long been included in the rates without [fols. 585-586] dealing with the rates themselves and their

reasonableness; and the contention that the railroads have already been compensated in the divisions for this service.

Respectfully submitted,

Leander I. Shelley, General Counsel, 111 Eighth Avenue, New York 11, N. Y.; Wilbur La Roe, Jr., Frederick E. Brown, Arthur L. Winn, Jr., Samuel H. Moerman, Continental Building, Washington 5, D. C., Attorneys for Protestant.

Dated at Washington, D. C.

October 27, 1950.

[fols. 587-594] Petition of the Secretary of Agriculture of the United States for Interim Relief omitted. Printed side page 175 ante.

[fol. 595] Before the Interstate Commerce Commission

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

I. & S. 5500

Answer of Respondents to Various Requests for Findings and Cancellation or Suspension of Charges.—filed November 6, 1950

Come now Respondents in this proceeding to reply to various petitions of various Protestants asking for particular findings and for cancellation or suspension of the charges under investigation. None of these requests have any substantial merit.

The petitions ask for various forms of relief. The City of New York asks for the filing of Respondents' evidence 15 days before hearing, for an opportunity to submit rebuttal evidence and for suspending the charges during the further course of litigation. The Port of New York Authority asks for a finding as to the inadequacy of the record and for a careful accounting of charges collected by Respondents for the unloading. The International Apple Association and other protestants associated with it ask, in

the alternative, for cancellation, suspension and accounting of the unloading charges. In his covering letter on behalf of the Port of New York Authority, counsel has requested for an accurate accounting of the cost evidence requested in the Commission's Notice of October 17.

[fol. 596] Respondents, of course, plan to submit all the evidence requested in the Commission's Notice. They assume that the Commission will give Protestants full opportunity to submit any evidence they may have with respect to the matters mentioned in the Notice of October 17. They have no objection to supplying their cost studies a reasonable time prior to the hearing date. This reply, accordingly, is addressed only to the request for particular findings and to the requests for cancellation and suspension of the charges.

I. The Commission Has Exhausted its Power of Suspension and Is Not Empowered to Order an Accounting of these Charges.

Not only is there not now any occasion which would justify either the cancellation of the charges or an accounting of the revenues but the Commission does not now have power to grant either of those requests.

As authorized by the terms of Paragraph (7) of Section 15, the Commission has the power to suspend the operation of schedules of rates and charges for a period not longer than 7 months beyond the effective date stated in the tariff schedule "whenever there shall be filed with the Commission any schedules stating a *new* individual or joint rate, fare or charge." The Commission may suspend the schedule "not for a longer period than 7 months beyond the time when it would otherwise go into effect." After full hearing, whether completed before or after the rate, fare, charge, classification, regulation or practice, goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective."

Under these provisions of the statute, there are two defects in the procedure requested by Protestants. In the first place, the power of suspension relates only to sched-

[fol. 597] ules stating new charges. That suspension has

already been entered and was lifted by the Commission's order of October 4, 1948. Having exhausted its power of suspension under the statute, the Commission may not now reinstitute the suspension, there being no change in the charges since they became effective and therefore no "new" charges to be suspended.

As stated in the statute, the Commission may suspend rates only for 7 months. The charges in this investigation were published to become effective on July 1, 1947 and were suspended by the Commission's order, until December 21, 1947. The suspension was voluntarily continued by Respondents until November 1, 1948. Respondents submit that the Commission's power of suspension was totally exhausted on December 21, 1947 and that the charges could lawfully have been made effective at any time after that date.

Secondly, the power of suspension may be exercised only in accordance with the terms of Paragraph (7) and only "pending such hearing and the decision thereon." The decision of the entire Commission in this proceeding was issued prior to November 1, 1948 and would then have terminated the Commission's power to suspend even had the 7-month suspension period permitted by the statute not already expired.

With respect to the request for an accounting of the revenues of the carriers derived from the unloading charges, the power to make the requested order may not be exercised in this instance because the statute itself limits the exercise of that power to an "increased rate or charge." In this instance, the investigation relates not to an increase of an existing rate or charge, but to an entirely new charge not previously assessed.

[fol. 598] The investigation was reopened for further hearing by order dated June 9, 1949. At that further hearing Protestants did not submit any evidence tending to challenge the conclusions and findings of the Commission's order of October 4, 1948. By virtue of the Notice of October 17, 1950, Protestants are being given a further opportunity to have presented evidence in support or denial of their argument as to the cost of team track deliveries. Since Protestants have failed on two previous occasions to

present any evidence in support of their argument in this regard, they cannot claim that they have any just cause for again invoking the extraordinary remedy of suspension.

It is altogether right and proper that the Commission's power of suspension should not now be indefinitely continued. If Protestants' request were meritorious and if the Commission had the authority again to suspend the charges or to require an accounting, the Commission would have that power with respect to any rate or charge which had ever been considered in an investigation and suspension proceeding. The Commission clearly has continuing jurisdiction to reconsider any prior decision in an investigation and suspension proceeding. If it had the additional power to reinstitute the original suspension, it would mean that all rates and charges previously investigated would be constantly subject to suspension. Obviously, the statute was not intended to provide the Commission with a continuing power of suspension over existing rates and charges.

Further, there is no apparent limit to this unauthorized power of suspension which Protestants seek to invoke. If the Commission now has power to suspend rates which became effective two years ago, which were approved and found just and reasonable by the Commission in its decision [fol. 599] of two years ago, is there then any rate, fare, charge, regulation or practice which is exempt from the power of suspension? Is there any distinguishing factor in respect of these charges which is different from any other effective rate or charge which would create a power to suspend these charges which would not be equally available for any other rate or charge?

II. Respondents Do Not Carry A Burden of Proof With Respect to These Charges

In their argument in support of their various requests, Protestants have relied principally on the argument that the statute requires the Respondents in this proceeding to carry the burden of the proof that the rates are just and reasonable, relying upon the provisions of Section 15(7) in support of that argument. In fact, however, Section 15

places a burden of proof upon Respondents only in connection with investigation and suspension proceedings involving an *increase* in rates and charges and no such burden is placed on Respondents in connection with the publication of new rates. *Bay State Milling Co.* v. *Transit Corporation*, 43 I.C.C. 338, *Cotton From New Orleans*, 59 I.C.C. 751, 752-3. In both of these cases the investigation related to rates published for services on which no previous rates had been applicable, and in both cases the Commission found that Respondents were not obliged to carry the burden of proof. The charges under investigation here were not previously subject to charges and accordingly, the Respondents have no obligation to carry the burden of proof with respect to them.

III. Respondents Have Fully Sustained Their Burden of Proof As to the Lawfulness of These Charges

The petitions are basically in error in their contention that the Commission's Notice may be construed to indicate that Respondents have failed to meet the burden of proof. [fol. 600] That burden of proof was fully sustained by the proof submitted at the original hearing of the cost to Respondents of providing the unloading service and of the existence of charges at all other points where the service is performed. That proof was accepted by the Commission as a full justification for the charges. The Commission had never in any previous proceeding involving separate charges for loading and unloading found such evidence necessary to prove that the charges were just and reasonable. In no proceeding of which we are aware has the Commission ever compared the costs of a special service with the cost of the alternative service. It is obvious, therefore, that the evidence requested in the October 17 Notice is not here necessary to Respondents' case nor has it ever been necessary in the past in any similar proceeding.

The charges under investigation are charges for a special service not generally provided on carload traffic in Official Territory. They are assessed to compensate the carriers for the performance of that special service. The lawfulness of the charges and the right of Respondents to assess them is determined by the cost and value of the special service

provided. It is not related to the comparative cost of other services performed under Respondents' obligation under their line-haul rates.

The occasion for the Commission's request for the additional evidence described in the Notice of October 17 relates not to the case presented by Respondents, but to the objections submitted by Protestants. While the Commission has not considered such evidence to be material in this or any similar proceeding in the past and has not in any similar situation compared the cost of a special service under investigation with the cost of alternative services, one of the objections cited by Protestants here was that Respondents had failed to deduct from the costs of providing platform delivery the cost of providing team track delivery in the [fol. 601] same general area. Respondents have always conare not obliged, in justifying the unloading charges, to make are not obliged, in jutifying the unloading charge, to make any deduction for costs of team track delivery. Neither prior thereto nor in the Notice of October 17 has the Commission adopted the argument resented by Protestants. The charges were found to be lawful irrespective of such evidence in the report of October 4, 1948. The Notice of October 17 speaks only of "certain evidence which seems to be important." There is no indication in the Notice of October 17 that the evidence requested is evidence which Respondents should previously have submitted or, indeed, that such evidence is even relevant. The Notice indicates only that the comparison of costs between platform and team track delivery *may* be important to the determination of the issues here. The Notice obviously does not contain a finding that such evidence is necessary to a proper determination of the issues in this proceeding or that Respondents are obliged to furnish such evidence in order to sustain their burden of proof.

The burden of Respondents' proof was fully met by their proof of the costs of providing this special service coupled with the proof that in all other instances where the service is provided, separate charges are assessed and paid.

That proof, moreover, if it did nothing more, at least shifted to Protestants the burden of going forward with the evidence and showing cause why the charges might be found to be unlawful. No such evidence has ever been received

from Protestants. Indeed, they expressly stated during the course of the second hearing that they did not intend to rely on evidence, that they would rely on their argument that the charges were inherently unreasonable.

[fol. 602] Pursuant to their decision to rely on argument rather than evidence, Protestants presented the argument that the cost of the alternative team track service should be credited against the unloading charge. Thus, the evidence with which the new hearing is concerned is not evidence necessary to the justification which Respondents presented, but is evidence as to facts which Protestants assumed for the purpose of their argument. The new hearing relates only to the question as to whether there is any merit to this particular argument made by Protestants. It relates to evidence which Protestants were obliged to supply if they were to show that their argument was valid. Obviously the actual evidence can be supplied only by Respondents—but the issue with respect to that evidence goes not to the basic justification for the charges but only to the validity of the argument submitted by Protestants in rebuttal.

The proposal now under investigation is whether there was error in the Commission's decision of October 4, 1948. The burden has now shifted to Protestants to prove that their objections to that decision were valid. Both at the second hearing and at the argument they took the position of proponents. The subject matter of this hearing concerns the validity of their objections to the Commission's report. It is they who have the burden of showing that their objections are valid.

Even aside from the considerations mentioned above, the burden of proof is fully satisfied by the submission of a prima facie case. Such a case has now been submitted and found to be a justification of the charges. In such a case the burden of proof is with the other side. In its comments in connection with the rule of Section 7(c) of the Administrative Procedure Act that the proponent of a rule or order has the burden of proof in the absence of a contrary [fol. 603] statutory provision, the Committee Report, Sen. Doc. 248, 79th Cong. 2nd Sess., says (p. 270):

> "That the proponent of a rule or order has the burden of proof means not only that the party initiating the

> proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have the burden to maintain.

If, then, Respondents have the initial burden of proof, that burden has already been met and it now devolves upon Protestants to carry the burden of sustaining their argument in opposition. The Commission has itself followed this rule. In *Commodity Rates Between the Missouri River Points,* 28 I. C. C. 265, 267 the Commission said:

> "While the law casts upon respondents the burden of showing that the increased rates are reasonable, it is but fair that parties at whose instance suspensions are ordered should present to the Commission all facts, circumstances, conditions or reasons which, in their opinion, tend to show that the increases should not be allowed."

Thus, even if this proceeding had involved an increase in charges, the new hearing would relate to matters on which the Protestants have failed to carry their burden of going forward with the evidence, not to matters on which Respondents had the burden of proof. The burden of proof, in any event, can relate only to matters on which a substantial issue is raised by virtue of evidence tending to show that the rates are in some respect unjust and unreasonable. In the absence of any attempt on the part of Protestants to show the cost of team track delivery, there was no occasion for Respondents to submit evidence of that sort.

IV. There is no justification for the Requested Suspension

The unloading charges have been found to be just and reasonable. That finding was made only after long and careful investigation and consideration of all the evidence submitted. It was the finding of the entire Commission. [fol. 604] It was in conformity with a long series of decisions involving similar charges. After the issuance of its original findings, the Commission gave Protestants an opportunity to submit additional evidence. None of the

evidence submitted challenged in any way the findings previously made by the Commission. Under these circumstances, there is obviously no justification for a suspension or cancellation of the charges at this time or for an order requiring a specific accounting of charges as they are collected. Where charges have been found to be just and reasonable and, upon hearing, no evidence has been submitted challenging those findings, there is obviously no occasion for granting the extraordinary relief sought by Protestants.

V. The Costs of Team Track Delivery are not Entitled to Substantial Weight in Determining the Validity of these Charges

The charges for unloading carload freight approved in this proceeding are charges assesed for the purpose of compensating the carriers for the special and extraordinary services which they provide on this particular traffic. Similar charges are in effect for this service at all other points in Official Territory where the service is provided. The determination of the proper level of charges is dependent upon the cost of that particular service without regard to the cost of the alternative team track delivery.

The legal status of these charges is not substantially different from that of charges for intraplant switching. In determining the level of charges for intraplant switching, carriers are not permitted to consider the level of the line-haul rates, the revenue derived from the line-haul rates or the cost of the alternative team track delivery. For the performance of intraplant switching, Respondents are required by this Commission to assess charges no lower than needed fully to compensate the carriers for the actual cost of the switching performed beyond the reasonable point [fol. 605] of interchange. Just as intraplant switching is an extraordinary service not normally comprehended within the scope of the line-haul rates, so the unloading considered here is also a special service which, like intraplant switching, must stand on its own feet and be paid for by charges wholly separable from the station-to-station charges.

In this connection, it is not material what may be the

total cost of both line-haul and terminal service at New York and Philadelphia. As the Commission well knows, the costs of providing transportation service to particular points is frequently not strictly proportionate to the differences in the rates applicable to those points. The level of the line-haul charges depends on many considerations other than the cost of the service performed. Wide blankets in the level of the line-haul rates have been permitted and prescribed by the Commission as needed to meet the needs of commerce and the necessities of Respondents' competitive position. The legality of those blankets and the level of the line-haul rates has never been made to vary depending upon the particular difficulties of providing particular forms of delivery among different consignees nor upon the various difficulties of operations at particular origins. Respondents do not here seek an arbitrary to be added to the line-haul rates. They seek rather special compensation which is necessary to reimburse them for the costs of a special service not otherwise provided without a comparable additional charge.

For these reasons, Respondents submit that even after the evidence called for in the Notice of October 17 is submitted, that evidence is not entitled to great weight. After that evidence is submitted, such evidence will neither add to nor detract from the justification made by Respondents for these charges. Notwithstanding that consideration, [fols. 606-607] however, Respondents are now proceeding to accumulate the data necessary to the compilation of the evidence requested and will submit that evidence at the hearing when it is assigned.

VI. Conclusion

Protestants' request for a further suspension of the charges and for an accounting thereof proceeds on premises and assumptions as to the status of this proceeding which are wholly mistaken. The Commission should conclude that Respondents have fully met the burden of proof, if any, which was placed upon them by the suspension order. The petitions have sought extraordinary relief which the Commission has not the power to grant even if there were occasion for invoking these extraordinary remedies. Where

charges have been approved by the decision of the entire Commission and the further proceedings concern only the validity of a contrary argument, there is no warrant for further suspension or an accounting while the information is being gathered.

Respondents respectfully request that these petitions be denied.

Respectfully submitted, Francis L. Brown, A. P. Donadio, Lockwood W. Fogg, Jr., Paul V. Miller, M. C. Smith, Jr., Counsel for Respondents, 1740 Broad Street Station Bldg., Philadelphia 4, Pennsylvania.

November 6, 1950.

[fol. 608] BEFORE THE INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

MOTION FOR ENTRY OF ORDER CANCELLING SCHEDULES—Filed November 13, 1950

Come now Florida Railroad and Public Utilities Commission, Florida Citrus Commission, and Growers and Shippers League of Florida, and respectfully show:

1. Each is a protestant in the above entitled proceeding.

2. The schedules involved herein were filed to become effective June 1, 1947, and the order instituting this investigation also suspended the operation of the schedules until December 31, 1947. Voluminous evidence was submitted before the Examiner at hearing in New York, N. Y., on July 29, 30 and 31, and August 1, 1947. Briefs were filed, and the matter was argued orally before Division 3 on October 20, 1947. Respondents voluntarily deferred the effective date of the schedules pending determination of this proceeding. Before any report was filed, the matter was set for oral argument before the full Commission on May 5, 1948. The Report of the Commission was filed October

4, 1948, four Commissioners dissenting and one, being necessarily absent, did not participate in the disposition of the proceeding (272 ICC 648). The statutory suspension [fol. 609] period having expired, the schedules went into effect on November 1, 1948. Petitions for reopening and reconsideration were filed, and by order herein dated June 9, 1949, the proceeding was "reopened for rehearing". Additional evidence was submitted at the Brooklyn, N. Y., hearing on September 27, 28 and 29, 1949. After briefs, the Examiner filed proposed report with recommended conclusion and finding:

> "The burden of proving that the assailed charges are just and reasonable is upon respondents under the provisions of section 15(7) of the act. This burden has not been met. The Commission should find that the assailed unloading charges are unjust and unreasonable. In view of the foregoing conclusions no findings need be made under sections 2 and 3 of the Act.
>
> "On rehearing the Commission should find that the charges assailed for unloading fresh fruits and vegeables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed. The schedules naming the unloading charges assailed should be ordered canceled and the proceeding discontinued."

Exceptions to such proposed report were filed by Respondents, and replies made thereto by Protestants. The matter was again argued orally before the full Commission on July 24, 1950.

3. No usual form of Report of the Commission has yet been served on the parties, but it is respectfully submitted that the Notice herein dated October 10, 1950, is tantamount to finding that the schedules have not been justified. Such notice however informs the parties that "The above-entitled proceeding will be assigned for further hearing at times and places hereafter to be announced."

[fol. 610] 4. The Notice of October 10, 1950, clearly indicates a finding that the record is deficient and that Respondents have not met the statutory burden of proof:

"Upon further consideration of the record in the above-entitled proceeding, it appears that the record is deficient in respect of further evidence which seems to be important, and the proceeding will be assigned for further hearing.

"At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of fruits and vegetables at railroad team tracks on Manhattan Island and in Jersey City, N. J. Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded pier delivery and those accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate.

"The above-entitled proceeding will be assigned for further hearing at times and places hereafter to be announced.

"By the Commission."

[fol. 611] 5. The total lack of evidence as to "difference in costs to them", the railroads, "of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of fruits and vegetables at railroad team-tracks, "is not raised for the first time by the Notice of October 10, 1950. More than three years ago, in our Brief dated September 30, 1947, we pointed out (page 5):

"No cost figures were submitted by respondents on team-track deliveries."

Likewise, on page 659 of the Report, 272 ICC, it was said:

> "Such criticisms as they (protestants) have made are largely with respect to respondents' failure to submit collateral data concerning costs incurred in making team-track deliveries."
>
> * * * * * * *
>
> "Attention is called to the fact that respondents' computations do not take into account various expenses which would be incurred in connection with team-track delivery which are not present in the case of pier delivery."

and on page 660 of 272 ICC:

> "There is no expense for switching at the piers. Protestants assert that the cost of switching to and from team-tracks should have been taken into consideration in respondents' cost studies, since there is no switching at the piers. They claim that this represents a saving to the carriers, as pier delivery is substituted for team-track delivery. Another factor which they say should be given consideration is the allowance for free time at team tracks. There is no detention of equipment when shipments are handled at the piers. No studies have been made concerning these switching costs or of the savings from more effective utiliza- [fol. 612] tion of equipment as the result of pier delivery."

In our Petition for Reconsideration (December 6, 1948), we specifically pointed out:

> "18. The Commission failed to give any weight to the Respondents' failure to submit data concerning costs incurred in making team-track deliveries * * *" (page 14)
>
> "20. If it be proper or lawful to assess any unloading charges at the New York piers, such charges should not be any greater than the additional cost of such type

of delivery, i. e. whatever excess, if any, there be over team track delivery * * *." (page 16).

6. Despite the many instances above cited in which the particular deficiencies of the record have been pointed out, the Respondents did not see fit at the subsequent hearings held in Brooklyn on September 27, 28 and 29, 1949, to present any evidence whatsoever as to costs of team track delivery.

7. It is respectfully submitted that it is wholly unreasonable to permit the rail Respondents to continue to collect unloading charges pending a further hearing which from the Notice of October 10, 1950 is occasioned by a deficiency in the record of certain evidence which should have been submitted by the rail Respondents at the original hearing in July, 1947. The fact of such deficiency in evidence exists solely because of the failure and refusal of Respondents to produce it. At this time to permit a continuance of the unlawful charges pending a further hearing would do violence to the mandatory terms of the statute which by Section 15(7) affirmatively requires that:

[fol. 613] "The burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation or practice is just and reasonable."

The shippers are not under the statute and have never been required to disprove the lawfulness of a suspended schedule in an investigation and suspension proceeding under that section of the Interstate Commerce Act.

8. Furthermore, it must be observed that this proceeding has been pending for more than three years. The suspended schedules went into operation on November 1, 1948 merely because of the expiration of the maximum statutory period of suspension. The termination of the taking of evidence on rehearing was September 29, 1949, more than a year ago. The Respondents were then given full opportunity to present whatever evidence was necessary to meet the burden of proof cast upon them by the statute. The express language of Section 15(7) requires that "the Commission shall give to the hearing and decision of such ques-

tions preference over all other questions pending before it and decide the same as speedily as possible." Such admonition of the statute is applicable not only during the period of suspension authorized by the statute, but also after such suspension period has elapsed. This is a matter particularly in which the rights and interests of the shippers require speedy action, and a cancellation of the schedules, if the statutory rights are to be accorded them. Because of the fact that the statute places the burden of proof upon the carrier, there is only one lawful decision that can be rendered when it is determined that the evidence is deficient to establish the lawfulness of the suspended schedules—and that is an order cancelling the schedules.

9. It is respectfully submitted that this proceeding should be now concluded and an order made cancelling the [fols. 614-615] schedules, so that the shippers and receivers of fruits and vegetables will no longer be penalized by the imposition of the unlawful charges, in the light of facts stated in the Commission's notice of October 10, 1950, that "it appears that the record is deficient in respect of certain evidence which seems to be important."

Wherefore, these Protestants move that the Commission enter an order cancelling the schedules, stating the unloading charges at New York and Philadelphia.

Respectfully submitted, Florida Railroad & Public Utilities Commission, by Fred Pettijohn, Director of Commerce Department. Florida Citrus Commission, and Growers & Shippers League of Florida by Gordon Stedman.

Lewis W. Petteway, General Counsel, Florida Railroad & Public Utilities Commission, Tallahassee, Florida. M. W. Wells, Attorney, 1007 Florida Bank Building Orlando, Florida.

November 8, 1950.

[fol. 616] Order of November 16, 1950 omitted. Printed side page 181 ante.

[fol. 617-621] BEFORE INTERSTATE COMMERCE COMMISSION

Washington

Investigation and Suspension Docket No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

NOTICE OF NOVEMBER 16, 1950 FOR FURTHER HEARING

The above-entitled proceeding is assigned for further hearing on June 4, 1951, 9:30 o'clock a. m., United States Standard Time (or 9:30 a. m. Local Daylight Saving Time if that time is observed) at the Hotel St. George, Brooklyn, N. Y., before Examiner M. J. Walsh.

The respondents are hereby directed to prepare in writing the evidence specified in the notice of the Commission dated October 10, 1950, and to furnish copies thereof to counsel for the protestants and to the Commission not later than April 16, 1951.

The protestants are hereby directed to prepare in writing their rebuttal of the evidence furnished by the respondents as herein directed, and such further evidence as they may deem appropriate, and to furnish copies thereof to counsel for the respondents and to the Commission not later than May 16, 1951.

By the Commission, W. P. Bartel, Secretary.

[fol. 622] BEFORE THE INTERSTATE COMMERCE COMMISSION

Unloading Charges, Fruits and Vegetables New York and Philadelphia

I. & S. 5500

EXCEPTIONS OF RESPONDENTS TO THE PROPOSED REPORT OF EXAMINERS RUSSELL M. BROWN AND M. J. WALSH—Filed June 5, 1950

Come now respondents in the above-entitled proceeding and except to the following conclusions in the report of

Examiners Russell M. Brown and M. J. Walsh which, in effect, reverse the previous decision of the entire Commission in this proceeding, made less than two years ago:

1. "To justify the institution of unloading charges after many years of free service requires the submission of clear and convincing proof that the practice of unloading free [fol. 623] of charge is unfair to the carriers, or that they receive insufficient revenues from the traffic in question. It is not sufficient to consider the matter solely in the light of the unloading charges as such. Determination of whether the terminal carriers are receiving adequate revenues from the traffic as a whole is necessary. All of these respondents receive a line-haul on this traffic and derive substantial revenues therefrom. And if these revenues are not sufficient to compensate for the line-haul transportation and for services such as unloading, the matter should be brought to the Commission's attention in an appropriate manner." (Sheet 21.)

2. "The principal question for determination is what constitutes delivery of the freight by respondents to the consignees or receivers, and the time when, and the particular location at which it is completed. Delivery of carload freight consists of the carrier either placing the car on a team track or siding where it can be unloadad by the consignee or, where the consignee is not permitted to perform the unloading, as in this proceeding, in unloading the freight from the cars on the floats and placing it on the floor of the pier. Here, and here only, does the transportation obligation of the carrier end. That obligation is not fulfilled until the freight is placed in a location conveniently [fol. 624] accessible to the consignee." (Sheet 11.)

"Until [the goods are placed in an accessible position] and tendered for delivery, it is obviously impossible for the consignee to receive and remove them and the carrier cannot reasonably be relieved of its common law liability until it has so placed or tendered the goods for delivery." (Sheet 13.)

Exception is taken to these conclusions because they are the basis for an inference, never clearly stated, that the unloading is synonymous with or included within delivery. That conclusion is in error.

3. "Under (the respondents') proposal, the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight to a location on the pier platform where the consignee can accept delivery."

4. "Heretofore it was generally assumed that compensation for those services [unloading] was included in the line-haul rate or in special divisions allowed the delivering carriers." (Sheet 21.)

5. The recommendation that the Commission find that the charges have not been shown to be just and reasonable.

[fol. 625] Argument

Contrary to what would be expected, the proposed report does not proceed on the basis of the findings and conclusions stated in the Commission's previous report appearing at 272 I. C. C. 648. The proposed report refers to no new fact or contention bearing on the Commissions's conclusions. It is only a statement of conclusions different from those of the Commission based on the same facts. Respondents submit that conclusions once accepted by the entire Commission should not be reopened without cause. No proof was offered at the rehearing justifying a reopening of the proceeding or showing any circumstance which was not fully considered by the Commission originally. The proposed report does not contain any reference to any fact or any legal argument which was not fully considered and disposed of in the Commission's report. In these circumstances, the only proper course for the Examiners was to follow the conclusions of the Commission on the law and the facts and to recommend that protestants' petitions for reconsideration be dismissed.

The conclusions of the Commission in this proceeding were succinctly stated in its report as follows:

> "Respondents have justified their proposals. In reaching this conclusion we have given due consideration to all pertinent facts of record, particularly the evi-[fol. 626] dence with respect to the cost of the service. Admittedly, respondents have derived substantial benefits from the concentration of traffic at their New York and Philadelphia produce terminals and from the line-haul revenue received by them from this traffic, but these

> factors are in no sense controlling in the determination of the issues now before us. The protesting shippers have also received worth while benefits. The present expense of unloading is such that respondents should no longer be required to furnish this service without adequate compensation. The cost of service is less at Philadelphia than at New York, but no separate charge for special sorting and stacking is made at that point. Furthermore, the record indicates the desirability of a parity of charges for unloading at New York and Philadelphia. We conclude that the charges for unloading should be the same at both points."

Administrative conclusions once established should not be changed except on a showing of additional facts which justify different conclusions. The policy followed by the Commission in such circumstances was stated in an early case as follows:

> "* * * It is plain that the matters presented by this present proceeding are the same as those presented by the second branch of the original complaint. That complaint was dismissed only a year and three months [fol. 627] before the submission of this case, and this complaint ought to be dismissed as a matter of course unless it appears that the Commission in deciding the original case labored under some misapprehension of fact. While this Commission is not bound by any rule of *stare decisis*, and while its conclusions are not *res judicata*, still, when a matter has once been fully considered and decided it must be regarded as settled unless it appears from new facts presented that the Commission was wrong." *Traugott Schmidt & Sons* v. *M. C. R. R. Co.*, 23 I. C. C. 685.

In a more recent expression, *Alabama Asphaltic Limestone Co.* v. *Akron & B. B. R. Co.*, 194 I. C. C. 275, the rule has been crystallized as follows:

> "A finding as to the lawfulness of a rate will be adhered to in subsequent proceedings regarding that rate unless new facts are brought to our attention, conditions are shown to have undergone a material change,

or it is shown that we proceeded on a misconception or a misapprehension."[1]

Since the proposed report shows that protestants' petitions for reopening and reconsideration were without sub- [fol. 628] stantial merit and that there is no reason for changing the conclusions of the earlier report, the Commission should disregard the proposed report and conclude that petitioners had failed to show any reason for altering the conclusions already stated in that report.

The proposed report is in error not only for failure to follow the law established by the Commission's decision but is not supported by either the law or the facts relating to charges for unloading carload freight.

The Examiners should have followed the Commission's conclusions and should have found that both the history of the rates and the nature of the service show that this unloading is not comprehended within the scope of the line-haul rates, that the cost of the service is the principal criterion for determining the lawfulness of the charges and that the benefits secured to the public by virtue of the service confirm the proof that it is both reasonable and lawful.

The ultimate conclusion in the proposed report is based on three erroneous conclusions: (1) That the unloading is somehow inseparable from the delivery of the freight, (2) that the line-haul rates should be construed as including the unloading, and (3) that past practice may not be changed. All these conclusions are wholly in error.

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[1] To the same effect are *Seaboard Air Line Ry. Recs.* v. *Carolina & N. W. Ry. Co.*, 194 I. C. C. 185; *A. Jacob & Co.* v. *New York Central R. Co.*, 223 I. C. C. 256; *Cities Service Oil Co.* v. *Alton R. Co.*, 203 I. C. C. 255; *Nebraska State Ry. Comm.* v. *Chicago B. & Q. R. Co.*, 196 I. C. C. 112; *West Kentucky Coal Bureau* v. *Illinois Central R. Co.*, 172 I. C. C. 291-2; *Hires Condensed Milk Co.* v. *P. R. R. Co.*, 38 I. C. C. 445.

[fol. 629] I

The Line-Haul Rates Do Not Include Unloading

As stated in the portion of the proposed report quoted in the first paragraph of Exception 2, the basic error in the proposed report is the erroneous conclusion that carriers are obliged to unload the cars without additional charge because that service is included within the scope of the line-haul rates.

As presented by protestants, and, presumably, as conceived by the Examiners, this conclusion is more legal than factual. The proposed report does not presume to be stating a principle peculiar to New York and Philadelphia but a general rule that this service must be understood to be included in the line-haul rates as a matter of law. Respondents submit that such a conclusion, whether a legal rule or a conclusion from the facts of this case is contrary to the facts submitted in evidence and is contrary to the course of administrative decision of many years.

A. Carload Rates Are Not Intended to Include Unloading

The Examiners' conclusion that the line-haul rates include the unloading service is directly contrary to the clear proof in this record that the rates are not so made. On all domestic carload freight terminated in Official Territory [fol. 630] except at New York and Philadelphia the receivers either unload the cars themselves or otherwise bear the cost of the unloading. It is only at those two points that the carriers provide that service without a separate charge.* In no instance is the level of any rate made to depend

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* Effective June 1, 1950, this statement is no longer correct as to Philadelphia. By tariffs which became effective on that date, charges are now applicable for loading and unloading all domestic freight at that point. The tariffs had been protested but were not suspended, These tariffs are in conformity with the testimony here that such charges would be published in due course (R. 88-9). The tariffs publishing those charges include Supplement No. 151 to C. W. Boin's No. 90-K, I. C. C. No. A-848, Exception to Rule 27.

upon whether it includes unloading. No change was made in any rate when loading and unloading charges were published at other points. The rates are the same whether or not the carriers absorb the unloading. Thus, as to fruits and vegetables, the transcontinental rate is the same to Pittsburgh, Philadelphia, Newark, New York and Boston (Ex. 4), yet charges for unloading have been applicable at Pittsburgh, Newark and Boston for many years. Rates from Florida are group rates and apply equally to all points in the Philadelphia and New York rate groups irrespective of whether the carriers or receivers perform the unloading and irrespective of whether they or the receivers bear the cost of the unloading. Thus the cost of unloading was previously absorbed at these particular stations at New York and Philadelphia but borne by the shippers at all other stations taking Philadelphia or New York rates. Further, [fol. 631] the same basis of rates applied at all other points, yet when carriers unloaded the freight at Pittsburgh, Newark, Buffalo or Boston, for example, charges for unloading were paid by the receivers.

The error in the Examiners' conclusion is equally clear if the service provided by the carrier at Philadelphia on traffic unloaded on team tracks in the perishable freight terminal is compared with the service rendered on traffic unloaded onto the terminal platform. The placement alongside the platform is substantially similar to placement on the team track. At the team track the receiver unloads. At the platform the carrier unloads. Yet the Examiners find it unlawful to assess charges for the additional service provided for the platform receiver.

The situation at New York is not materially different. Team tracks are not located immediately adjacent to the pier station but the same difference in service obtains between the pier stations and all other points in the New York metropolitan area. It is only at these particular stations that the carriers perform the unloading except at an additional charge.

The error in the Examiners' conclusion is shown by this proof that loading and unloading service is provided at other points on these same commodities at the same rates [fol. 632] or the same basis of rates plus unloading charges.

Almost universally the loading and unloading of carload freight is at the cost of the shipper. These charges only bring the practice at New York and Philadelphia into conformity with what is a nearly uniform practice throughout Official Territory.

Further, even if the Examiners were correct in concluding that the reasonableness of the charges may be determined only on the basis of the total charges, this record proves the total charges reasonable. For equivalent service at all other points an additional charge is added to the line-haul rate—which rate is admittedly made the same or on the same basis as the rates to New York and Philadelphia. Accordingly, by the standard of comparable rates in the same general territory, the rate plus the unloading charge—both individually and in total—are reasonable.

B. The Obligation to Deliver the Freight is Not Affected by the Unloading Charges

As noted in Exception 2, the Examiners have adopted the fallacy that unloading is a part of delivery and therefore a part of the line-haul service because the unloading is completed before the freight is delivered and before it becomes available to the consignee. The fallacy in this analysis is that most extraordinary services are performed prior to [fol. 633] delivery. All are necessary to make the freight available to the consignee in accordance with his directions. In this respect, the unloading at Chicago, Buffalo, Pittsburgh or any other point is no different from the unloading at New York and Philadelphia. Wherever the carrier performs the unloading, that service is performed prior to delivery and is necessary to effect delivery at the locations designated by the receiver.

This same fallacy has also been stated in the form that carriers are obliged to make the freight accessible to the receiver. This contention ignores the fact that in all cases where the carrier unloads—whether at Chicago, Pittsburgh or at New York or Philadelphia, the freight is not accessible to the consignee until it is unloaded. In other words, when the receiver asks the carrier to unload the freight and the carrier does perform the unloading, the freight is not accessible until unloaded and the receiver does not take possession until the unloading is completed.

The same situation obtains in cases where charges are assessed for pickup and delivery service, for storage and for switching. All of these are special services for which additional charges are assessed. All are performed prior to delivery. All are necessary to the type of delivery ordered. All are performed in order to make the freight [fol. 634] accessible to the receiver at the place where delivery is requested.

It is apparent, therefore, that unloading charges are not inherently unlawful because they precede delivery. Admittedly, carriers are obliged to deliver freight. Admittedly, the cost of effecting delivery is attributable to the line-haul rate. No portion of the costs relied on to sustain the charge involved here is attributable to the delivery. It is only the job of unloading which is charged for. Unloading is the service of moving the freight from the cars to locations on the pier or station platform. It is only after the unloading is completed that the shipment is checked and the freight delivered to the receiver.

Further, even if the conclusion were correct that unloading is a part of delivery, that conclusion does not tend to show the charges to be unlawful. The unloading is necessary to provide a particular kind of delivery at a particular place and in order to provide that special delivery, not accorded to shippers generally, the carriers incur additional costs and are entitled to recover those additional costs from those at whose request and for whose benefit the special form of delivery is made. Accordingly, whether unloading be a part of delivery or not, the unloading charges are lawful.

[fol. 635] C. The Line-Haul Transportation is Complete Before the Unloading is Begun

Just as the delivery is separate from and follows the unloading, so the line-haul transportation precedes it. Before the unloading has begun, the cars have completed their forward movement and have arrived at their destination.

The situation may well be compared with terminal switching. Throughout the many proceedings in *Ex Parte* 104, Part II, the basic issue is the scope of the line-haul rates. The Commission has repeatedly fixed the point at which

the line-haul obligation ends at the place where service has been performed which is not in excess of simple switching or team track placement. In the case of the Philadelphia Produce Terminals, the placement alongside the terminal involves almost the identical service with that necessary to team track placement. In the case of the New York pier stations, carfloat service has been compared (*e. g.* in the proposed report, Sheet 15) to switching service and the placement of the carfloat alongside the pier to spotting on team tracks or private siding. The placement alongside the pier or station platform, therefore, completes the line-haul movement. The perfomance of additional service not furnished to shippers generally is proper only on payment of additional charges just as in the terminal allowance cases.

[fol. 636] II

The Conclusion that Carriers May Not Publish Separate Charges for Unloading Is Contrary to the Course of Administrative Decision Throughout the Commission's History

The conclusion in the proposed report is contrary to two fully established principles: That unloading charges may properly be separated from the line-haul rates and that carriers may not provide for particular shippers or at particular locations any special service not accorded shippers generally. As to the separation of unloading charges from the line-haul rates, the cases referred to in the proposed report do not support the conclusions for which they are cited and other decisions of the Commission have placed beyond challenge the proposition that charges for loading or unloading carload freight may properly be separated from line-haul charges.

The propriety of the publication of separate charges for unloading carload freight is grounded both on the provisions of the statute and of the governing classification. The statute [2] provides that tariffs "shall separately state

[2] The provision in the Act relating to this matter is that of Section 6(1) which provides that "the schedules printed as aforesaid by any such common carrier shall plainly state

[fol. 637] all terminal charges * * * and all other charges which the Commission may require." By this provision, separate charges are specifically authorized and expected. The Classification provides that loading and unloading carload freight is the obligation of the shipper.[3]

Accordingly, the conclusion of the proposed report that the publication of separate charges is unlawful is erroneous unless it could be shown that the Commission is precluded from approving these charges by some course of administrative decision having the force of law which would prevent it from granting its approval. In fact, the opposite is the case. Both with respect to unloading and with respect to many other services similar in character, the Commission has repeatedly found such charges to be lawful.

As the Examiners acknowledge, the general rule throughout the United States is that the obligation to load and unload carload freight rests with the owner of the property. It is only in exceptional circumstances that the carriers perform the loading and unloading. Throughout Official Territory, with the exception of New York and Philadelphia, in every instance in which the carriers perform the service [fol. 638] in connection with domestic traffic, tariff charges are assessed. Philadelphia and New York are the only points at which the service was performed without a sepa-

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the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee."

[3] Rule 27 of the Consolidated Classification is as follows:

"Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carries, carried at CL ratings or rates. * * *"

rate charge. Under such circumstances, it is obviously in error to conclude that the separation of unloading from line-haul charges is in itself unlawful.

The publication of separate charges for unloading carload freight is the result of three policies which the Commission has repeatedly urged on the carriers and the adoption of which it has frequently required. Those three principles are, first, that the carriers should not perform for particular consignees or at particular locations any greater terminal service than those generally accorded to shippers and consignees. The importance of this policy is attested by three major investigations; the *Freight Forwarding Investigation*, 229 I. C. C. 201, *Propriety of Operating Practices—New York Warehousing*, 198 I. C. C. 134 and *Practices of Carriers Affecting Operating Revenues or Expenses, Part II, Terminal Services, Ex Parte 104*, 209 I. C. C. 11. The second policy concerned is the repeated admonition to the carriers that they require that each segment of traffic bear its due share of the cost to the carriers of providing the service. The third is the admonition that carriers review their tariffs to discover any "low spots" [fol. 639] in the rate structure and to raise the rates and charges on those commodities and for those services to a level commensurate with the general level of rates. As to the legality and propriety of separating charges for loading and unloading from the line-haul rates, the Commission has expressly stated the criteria to be used in determining whether charges for unloading should be separately stated. Those criteria are set forth in *Loading and Unloading Carload Freight*, 101 I. C. C. 394, as follows:

> "Protestants particularly urge that the line-haul rates include loading and unloading, and that under the law respondents not only have to justify the charge for those services but the burden is upon them to show that the line-haul rates heretofore contemplating the loading and unloading services are reasonable when demanded by respondents for the road haul alone. Respondents answer that while it may be true that the line haul rates to and from the points in question include loading and unloading in the tariff sense, there was no extension or increase in the rates to cover the

cost of such services. *Many of the line-haul rates to and from these points have been prescribed or approved by us, and our reports do not indicate that we have given any consideration to the cost of unloading carload freight in arriving at such rates. The same line-haul rates are assessed on shipments to and from industrial siding or outlying team tracks at these points* [fol. 640] *although the loading and unloading is not performed by the carriers. The same rates, or the same bases of rates, apply to or from other points in the same group or for a similar distance, and the rates do not include loading or unloading.* All of these facts indicate that the general measure of the rates to and from the points in question are not unreasonable for the line-haul service alone, and warrant the conclusion that if the carriers justify the charge for the loading and unloading service, they have borne their burden of proof under the law." (Emphasis supplied.)

Those conclusions were adopted by the Commission in its later consideration of the carriers' request for increases in those charges in *Charges for Loading and Unloading Carload Freight*, I. & S. 5466, 272 I. C. C. 388.

The service most closely similar to loading and unloading carload freight is that of bracing and blocking. Additional charges for that service have been repeatedly approved. *Demurrage Allowances*,[4] 30 I. C. C. 538, *Blocking and Staking Lumber*, 168 I. C. C. 37, *Berg Industrial Alcohol Co.* v. *Reading Co.*, 142 I. C. C. 161. In the last-named case the Commission said:

[fol. 641] "In the situation here considered defendant has elected for its own convenience or from the ne-

[4] The Commission there said: "We have in several instances approved of tariff provisions for additional reasonable charges for loading and unloading when done by the carrier. For such services and all other services performed by it apart from conveyance, we think the carrier may properly make a reasonable charge, since in our view they are not accessorial parts of the transportation which Section 1 requires the carrier to furnish."

cessities of the case, to assume the burden of performing an accessorial service which it is under no duty to perform. It is its duty, in respect of carload freight, to place a car for loading or unloading at some point convenient to the shipper or consignee. * * * Inasmuch as the service in question was a transportation service it becomes necessary to determine what would have been a reasonable charge therefor. There is no presumption that the service, being one of transportation, was included in the line-haul rate."

In passenger service, the nearest parallel to loading and unloading is the service of the red cap porter in handling baggage. The Commission has only recently, in *Red Cap Service—Cincinnati, Columbus, Indianapolis*, I. & S. 5693 (mimeographed report dated March 14, 1950) sustained its earlier conclusion that separate charges were proper for this service and has supported that conclusion by concluding, at sheet 9, that "Red Cap service is comparable to other various services in connection with transportation which are available to shippers at their option, and at a published charge, such as loading and unloading freight at certain points, furnishing icing for perishable traffic, and switching."

As noted in this quotation and in the Commission's pre- [fol. 642] vious decision in this proceeding, the unloading service is, so far as the separation of charges is concerned, similar to switching, refrigeration and reconsignment, all of which services are performed only on payment of separate charges.

With respect to other accessorial services, the Commission has been constantly on the alert to assure that no additional service is provided for particular consignees or at particular points which carriers fail to perform for other consignees or at other points. The additional switching service condemned in *Ex Parte* 104, Part II, the segregrating and stacking condemned in *Allowances for Stacking*, the special loading, unloading, sorting and split delivery services condemned in the *Freight Forwarded Investigation* and the providing of special storage facilities condemned in *New York Warehousing* are all specific examples of services

closely similar to unloading carload freight at Philadelphia and New York.

III

The Authorities on Which the Examiners Rely Do Not Support Their Conclusions

In the course of the report, the Examiners have referred to a number of previous cases on which they rely as support-[fol. 643] ing their conclusions. None of these authorities are controlling in this proceeding. Two essential differences in this proceeding should be recognized: (1) That charges for performing this service have now become general throughout Official Territory and (2) that this service is not performed in conjunction with line-haul services or with other terminal services but is the same unloading service which is performed at all other points in Official Territory subject to a charge.

In *Lighterage and Storage Regulation at New York*, I. C. C. 47, the proposal was to change certain regulations with respect to the performance of lighterage and the furnishing of storage in and about New York Harbor. One of the proposals was to assess a charge for loading and unloading carload and less-carload shipments to and from lighters placed alongside private piers and carriers' pier stations. Respondents submit that there is a clear distinction between the services involved in loading and unloading lighters moving in and about New York Harbor which provides a service not duplicated at other points when such charges are not generally assessed at other points and where there is no comparable service provided at other points as contrasted with the situation here where at all other points [fol. 644] charges for performing this same service are already in effect and have been in effect for many years.

As to the Examiners' reference to *Erie R. R. Co.* v. *A. & V. Ry. Co.*, 98 I. C. C. 268, it is apparent from a reading of that decision that the division of the revenue as between eastern and western carriers considered there and the special deductions for New York Harbor service which were there permitted, related not to the loading and unloading but to the expensive service of the carriers in transporting the freight from the New Jersey railhead to Manhattan.

It is, therefore, of little help in this proceeding. Obviously, moreover, the issues as to the propriety of the division of revenue among carriers have little relevancy to the issue as to whether charges to shippers are just and reasonable.

In respect to *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, it is apparent that the loading and unloading there was purely incidental to the large number of other services which were included within the scope of the terminal charges proposed.

Moreover, both with respect to this decision and that at *Storage and Lighterage Regulations, supra*, an entirely different situation is presented by a proposal to publish charges for loading and unloading at a single point long [fol. 645] before such charges became almost universal and the situation here where the proposal is to extend to the last two remaining points a tariff provision creating charges for this service.

Allowances for Stacking, 169 I. C. C. 780, was an investigation to determine whether or not the line-haul rates included the segregation of shipments and the stacking of boxes of fruit on the New York pier. The finding was that the transportation service subject to the Act had been completed when the packages were placed at rest on the pier floor and that in making allowances to consignees for performing the additional service of placing the boxes in order on the pier floor was a concession outside the obligation of the carrier. That proceeding is of importance here only to the extent that it shows that additional charges should be assessed for special services not generally provided without additional charges. The actual decision in that case is that carriers are not obliged to perform special services not generally performed on carload traffic. It is different from the service involved here only in that the sorting and stacking is one step further removed from the normal service provided on carload traffic.

The charges proposed in *Unloading Lumber in New York* [fol. 646] *Harbor*, 256 I. C. C. 463, were significantly different from those involved here. The transfer of freight between two vehicles is not normally involved in the transportation of carload freight by railroad. Unloading occurred during the course of the forward movement of the freight and was not a service normally performed at the

shipper's expense. There is no similar charge made at other points because the need for the service does not normally arise. None of these conditions apply to the unloading involved here.

Terminal Charges at Pacific Coast Ports, 225 I. C. C. 673, is equally inappropriate. The proposal there was a charge to cover switching, drayage, storage, wharfage and toll charges. The service involved was the movement of freight from rail terminals to the docks. The question presented, therefore, was whether the line-haul rates included the cost of effecting the interchange between rail and ocean carriers.

Thus, even though the Commission has required that the justification for the payment of additional charges include proof of the reasonableness of total charges where the service in question was one normally comprehended within the scope of the line-haul rate, that rule has no application here where the service is entirely separate from the line-haul.

[fol. 647]

IV

The Examiners are in Error as to the Burden of Respondents' Proof

Exception No. 1 is directed to the statement in the proposed report of the measure of respondents' proof. In this, just as in any investigation and suspension proceeding, "burden of proof is upon the carrier to show that the proposed rate, fare, charge * * * is just and reasonable." (Section 15(7).)

This provision in the statute does not require proof that the pre-existing absence of a charge was unfair. It does not require respondents to prove inadequacy of revenues. Further, the apparently more onerous burden suggested in the proposed report is not a proper interpretation of the statute in the light of the circumstances surrounding the charges under investigation here.

The long-continuance of free unloading at these two points might itself place a burden of proof on respondents by creating a factual presumption that a change in the rate structure was unreasonable. At most, however, this is only a factual presumption. At most it requires only that the carriers prove the rates to be just and reasonable. It does

not create a presumption that increases the burden of proof. [fol. 648] Further, whatever presumption may arise from the long-continuance of free unloading, that presumption is fully met by the proof that there has developed a rate structure throughout the territory whereby this service is performed by the carriers only subject to additional charges. Having thus met the only presumption justified by the facts, the respondents should not now be called upon to meet a more onerous burden.

As to the reference to a possible division question in the report, it should be sufficient here to note that the issues involved in determining proper divisions between carriers are entirely separate from those involved in determining the reasonableness of rates charged to the public.

Further, it should be noted that whatever the proposed report may mean by the language that "it was generally assumed" that the cost of unloading was included in the line haul rates and in the divisions, the fact is that none of the Commissions reports relating to this traffic indicate that the cost of unloading at these two points was ever considered by the Commission in fixing either the rates or the divisions. The unloading has in fact been separately published from the line haul rates to other points for many years. As to the deduction before prorating, it is apparent from the tariffs involved that this deduction relates to the [fol. 649] "harbor service" provided in moving the freight from New Jersey railheads to Manhattan piers and not to the unloading. Further, even if the contention had any validity otherwise, it would be shown to be erroneous by the fact that no such deduction is made on freight delivered at Philadelphia.

Further, the reliance placed by the proposed report on the long-continuance of this free service is in direct conflict with the well-established rule that carriers may not be required to continue to meet competition. The proof is that the cost of the service was absorbed, at a time when the cost was relatively less burdensome, in order to meet water competition (R. 27). It is, of course, the prerogative of the carriers to determine whether and in what manner and to what extent the competition of other forms of transportation is to be met. Moreover, once having decided to meet

a particular competitor, the carrier is entitled to withdraw from competition or to discontinue a particular form of competition. In *Tobacco from Ohio River Crossings*, 73 I. C. C. 384, 387, the Commission said:

> "We have many times held that if a carrier elects to discontinue a competitive rate, whether because the competition no longer exists or because it does not care [fol. 650] longer to compete, we would concern ourselves only with whether or not the increased rates are just, reasonable and proper." Cf. *Tobacco from Ky. and Tenn. to New Orleans and Mobile*, 235 I. C. C. 577, 582.

In *Lumber Between Points in Western Trunk Line Territory*, 38 I. C. C. 370, 376, the Commission said:

> "Nor can it be maintained that because a carrier has once chosen to make a low rate to meet water competition, it is estopped from thereafter increasing that rate, provided the new rate is just, reasonable and nondiscriminatory * * *."

Moreover, there has been an entirely new development in the rate structure since this practice was first begun. Progressively, first at the inland cities, then at the port cities, it has become the practice for the carriers to assess charges in every instance where they perform loading or unloading service. Thus, even if there were substance to the Examiners' reliance on the long-continuance of the rate, it is shown that whatever be the importance of that factor, the carriers are amply justified in now discontinuing the practice.

[fol. 651]

V

The Charges Are Reasonable

The previous portion of this argument has been devoted largely to a statement of the reasons why the Examiners' conclusions are in error and what their conclusions should have been. This section will be devoted to a more affirmative statement of respondent's case.

A. Similar Charges Are Applicable Under Similar Conditions for the Same Service at Other Points.

With respect to all issues presented in this proceeding, the most significant fact in the whole case is the fact that similar charges are assessed in all other cases where carriers unload domestic carload freight, except at New York.[5]

Respondents submit that if it be reasonable—as the Commission has previously found—to assess charges for unloading at Pittsburgh, Buffalo, Albany and Newark, to name only a few of the points where carload freight is unloaded by the carriers, it is also reasonable at New York and Philadelphia. At all such points, including New York and Philadelphia, delivery is made either on team tracks, or on station platforms whichever location be elected by the receiver. The receiver is not obliged to have the freight [fol. 652] unloaded by the carrier. Facilities to fill every actual demand are provided at both points. Respondents seek only compensation for such service as is actually incurred in providing a special service.

B. The Cost Studies Fully Justify the Present Charges.

At both hearings, respondents relied principally on the cost of the service as their justification for the charges. The major cost study was that made by the Erie Railroad in 1946 and 1947. That study was, at the second hearing, brought forward to show the increases in cost incurred since it was made. It was again supplemented by more recent studies made by the other respondents showing the 1949 costs more directly.

The new costs are shown in Exhibit 127. At the previous hearing, Witness Root introduced Ex. 23, summarizing a study made by him of the cost of unloading fruits and vegetables at the Erie's Duane Street Piers. Ex. 23 was fully discussed by the Commission in its previous decision, and was accepted as sufficient proof of the facts therein set forth. While there has been no substantial change in the physical operation as described by Witness Hart in his

[5] Tariffs publishing charges for loading and unloading other domestic carload freight became effective at Philadelphia on June 1, 1950.

testimony at the previous hearing, there have been changes in compensation paid employes of Seaboard Terminal and [fol. 653] Refrigeration Company which performs the unloading for the Erie under contract. On September 1, 1947, the wages of Seaboard employes involved in the unloading operation were increased 15½ cents per hour. On November 29, 1948, their wages were again increased 10 cents per hour, making a total of 25½ cents per hour above the wage levels in effect at the time of the original study—Ex. 23. Also, there was a change in vacation allowance. At the time of the original study, Ex. 23, employes with one year's service, who had worked for 165 days within the year preceding April 15th, were allowed one week's vacation with pay. At the present time, employes with five years or more of service are allowed an additional week's vacation with pay. Ex. 127, consisting of three pages, is the same as Ex. 23 except that it gives effect to the aforesaid wage increases totalling 25½ cents per hour (R. 1347-1351). Ex. 127 does not reflect the increased vacation allowance since the complete costs are not yet available for a representative year to make an accurate computation (R. 1349).

In addition, subsequent to the preparation of Ex. 127, Seaboard offered its employes an additional increase of 20 cents per hour, retroactive to September 1, 1949, in conformity with the hourly increases granted railroad employes in connection with the 40-hour week. This 20 cents [fol. 654] per hour increase was, of course, the minimum effective increase, having been offered by the employer.[6] The result of this additional 20 cents per hour increase is to raise the costs shown in column 3 of Ex. 127 by approximately 16% (R. 1353-1355).

On the other hand, the combined effect of two minor operating changes described by Witness Root at pages 1351-1352 of the Transcript reduces the cost of unloading citrus as a whole by not more than 10 cents per ton.

The following table compares the unloading costs shown by Ex. 23 with the unloading costs shown by Ex. 127, the

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[6] Although the fact is not in the record, subsequent to the rehearing the Seaboard employes accepted this offer.

latter costs being adjusted to take care of the changes (except the increased vacation allowance) referred to above:

Table I

Commodity Group	Previous Net Cost Per Ton (Ex. 23)	Current Net Cost Per Ton (Ex. 127 as adjusted)	Percentage increase of current cost over previous cost
Citrus Fruits	$1.2206	$1.6304	33.57%
Fresh Fruits (other than citrus)*	1.7242	2.4467	41.90%
Fresh or Green Vegetables (top iced)*	2.0538	2.9064	41.51%
Fresh or Green Vegetables (not top iced)*	1.2096	1.6988	40.44%
Cantaloupes and Melons	1.8202	2.5711	41.25%

* Not cold pack or frozen.

It will be noted that, in each case, the current costs exceed the previous costs, on which the previous decision was based, [fol. 655] by more than 30%, the amount by which the originally published charges were increased for revenue purposes pursuant to *Ex Parte* 166. Such fact is, obviously, complete justification for applying the 30% general increase to the unloading charges, one of the purposes of *Ex Parte* 166 being to enable the carriers to meet "necessities growing out of increases in wages and materials costs" (270 I. C. C. 403, 406). This substantial increase in costs also points up strongly the Commission's previous conclusion that the "present expense of unloading is such that respondents should no longer be required to furnish this service without adequate compensation."

It should be noted that the unloading charges, at the request of protestants, were exempted from the general increases under *Ex Parte* 168, although the charges for railroad services generally within the East were increased by 10% for revenue purposes.

In the case of the respondents other than the Erie, new studies were prepared showing actual costs for one and two-week periods in 1949 (Exs. 128-131). Weighted and arithmetical averages of all cost studies are shown and compared in the Table below. Since none of the new cost studies were revised to reflect the increases in cost to the carriers by reason of the adoption by the industry of the [fol. 656] 40-hour week effective September 1, 1949, all

the 1949 figures have been increased by 16 percent to reflect that increase in cost (R. 1355).

Table II

	Citrus & Vegetables	Fresh Fruits	Top-iced Vegetables and Melons
New York			
1. Weighted Average Costs Based on 1949 Studies	1.77	2.28	2.65
2. Above Average plus 16% for 40-Hour Week	2.05	2.64	3.08
3. Arithmetical Average of Costs of Each Carrier, 1949 Study	2.10	2.98	2.01
4. 1946–7 Study Weighted Averages	1.49	1.76	3.10
5. Percent of Increase, 1949 Over 1947 (Lines 2 and 4)	37.58%	50%	−0.35%
Philadelphia			
6. 1949 Study Weighted Averages	1.39	1.66	3.58
7. 1949 Study Averages plus 16% for 40-Hour Week	1.61	1.93	4.15
8. Arithmetical Averages of Costs of Each Carrier, 1949 Study	1.62	2.09	3.58
9. 1947 Study Weighted Averages	1.02	1.73	3.07
10. Percentages of Increase 1949 Over 1947 (Lines 6 and 9)	57.84%	11.56%	35.18%
New York and Philadelphia			
11. Combined Weighted Average Cost, 1949, including 16%	1.96	2.52	3.09

Protestants themselves have submitted the proof as to why the charges applicable at Philadelphia must be on a parity with those at New York. Witness Ward stated that:

> "An area of competition exists between Philadelphia and all of its surrounding major terminals, that is, that group of receivers who are midway between" (R. 1162).

[fol. 657] Witness Ward further testified that 40 percent of the total volume of perishables moving to Philadelphia were moved thence to points outside the City, a large part of that portion moving to points which could purchase their perishables as well from New York as from Philadelphia (R. 1174-5). This evidence amply confirms the Commission's finding that the competitive relationship between the two cities justifies the publication of equal charges at both points (272 I. C. C. at p. 663).

The table also shows the arithmetical average of the various costs incurred by the respondents. These arithmetical averages are particularly instructive in view of the wide variation in the volume handled by individual carriers.

Respondents do not rely, in supporting the reasonableness and legality otherwise of these charges, on any services which they perform in connection with this traffic other than the actual unloading of the freight and the services at the pier stations which are clearly incidental to the unloading operation. They have cited the storage privileges, the notification to consignees of the location of their freight enroute, the extra heat and light, the providing of auction rooms and other similar services as showing the extent to which they have cooperated with the trade in facilitating the receipt of the freight and its sale. Some of them are [fol. 658] admittedly assignable to the line-haul operations rather than to the station operations. No cost studies were prepared or submitted showing the cost of these additional services. The cost studies actually submitted include only the wages of the employes actually engaged in unloading, the wages of their supervisors and the wages paid in providing the police protection and cleaning services which accompany the unloading operation.

For reasons of their own, protestants did not challenge materially the accuracy of the new cost studies. These cost figures should, therefore, be accepted as proof of the reasonableness of the level of the charges.

C. The Evidence at the Rehearing Confirms the Commission's Finding That Receivers Reap Substantial Benefits from the Unloading Service

Respondents also submitted evidence showing the effect of the charges on the distribution of traffic between pier stations and produce terminals, where the charges apply, and team tracks where the unloading is performed by the receivers themselves.

The Erie presented figures comparing carloads unloaded in the first 8 months of 1948, when the unloading charges were not in effect, with those in the first 8 months of 1949,

[fol. 659] when the unloading charges were in effect, as follows (R. 1353):

Table III

	Carloads First Eight Months	
	1948	1949
Citrus fruit	5,342	5,131
Fresh fruits (other than citrus)	6,476	6,731
Fresh or green vegetables (top-iced)	1,742	148
Fresh or green vegetables (not top-iced)	581	92
Cantaloupes or melons	1,878	2,024
	16,019	14,126

These figures are particularly illuminating in that they show that the decline in the vegetable traffic (2083 cars) was greater than the decline in the total perishable traffic (1893 cars). In other words, the fruit and melon traffic unloaded by the Erie actually increased from 13,696 cars during the first 8 months of 1948 when the unloading charges were not in effect, to 13,886 cars during the first 8 months of 1949 when the unloading charges were in effect.[7]

The meaning of these figures is clear. It will be recalled that practically 100% of the fruit and melon traffic, after being unloaded, is displayed, inspected and sold on the piers, either at auction, or at private sale (R. 110). Vegetable traffic, however, both top-iced and not top-iced, is not generally sold on the piers (R. 110). As was stated by the Commission in its previous decision, without contradiction [fol. 660] by the protestants at the rehearing:

> "Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers. Practically all of the citrus fruits and fresh fruits other than citrus, after being unloaded on the piers, are sold at public auction in rooms specially assigned for that purpose. These rooms, made available by the Erie solely for the auctions, are located on the second floor of Piers 20 and 21. Prospective bidders usually inspect the fruit while it is on display on the pier floor.

[7] There is nothing in this record to show that these figures were affected by any conditions which would make them unrepresentative generally.

> This takes place prior to the auction. Cantaloupes and melons, as a rule, are not sold at auction, but are bought at private sales on the pier floor where the packages are displayed. Fresh or green vegetables, particularly those not top-iced, frequently reach the consignee without prior sale at the piers. With the exception of tomatoes they are not sold at auction" (272 I. C. C. at p. 653).

Thus, the fruit and melon traffic, which is displayed, inspected and sold on the piers after being unloaded, did not decline in volume despite the unloading charges, while the vegetable traffic, which is not generally so displayed, inspected and sold, did decline in volume by more than 89%. This clearly proves that the display, inspection and sale of perishables on the piers is of great benefit to the trade—[fol. 661] otherwise the decline would not have been limited to the vegetable traffic. As the Commission stated in its previous decision, "Pier delivery affords consignees the advantages, not available in connection with team-track delivery, of displaying their produce to prospective purchasers and the added privilege of auction sales of a considerable portion of the traffic in question, both at convenient locations" (272 I. C. C. at p. 655).

The attention of Witness Root was called to the heavy decline in the vegetable traffic, and he stated that such decline, aside from the effect of the heavy freeze in the West and Southwest, was due to the diversion of such traffic to the Manhattan team tracks of the New York Central and Baltimore & Ohio Railroads, where it is now being handled (R. 1353).

The continuation of the fruit and melon business on the piers[8] substantiates the belief, stated on behalf of the respondents at the oral argument before the full Commission prior to the effective date of the unloading charges, that (R. 814):

> "I think perhaps the interesting point is, Your Honor, that even if we had an unloading charge on the

[8] This continuation of pier deliveries of fruit and melons is in sharp contrast to the broad decline in rail traffic generally throughout the country.

> piers, the practical business advantages to the trade [fol. 662] of pier delivery are such that there would be no substantial additional demand for team track delivery."

In other words, the additional demand for team track delivery, occasioned by the unloading charges, was limited to the vegetable traffic. Significantly, protestants at the rehearing, as well as at the original hearing, failed to cite one instance where the railroads were unable to furnish team track delivery of perishables upon request for such delivery. The reason for such failure is obvious. Because of the advantages of pier delivery, the receivers of fruits and melons do not want team track delivery. The receivers of vegetables, who do not in all cases desire those advantages, apparently do want team track delivery in many instances, and this record shows that they are able to get it as far as the railroads are concerned.[9]

This demonstrated fact, that only a very small number of receivers of perishables want team track delivery,[10] dis-

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[9] To the extent that the receivers of vegetables use the piers, they obtain the benefit of delivery near the market. In its previous decision, the Commission said: "The piers are adjacent to Washington Market, the largest fruit and vegetable market in New York and the primary market in the entire metropolitan area" (272 I. C. C. at p. 651). In addition, pier delivery of vegetables avoids the "added expense" present in team track delivery, "notably where the commodities are top iced", as referred to by the Commission (without contradiction by protestants at the rehearing) in its previous decision. Those receivers of vegetables who use team tracks or private sidings do not, of course, pay the unloading charges.

[10] At the first hearing, protestants not only admitted but urged that team track delivery would not meet their needs. For example, a representative of the Philadelphia auction company, whose remarks are equally applicable to conditions in New York, testified (Tr. 695):

> "Now, this unloading charge will most certainly cause a great hardship, not only to our company but

[fol. 663] poses entirely of the contention made by protestants that the theoretical "inability" of the railroads to handle all of the perishable traffic on team tracks on Manhattan Island makes the unloading charges at the piers improper.[11] Respondents' team tracks are sufficient to handle all the perishable traffic that the trade wants handled on team tracks, and there is not one bit of evidence in this record to the contrary. The trade today has the option of pier delivery or team track delivery. The unloading charges do not apply to team track delivery. If, however, the trade elects pier delivery for the advantages that go with such delivery, [fol. 664] the trade should pay for the cost of the unloading in accordance with the universal practice that the unloading of carload freight is done by or at the expense of the shippers. As the Commission, in its previous decision, said:

> the consignees for whom we sell. The auction method of selling—I believe the basic principle of it is unloading whereby the buyer has a true picture of what he is buying. We do not sell by sample at auction. I do not believe it is possible to display the wares of these consignees from any form of team-track which we have in Philadelphia. I know it is practically a physical impossibility to make deliveries from team-tracks where so many sizes are involved."

The Brief, dated September 26, 1947, of the California Grape and Tree Fruit Association and the California Growers and Shippers Protective League argued this (p. 14):

> "The method of auction selling prevailing in New York requires terminal delivery of fruit at a single station."

At the rehearing, protestants did not impeach their previous statements on this point.

[11] This "inability" is not a new fact brought out at the rehearing. In its previous decision, the Commission stated that the team tracks and private sidings at New York City "are not sufficient to handle all of the great bulk of fruits and vegetables received at New York" (272 I. C. C. at p. 654).

"The general rule is that shippers must load or unload carload freight or make provision therefor at their own expense. Where the carriers perform this service a charge usually is made" (272 I. C. C. at p. 649).

Even in the case of vegetable receivers, the record shows that the unloading service provides substantial benefits (R. 1143-5, 1230-32). It is only when, in a particular case, a vegetable receiver believes that he can profitably dispense with the unloading service that he uses the alternative team track delivery. The extent of the use of team track facilities has already been referred to in connection with the Erie receipts. Additional evidence is witness Ward's estimate that the volume of vegetables unloaded at Philadelphia declined to 40 percent of the previous volume.

This evidence shows clearly that the unloading service is of substantial benefit to the receivers of this traffic and that the value of the service fully justifies the level of the charges.

[fol. 665]

VI

The Total Charges Are Reasonable

While, as has been previously shown, respondents are not obliged to prove the total charges on this traffic to be reasonable, they submit that the proof shows that the total charges are reasonable.

The most important evidence of the reasonableness of any rate or charge is the rate or charge assessed for similar services in the same general territory. In this proceeding, it is shown in Exhibits 4 through 12 that the same rates, or the same basis of rates applies on all this traffic delivered in Official Territory. In all cases on this traffic, at least since November 1, 1948, the receiver pays both the rate and an unloading charge on freight unloaded by the carrier. On all freight not so unloaded he pays the rate and himself unloads.

Further, the findings of the Commission in *Ex Parte* 168, *Increased Freight Rates, 1948*, indicate that the total charges are reasonable. With full recognition of its previous conclusions in this proceeding, the Commission there found that the rates on these commodities might reasonably

be increased in the amount of 9 cents per 100 pounds. The findings in that proceeding were as follows:

> [fol. 666] "6. Line-haul rates on citrus fruits, fresh fruits, fresh vegetables, and melons (not cold-pack or frozen) may be increased as provided in finding 2 above, subject to a maximum of 9 cents per 100 pounds."
>
> "21. Charges for loading or unloading of carload freight may be increased as provided in finding 2 above, except that no increase is proposed or authorized in charges for loading or unloading of livestock, and except that charges for unloading fresh fruits and vegetables, in carloads, at New York, N. Y. and Philadelphia, Pa., found just and reasonable in Unloading Charges, Fruits and Vegetables, N. Y. and Phila., 272 I. C. C. 648, may not be further increased at this time, and such charges are exempted from the findings herein."

* * * * * * *

These unloading charges were in effect prior to the *Ex Parte* 168 decision. Prior to that time they were found to be reasonable and that conclusion was specifically referred to in the general increase case decision. Notwithstanding that fact, however, the carriers were there authorized to increase the line haul rates in the amount of nine cents per 100 pounds. Obviously, had there been any occasion for reducing the line haul rates to compensate for the unloading charges or had there been any doubt as to the reasonableness of adding the unloading charges to the line haul rates, the increase in the line haul rates would not have been [fol. 667] authorized.

The treatment of the line haul rate in *Ex Parte* 168 is in conformity with the Commission's previous decisions. The line haul rates have never been varied because unloading was performed with or without a separate charge, and the increases were similarly applied without regard to the unloading charges.

Further, the basic problem presented in the *Ex Parte* 168 proceedings was the question as to the proper method to be used in allocating the burden of meeting the increased costs of railroad transportation. The Commission there

varied within precise limits the amount of the increase to be applied to particular commodities and thereby the extent of the contribution which should be made by particular commodities to the burden of the increased costs. Since the line haul rates were there found to be reasonable irrespective of the unloading charges, there is no basis now for a claim that the total cost of transportation must be considered.

VII

Conclusion

These exceptions include those portions of the proposed report in which the basic errors of the proposed report occur. No attempt has been made to thin out with extreme [fol. 668] care all portions of the proposed report which respondents believe to be in error. They submit that the proposed report is in error in failing to accept the conclusions stated in the Commission's report and in failing to limit itself to the evidence submitted at the rehearing in the light of the conclusions stated in the Commission's report. They also submit that the evidence shows that the Commission fully considered all the relevant evidence and that the evidence submitted included all facts and circumstances relevant to the issues presented. The rehearing did not produce any evidence which would justify changing the conclusions stated in the original report.

Further, respondents submit that they have here shown that the legal and factual conclusions on which the proposed report relies in reaching its ultimate conclusion are erroneous and that it should have found that the level of the line haul rates is not in issue here, that the reasonableness of the unloading charges is dependent on the facts and circumstances relating to those charges alone without regard to the line haul rates, that the obligation to effect a delivery is irrelevant to the issues in this proceeding and that protestants' contentions are not supported either by the evidence in this case or by the previous decisions of the Commission.

[fols. 669-681] The proposed report should have found that the existence of similar charges at other points, the cost studies and the benefits secured by the receivers as

a result of this service amply fulfill the respondents' burden of proof and that the charges are therefore just and reasonable.

The Commission should follow its own decision, affirm its previous findings that the charges are just and reasonable, dismiss the petitions for reopening and cancel the proceeding.

Oral Argument is requested.

Respectfully submitted, Francis L. Brown, A. P. Donadio, Lockwood W. Fogg, Jr., Paul V. Miller, M. C. Smith, Jr., Counsel for Respondents.

[fols. 682-702] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. No. 5500

Unloading Charges Fruits and Vegetables at New York and Philadelphia

REPLY BY THE SECRETARY OF AGRICULTURE TO RESPONDENTS' EXCEPTIONS TO PROPOSED REPORT OF EXAMINERS RUSSELL M. BROWN AND M. J. WALSH—Filed June 20, 1950

Comes now the Secretary of Agriculture of the United States and, in reply to the exceptions by respondents to the proposed report on rehearing in this proceeding, states as follows:

The proposed report, in the respects it is assailed by respondents' exceptions 1 to 5 inclusive, speaks for itself and is amply supported by the record.

Respectfully submitted, by direction of the Secretary of Agriculture of the United States.

Chas. B. Bowling, Chief. J. L. Pease, Transportation Specialist, Transportation Rates and Services Division, Transportation and Warehousing Branch. Charles W. Bucy, Associate Solicitor. Walter D. Matson, Attorney, United States Department of Agriculture, Washington, D. C.

[fol. 702a] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. 5500

Unloading Charges, Fruits and Vegetables—New York and Philadelphia

REPLY TO EXCEPTIONS OF RESPONDENTS—Filed June 29, 1950

On behalf of: Samuel Fraser, International Apple Association. Durward Seals, Traffic Manager, United Fresh Fruit & Vegetable Ass'n. John R. Van Arnum, Secretary-Practitioner, National League of Wholesale Fresh Fruit and Vegetable Distributors.

Dated: June 30, 1950.

512 F Street, N. W., Washington 1, D. C.

[fol. 702b] Statement

This reply to the Exceptions of Respondents to the proposed report of Examiners Russel M. Brown and M. J. Walsh will not contain any exhaustive discussion or argument of the interpretation placed on the several decisions of the courts and the Commission which Respondents deal with in their Exceptions because it would appear to these Protestants that such a course would merely be a matter of assertions, counter-assertions, denials and counter-denials without proving anything.

On the other hand, we are going to endeavor to do what we apparently failed to do in the first phase of these proceedings and that is to emphasize those points which we think the Commission should hold as controlling in this case.

Respondents have more or less set up this issue at Page 7 of their Exceptions where they say that, "The ultimate [fol. 702c] conclusion in the proposed report is based on three erroneous conclusions: (1) That the unloading is somehow inseparable from the delivery of the freight, (2) That the line-haul rates should be construed as including the unloading, and (3) That past practice may not be changed. All these conclusions are wholly in error."

To these three basic Exceptions the Protestants in turn

hold that the Examiners were not wrong in the manner in which they actually outlined the issues and made their conclusions and recomendations.

Argument in Reply

First Conclusion

On the first phase of these conclusions, "That the unloading is somehow inseparable from the delivery of the freight", there is obviously no intent on the part of either the Examiners or in the evidence and allegations of these Protestants to hold that this is an all-inclusive obligation on the part of the carrier. The Examiners, on rehearing, and these Protestants allege, without qualification, that the carriers operating pier produce terminals in and on Manhattan Island in New York City have not made or offered, or cannot make or offer, delivery of perishable commodities which they bring across the river until they have set it down and made the commodities available so that the consignee can take physical delivery. The consignee, as was shown by the evidence and testimony at the second hearing, is not allowed to take delivery from the refrigerated freight cars on the float. Indeed, it is obvious that this would be practically impossible because of the physical design of the floats, or "lighters" as they are sometimes called, which have only one point of entry and exit in the middle of the lighter with a runway down the center between two lines of [fol. 702d] cars with usually six on the far side and five on the near side of the pier. Obviously twelve or thirteen consignees could not work in this narrow space at their own discretion without unutterable confusion and chaos. The result was that as a practical matter, it is almost necessary for the railroads to provide some orderly system of unloading these cars to make the freight physically available for the first time to the consignee.

This is not any concealed effort to deny the general classification rule that on freight moving under carload rates it is the obligation of the shipper to load and the consignee to unload such cars, but this obviously presumes that the railroads have placed the car in such a manner that the consignee has physical access to the freight which he

is obligated to unload. To require otherwise would be to require the impossible and this, of course, would never stand up under any reasonable law or regulation. The consignee is not responsible for the character of facilities which the railroads have elected to provide for delivery of perishable freight on Manhattan Island. The railroads undertook to provide these pier facilities over fifty years ago to save the costs of providing team-track facilities on Manhattan Island, and the terminal cost on reaching Manhattan Island other than by carfloat or lighter. The only exception to this policy was in the case of the construction of the underwater tube of the Pennsylvania Railroad and the passenger station facing on 7th Avenue and the facilities extending under Manhattan and under the East River to Long Island City.

Prior to 1927 the record has disclosed that the railroads maintained for their economy and convenience the same [fol. 702e] type of facilities at Philadelphia on the Delaware River waterfront practically adjacent to the Dock Street wholesale produce market, and when they built produce terminals some two or two and a half miles south of these facilities—about 1927-1928—they maintained the same character of facilities and the same practice of making delivery on the platforms in order to release cars promptly and secure a quick turnover of both refrigerated cars and platform space.

It becomes obvious, therefore, that all the reference to and attempt to create the impression of the similarity between delivery service to private industrial areas, as pointed out in Ex Parte 104—Part 2, is completely without foundation in fact. In the case dealt with by the Commission in Ex Parte 104 it was the industry that provided its own private yards and platforms, all of which required a considerable amount of intra industry switching in order to coordinate the various operating and production processes, which was obviously beyond any obligation of the delivering railroad to perform. In simple language, the Commission in this case said that the railroad's obligation ended when they set the unloaded car at the entrance to the industry's private facilities for the consignee, which has no relation to the condition existing on the pier produce terminals in Man-

hattan where it is in fact a physical impossibility for the consignee to take delivery of his freight until it has been placed in a physically accessible position. Therefore, delivery, under these conditions, must necessarily include the unloading and placing the freight somewhere where the consignee can pick it up and take it away. It does not include any of the accessorial services such as sorting, stacking for sales appeal or convenience, sweeping, heating, supervision [fol. 702f] of contract labor or anything beyond the tender of delivery in such a manner as would be made if the car had been placed on the team-track where the consignee could unload, count, and inspect the contents of the car to take away for such disposition as he cared to make.

The plea of Respondents that there are adequate team-track facilities on Manhattan Island for the volume of freight that has been regularly terminated by the several railroads is, of course, contradictory to all of the evidence adduced in both the first and second hearings, with the possible exception of the New York Central Railroad, if they continue to handle approximately the same volume as they have in past years. If by any chance or deliberate intent a very substantial proportion of the freight now terminated by the Pennsylvania, Erie, and Baltimore & Ohio Railroads were diverted to the New York Central, then these team-track facilities would obviously be wholly and entirely inadequate.

Second Conclusion

Under the second alleged erroneous conclusion, the carriers say that the Examiners' purported conclusion, "That the line-haul rates should be construed as including the unloading", is in error and is again in our opinion a misconstruction of the basis for the actual conclusion of the Examiners.

In the first place, the Commission has never fully considered the blanket transcontinental rates which apply to cities under consideration, either as to their reasonableness or lawfulness, with certain minor exceptions involving the difference between the California and Arizona rates on lettuce. There, they merely considered the origin point relationship and not the destination. On the group rates on [fol. 702g] fresh fruits and vegetables from other produce

areas in the United States, the Commission has on numerous occasions undertaken to fix reasonably maximum limits which took into account all of the costs which they (the railroads) put in evidence, including all of the onerous services required at destination to effectuate delivery.

The Respondents' effort to create the impression that unloading under the conditions prevailing in these proceedings is something of a temporary competitive situation which the railroads may discontinue at any time is wholly at variance with the facts. It may be true that fifty or more years ago the railroads unloaded cars of perishables at the Manhattan side piers because the coastwise boatlines unloaded without charge, but it is somewhat speculative. If that were the whole reason, it is true that the boats had to unload in order to clear the ship for the return voyage without being held up by the will of the consignee or his convenience, and the same applied to the railroads, but it does not erase the real reason for the railroads' acquisition of pier terminals and practice of unloading which was to divest itself of the necessity for acquiring expensive team-track and yard facilities on Manhattan Island and, at the same time, insure itself of quick release of its refrigerator and other cars and equipment. This has become a part of the rate structure and it is unbelievable that both the railroads and the Commission would have ignored the costs of this operation, even though they may be concealed in total terminal costs, for over more than half a century.

The argument of the Respondents that the unloading practice is susceptible to a separate charge at New York and Philadelphia because unloading by the railroads at all other points in the same rate groups or blanket would be [fol. 702h] subject to an unloading charge is wholly without foundation for the simple reason that at all these other destinations in the same rate groups or blankets as New York and Philadelphia, the railroad has provided team-track delivery where the consignee, without question, may accept delivery of the car and unload and release it subject to demurrage rules, at any time he wants, whether on free time or on demurrage, and the plain fact of the matter is that at these essential pier produce terminals they do not offer such facilities and they did not offer adequate team-

track facilities elsewhere on Manhattan Island for the volume of freight which they have been terminating year after year in volume wholly beyond total team-track capacity available for fresh fruits and vegetables on the entire Island of Manhattan. At these other points the only reason why the consignees who have the railroad unload with railroad labor or railroad contract labor would be for the economy and convenience of the consignee. This condition applies at every one of the destinations named by Respondents on Page 30 of their Exceptions, namely, Pittsburgh, Buffalo, Albany, and Newark. At these points there is no question of the consignee's right to employ and utilize his own labor and vehicles to unload refrigerated carloads of fresh fruits and vegetables, and the cars are made accessible to him to perform these services for himself.

Third Conclusion

The Respondents say that the Examiners have held, "That past practice may not be changed." As we read the proposed report containing the conclusions and recommendations of the Examiners, they said no such thing by direct statement or implication. What the Examiners did say was that practices of such long established standing, which [fol. 702i] have been incorporated in the tariffs for generations, are subject to a minute examination when the carrier or carriers undertake to make a radical change in these practices and the rules and charges governing same, and that in such cases the burden of proof is certainly upon the proponent of radical changes to justify them under the present I. & S. Docket 5500, and the conclusion of the Examiners was that the Respondents in this case have not justified the radical changes proposed.

The plea that once the Commission has made a decision, it cannot change this decision is, of course, fallacious. This case in simple fact was decided by a majority and was not an unanimous decision, indicating that there were serious doubts in the minds of several of the Commissioners as to the correctness of the first decision. It is true that the second hearing in this case was devoted quite largely to emphasizing much of the evidence and testimony adduced at the first hearing, but to say that there was no new testimony is,

of course, not in accordance with the facts. Mayor O'Dwyer was not present at the first hearing, nor were Witnesses Spangler, Volke, Huber, or Pappas, and the evidence which they gave was certainly new in that it was not given in the first hearing. This evidence related to the actual experience as to the first point where freight could be physically delivered and accepted by the consignee at the pier produce terminals, and it related to wholly changed conditions as to the development of new produce terminal facilities in New York, and the practice of accepting deliveries in New York as a result of the imposition of the unloading charge approved by the majority of the Commission in its decision based on the first hearing.

The allusion to the Commission's decision in Ex Parte [fol. 702j] 166 and Ex Parte 168 that the Commission had fully considered the propriety and reasonableness of the unloading charges at New York and Philadelphia in these proceedings and had put the stamp of final approval on them in authorizing rate increases in those proceedings is, of course, wholly fallacious. The supposition that the Commission's decisions in Ex Parte 166 and Ex Parte 168 were final and correct is, of course, known by the Commission to be wholly fallacious. The fact of the matter is that the Commission, in its decision in Ex Parte 166, took the pains to admonish the carriers that if it were found that the increased rates resulted in substantial hardship or diversion of traffic, the railroads were expected to review the approved increases and make such adjustments as would be lawful under the Interstate Commerce Act. That tremendous diversions of traffic which have occurred since these increases were approved, is evidence that at least one part of the so-called rate making rule was not given full consideration, i. e., that part of the rate making rule under Section 15 a. (2) where it states that "in the exercise of its power to prescribe just and reasonable rates, the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed."

This is the first of three tests provided for in the so-called rate making rule but is as important as are the other two, and it is rather obvious that the tremendous diversion of traffic which has occurred since these rate increases went

into effect clearly proves that the increased rates were so high as to drive business away with consequent loss of total revenue to the carriers rather than an increased revenue as was the sole purpose and intent of the railroads and the [fols. 702k-702l-742] Commission in both of these proceedings. Therefore, the Respondents may not use the purported perfection of this decision as proof that the unloading charges prescribed were considered and found to be reasonable in those cases cited.

Recommended Findings

Wherefore, these Protestants urge that the Commission adopt in its entirety the recommendations of the Examiners, to wit, "On rehearing the Commission should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed. The schedules naming the unloading charges assailed should be ordered cancelled and the proceeding discontinued," as shown on Sheet 21 of the Examiners' Report on Rehearing. Oral argument is requested.

Respectfully submitted, Samuel Fraser, Secretary, International Apple Association; Durward Seals, Traffic Manager, United Fresh Fruit & Vegetable Ass'n; John R. Van Arnum, Secretary-Practitioner, National League of Wholesale Fresh Fruit and Vegetable Distributors.

[fol. 743] BEFORE THE INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 5500
Unloading Charges Fruits and Vegetables—New York and Philadelphia

REPLY OF FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, FLORIDA CITRUS COMMISSION, AND GROWERS AND SHIPPERS LEAGUE OF FLORIDA TO EXCEPTIONS OF RESPONDENTS TO THE PROPOSED REPORT OF EXAMINERS RUSSELL M. BROWN AND M. J. WALSH—Filed June 30, 1950

The differences between the clear and cogent Proposed Report and the original Report of the Commission (October 4, 1948), 272 ICC 648, fully justify the propriety of the order of the Commission, dated June 9, 1949, "that the above-entitled proceeding be, and it is hereby, reopened for rehearing."

We do not understand, as intimated in Respondents' exceptions to the Proposed Report, that the issue now is whether the order of June 9, 1949, was improperly or improvidently entered nor even whether the former Report of October 4, 1948, was erroneous. This is a reopened proceeding, and not an appeal from the original Report herein. The issue on rehearing is correctly interpreted by the Examiners as being whether the suspended schedules are lawful and whether the respondents have met the statutory burden of proving that the unloading charges of those schedules are just and reasonable.

[fol. 744] The basic misconception and misapprehension of fact in the former Report (272 ICC 648) were the misapplication or inadvertent failure properly to apply the law and the apparent misunderstanding of the facts as to whether the unloading here involved is actually a part of, or is in addition to, delivery. The effect of the former Report, if permitted to stand, would have been to overrule long-standing principles of law enunciated by the Commission and by the Supreme Court and also to deny to the shippers and receivers of fruits and vegetables at New York and Philadelphia the benefit of the real facts. All of this was pointed out in the petitions for rehearing and reconsideration.

In the Proposed Report, the Examiners have taken cognizance of the additional facts presented by the evidence on rehearing and have integrated those with the former record (some of which were not noted in the former Report), and have presented a clear and complete over-all review of the actual situation.

In the original Report (272 ICC 648), it was found that (654):

> A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floors only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor.

That finding of fact is incorporated in the Proposed Report. The latter, however, clarifies the former and clearly distinguishes the factual situation regarding delivery and the other things which are sometimes done in addition to delivery—unloading not being in the latter category under the circumstances detailed in the Record but being essential to, preceding, and an integral part of delivery.

[fol. 745] The Proposed Report sets out:

> There is no question with respect to the applicability of the line-haul rates from the various points of origin to New York. The principal question for determination is what constitutes delivery of the freight by respondents to the consignees or receivers, and the time when and the particular location at which it is completed. Delivery of carload freight consists of the carrier either placing the car on a team track or siding where it can be unloaded by the consignee or, where the consignee is not permitted to perform the unloading, as in this proceeding, in unloading the freight from the cars on the floats and placing it on the floor of the pier. Here, and here only, does the transportation obligation of the carrier end. That obligation is not fulfilled until the freight is placed in a location con-

veniently accessible to the consignee. This method of delivery of fresh fruits and vegetables has, for more than 50 years, been included in the line-haul rates from the various origins to New York piers on such traffic. And it must be so included because the transportation service is not completed until delivery has been made. Section 1(3) of the acts defines transportation to include, among other things, all services in connection with delivery of the property transported. Extra charges may, however, be assessed for accessorial services, such as, sorting or stacking the fruits and vegetables for display purposes after unloading the freight on the pier platform. But unlike delivery these services, for which extra charges are usually collected, are not included in the line-haul rate. (Mimeographed sheet 11 of Proposed Report.)

Basically and fundamentally, the unloading operation of the rail carriers at the New York Piers provides no greater amount of transportation than is provided anywhere—it is simply delivery, and nothing more. We see no reason for attempting to reply here in detail to the arguments of Respondents' Exceptions, which are merely repetitions of what they have heretofore advanced, with the possible additional unfounded argument that the reasonableness of the total charges is supported by the decision in Ex Parte 168. We respectfully ask that our former briefs and petition for reconsideration herein be considered as a reply to the contentions of Respondents as set forth in the Exceptions.

Actually, the clear and logical presentation of the facts and precedents in the Proposed Report itself is a full and [fols. 746-748] complete answer to everything attempted to be set up in the Exceptions.

It is respectfully submitted that the recommendations of the Proposed Report should be adopted by the Commission, and that an order should be issued directing that the schedules naming the unloading charges be cancelled.

Respectfully submitted, Florida Railroad and Public Utilities Commission, by Fred Pettijohn, Director of Commerce Department. Florida Citrus Com-

mission, and Growers and Shippers League of Florida, by Gordon Stedman, Secretary-Manager.

Lewis Petteway, General Counsel, Florida Railroad and Public Utilities Commission; 700 S. Adams Street, Tallahassee, Florida, Mr. M. W. Wells, Attorney, Maguire, Voorhis & Wells; 1007 Florida Bank Building, Orlando, Florida.

June 30, 1950.

[fol. 749] BEFORE THE INTERSTATE COMMERCE COMMISSION

I & S No. 5500

Unloading Charges, Fruits and Vegetables—New York and Philadelphia

REPLY TO RESPONDENTS' EXCEPTIONS IN BEHALF OF THE PORT OF NEW YORK AUTHORITY—Filed June 30, 1950

The main argument of the carriers in their Exceptions begs the whole question in issue. The case was reopened because the Commission thought that there was some doubt about its findings and conclusions and the question now is whether the Commission shall adhere to its original conclusion. The Examiners properly find that the Commission erred and that the conclusion should be reversed. It is not helpful under these circumstances to argue that the Examiners' conclusion is wrong because it differs from the original conclusion of the Commission.

[fol. 750] A collateral argument is that no new facts have been shown. On the contrary, the record contains many new facts, including the important fact that one of the main purposes of the railroads here is to compel abandonment of the pier stations, which are vitally important to the people of the New York district, and require consignees to take delivery of this perishable traffic at points short of destination. The rates are published to New York, N. Y., and consignees cannot properly be required to accept delivery at some intermediate point.

Furthermore, there has been a radical change in the whole picture due to the attitude of the southern carriers which

have shown their dislike for the so-called unloading charges (actually they are charges for making delivery) by proposing to absorb them so as to enable them to compete with the rates of the water carriers. This makes a most radical change in the whole situation because it shows not only that an important group of railroads is opposed to these so-called unloading charges but because it now appears that practically the only beneficiary as to the important Florida traffic will be the Pennsylvania Railroad. As to the traffic from the Pacific Coast area, the Pennsylvania and the Erie are the delivering carriers, so that the entire case is given a completely new complexion under which only two railroads will benefit from this damaging proposal of respondents—a proposal which hurts not only the public but also other railroads. The propriety of the absorption by the southern lines is involved in another proceeding, I. & S. 5718.

This is no longer to be looked upon as a proceeding involving revenue to the railroads. The so-called unloading charge helps the Pennsylvania and the Erie but it correspondingly hurts the Florida lines which have filed the [fol. 751] tariffs under suspension proposing to absorb the very charges here in issue. Even from a broad railroad viewpoint, what will be gained by having the Pennsylvania and Erie impose charges which the Florida lines must absorb. All these are new facts, and very important facts, negativing the argument made in the Exceptions that the facts are just the same as they were before.

The Line-Haul Rates Have Always Included Delivery on Pier Station Floor

In spite of the clear showing in the record that the rates to New York and Philadelphia have included the delivery service for half a century, the railroads now argue that the line-haul rates do not include delivery.

It is manifestly unfair for the railroads to contend, as they do here, that the New York situation should be treated the same as other situations where consignees have cars offered for delivery and where the contents are accessible to them. In the latter instances the consignees have the option to require the carriers to unload the cars at a tariff

price. The railroads are under an admitted disability at New York because their freight stations at which delivery is made consist of piers where it is admittedly not practicable, and not even permitted, to have the consignees perform their own unloading or to have access to the cars for that purpose. The railroads have recognized this condition for half a century and have borne the expense of placing the freight on the piers where it will be for the first time accessible to the consignees. They have themselves distinguished the situation at interior points where consignees can and do normally unload their cars on team tracks. Now the railroads reverse themselves and argue [fol. 752] that New York, in spite of its radically different conditions, should be treated in just the same manner as interior points where consignees are given access to freight and where the consignees normally unload their own cars at their convenience and under the allowed free period of forty-eight hours.

Making Contents of Cars Accessible is a Part of Delivery

On page 11 of the Exceptions will be found the amazing statement that it is a fallacy to look upon unloading as a part of the delivery service. The testimony shows very abundantly, and without exception, that the delivery service is not completed until the traffic is placed on the floor of the pier. The record further shows that the fruit and vegetables are not even accessible to the consignee before they reach the floor of the piers. Indeed, consignees are not permitted to touch the freight before it reaches the floor of the pier.

It is legally impossible to hold that the freight has been delivered to the consignee while it is still on the car floats or that service under line-haul published New York, N. Y., rates has been completed. In a leading case, *In the Matter of Bills of Lading,* 52 I. C. C. 671, at page 701 the Commission said:

> As a practical matter it is not only essential that the shipper should have notice of the arrival of his goods, but that the carrier should place them in an accessible position to be received by him and removed. Until they are so placed and tendered for delivery it is obvi-

ously impossible for the consignee to receive and remove them and the carrier cannot reasonably be relieved of its common law liability until it has so placed or tendered the goods for delivery.

[fol. 753] If there is any fact unchallenged on this record it is that the consignees are denied access to the car floats; indeed it is said that there would be chaos if such access were permitted. It would not be practicable to let the trucks of numerous shippers have access to the car floats even if such access were feasible physically, which it is not. One reason for this was explained by Division 3 in *Allowances for Stacking*, 179 I. C. C. 780, where the Division pointed out that the traffic must be moved over the piers with great dispatch and that the same pier space may be used for different shipments two or three times during the night. A truck can back up to a car on a team track but it has no access to a car float (603).

How the railroads can deny a fact so abundantly established by the record is beyond our understanding. Witness Kraemer testified that it is the practice of the carriers to unload all types of freight on to the pier floor because of the impracticability of making the freight otherwise available to consignees when car floats are used (604).

Indeed it was a railroad witness who testified under cross-examination as follows:

Q. In your judgment, after the hand trucks have been loaded in the car and moved out onto the dock, when is delivery complete?

A. When the consignee calls, shows his ownership of the car and accepts delivery of it.

Q. Well, at what point are the fruits and vegetables at that time?

A. On the dock floor, the pier floor.

Q. And until that time, in your judgment, there has not been a delivery?

A. That is right. (604)

[fol. 754] The railroads see fit to rely on the condition at interior points where team tracks are used but it must be understood that at team tracks it is the invariable practice for consignees to unload their freight at their convenience within the free time period published in the tariffs.

The railroads insist that there is no new evidence. But Exhibit No. 102 shows that on October 4, 1948, after the decision herein, the California fruit interests approached the Erie Railroad to ascertain whether it would permit consignees to unload at the piers. The telegraphic reply given by H. W. von Willer, Vice-President of the Erie, was that "physical unloading by shippers would be impracticable". To this telegram the California interests replied that it would be practicable if there were uniform unloading by a joint agency. But again Mr. von Willer telegraphed back that the unloading charges are justified and that any earlier suggestions that consignees might unload must now be considered to be superseded. This is contrary to the position taken by the respondents at the first hearing.

It is not often that a record is so complete and convincing as this record is on the point that consignees do not have access to the freight until it is placed on the floor of the pier. The following is from the record:

By Mr. La Roe:

Q. When the goods come to the pier on the carfloat, and the carfloat ties up to the pier, is there any physical means provided whereby the truck of the consignee can get on to the carfloat?

By Mr. Spangler:

A. None whatsoever.

Q. Do the railroads permit you to have access to the cars on the carfloat?

A. For inspection purposes, yes.

[fol. 755] Q. I mean for delivery purposes.

A. They do not.

Q. You could not, if you wanted to, go on to the carfloat and take delivery of the freight?

A. No.

Q. Where is the first point where the freight is physically made available to you so that you can conveniently pick it up?

A. On the pier floor. (985-6)

The testimony of another dealer in vegetables is to the same effect. (Volk, 992)

Not only are the consignees denied access to the freight but they are not permitted to hold it in the manner that freight is normally held at terminals during the free time period. The tariffs provide that the cars spotted at pier stations must be released at once because the freight must be unloaded immediately—no free time. The following is from page 117 of the transcript:

Mr. Loos:

Q. . . . Would you permit him to receive a car on a car float . . . and unload it in accordance with the rules and regulations that apply to unloading on a team track?

Mr. Hart, Erie agent:

A. That could not be done, Mr. Loos, under the existing tariff. The tariff provides that the withholding of unloading of cars will not be permitted. They must be unloaded promptly on arrival at piers.

A Novel Theory

The theory upon which this case originally rested was that delivery of this freight on the piers was more expensive than ordinary team track delivery and that the railroads should be compensated for it. To this the shippers replied, and the Examiners agreed, that delivery must be completed [fol. 756] under the line haul rates and that the delivery service for half a century has been included in the rates. Facing this predicament the railroads have now invented a new thory which is expounded on pages 12 and 13 of their exceptions, namely, that unloading is not delivery at all but an extra and peculiar service rendered *prior* to delivery.* "The same situation obtains where charges are assessed for pickup and delivery service, for storage and for switching." (Brief of Exceptions, p. 12). The trouble with this argument is that the pier stations have for half a century and longer been the *normal stations* at which Manhattan fruit and vegetable traffic is delivered, and pier station de-

* Incidentally, if this service is rendered "prior to delivery" it must be deemed part of the line-haul service.

livery has never been deemed a special service until the novel theory was invented for the purposes of this case.

The railroads have never looked upon team track delivery as normal for this traffic, nor have they provided teamtrack facilities adequate to handle it. It is at least doubtful whether space could be found on Manhattan for such team tracks. More than 300 carloads a day would have to be placed. "Obviously with hold-over cars . . . plus other freight for team track delivery, the congestion and delay to railroad equipment would be terrific." (617) Team tracks on Manhattan are very expensive to build because of high land values. And pier stations are economical in the sense that they can be used two or three times a day. (618)

Mr. Hedden explained that team track delivery is impracticable and that pier station delivery is the only practicable method. He carefully explained the alternatives. The New York Central, which is the only line reaching [fol. 757] Manhattan with its own rails, does not have adequate facilities for teamtrack delivery of this traffic. Indeed, as Mr. Hedden pointed out, many cars delivered by the New York Central for trading in the wholesale market are floated to the pier stations of that railroad near Barclay street. The B. & O. at its 26th Street yard has a capacity of only 45 cars, and even this limited capacity can be reached only by crossing 11th Avenue. Cars on these team tracks are delayed 4 to 5 days, as compared with immediate release at the pier stations.

A second theoretical possibility mentioned by Mr. Hedden is a trans-Hudson bridge or tunnel to be built specially for rail freight. This has had serious consideration in the past but it need not be further considered here.

The third method is to move the produce cars across the river on floats and then across a floatbridge to the team tracks. But there are two difficulties in connection with this method: (1) the team track yards are of limited capacity; (2) the produce must be trucked from the yards to the market, tending to congest streets already congested.

Therefore, Mr. Hedden concluded, the pier station method of delivery is the best. The waters of the river become virtually floating car yards. The railroads are occupying about 40 acres of the harbor for this purpose, including

piers and slips. (961) It would cost $42,000,000 to acquire that much real estate on Manhattan. (961)

So the conclusion is inevitable that the normal pier station delivery—deemed normal even by the railroads for half a century and until their new theory was invented for the purposes of this case—is the best for them and best for the [fol. 758] public. And it fits into the plans of public authorities for the relief of street congestion and for expeditious handling of an enormous volume of produce.

The Alleged Right to Publish Separate Terminal Charges

No one disputes the legal right of railroads to impose separate terminal charges provided they are to cover a service not included in the New York, N. Y., line-haul rates.

It serves no useful purpose to call attention to the well-known statutory provision authorizing the separate publication of terminal charges. What the railroads overlook is the long-established legal point that where line-haul rates have included terminal delivery for many years, as they have for half a century, a separate charge may not be imposed without proof of the inadequacy of the rates themselves.

A case strikingly similar to the present case is *Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673, decided by Division 2 (Commissioners Aitchison, Splawn, and Alldredge). In that proceeding the western carriers proposed a new and separate charge of $1.00 per ton, in addition to the line-haul rates, for terminal service at Pacific Coast ports on long-haul traffic. On import traffic the proposed charge "would cover the loading of freight into cars from piles on the docks." The Division said that for many years the respondents "have absorbed most of the cost of these terminal and port services out of the transcontinental line-haul export and import rates." The Division said:

> [fol. 759] We have frequently approved the separation of certain charges for accessorial services from the line-haul rates. But this has only been upon a clear showing that the resulting separate charges for each portion of the total services were just and reasonable. In a number of these instances, the inclusion of certain services in the line-haul rates was for the benefit of par-

> ticular shippers, and the extra cost entailed was not considered when the level of the line-haul rates was determined. Here, however, the entire body of these export and import rates have been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of these terminal services as a part of the through transportation to and from the docks.
>
> Their proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services. (677)

An equally pertinent case which is still stronger because it applies to the Port of New York is *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, 61, a proceeding dealing with a proposal of the railroads to increase their charges for the receipt and delivery of freight in New York Harbor. In that case the Commission found that the assessment of any charge for terminal handling would have the effect of increasing the rates and that a proper justification of the increase would involve consideration both of the line-haul and terminal services. To quote from the decision at page 61:

> * * * where a terminal service has heretofore been treated by the carriers as a part of the transportation [fol. 760] service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through service.

The Examiners correctly say in their report that "in this proceeding respondents not only fail to prove the entire through charges reasonable, but have taken the position that the reasonableness of the line-haul rate is irrelevant". The legal question involved is very clear and free from dif-

ficulty: May railroads which have embraced a given delivery service in a through rate for half a century impose a separate charge for the delivery service while completely ignoring the line-haul services and while contending that the line-haul services and line-haul rates are irrelevant? We do not believe there will be found in all the books a precedent for an affirmative answer to this question.

It is significant that the railroads find it necessary to confuse the issue by referring to "bracing and blocking" services for which additional charges have at times been authorized. Such special services as bracing and blocking are analagous to the special stacking involved in the present case for which a separate charge is already provided. It is neither logical nor fair to confuse such special services with delivery. Consignees do not have a common-law right to have their freight braced and blocked without special compensation. They do have a right to have their freight delivered and what constitutes delivery depends on custom. Here the railroads for half a century have treated the pier stations as the normal delivery stations for this traffic and [fol. 761] they have no other adequate facilities for making the freight conveniently accessible to the consignees on Manhattan Island. It is also significant that the exceptants wholly ignore that other domestic freight referred to by witness Laux and export freight are delivered without the assessment of the so-called unloading charge. The railroad admission here that they are trying to force abandonment of the pier stations and force delivery short of destination (1410-1412) is in itself enough to condemn the proposal because the railroads, after making convenient delivery for half a century, have no right whatsoever to force the public to accept delivery at points other than bill of lading destinations, nor should the Commission be a party to any such proposal.

The Burden of Proof

It is a rather late hour in the history of regulation to contend that in an I. & S. case the burden of proof is not on the respondents. Yet the respondents have a chapter beginning on page 26 entitled: "The Examiners are in error as to the burden of respondents' proof."

In fairness to the respondents it should be said that they

seem to admit that there is a factual burden on them because they say: "the long continuance of free unloading at these two points might itself place a burden of proof on respondents by creating a factual presumption that a change in the rate structure was unreasonable". Soon after this they say: "At most it requires only that the carriers prove the rates to be just and reasonable". This latter statement is important because we call attention to the fact that at other stages of the proceeding they have taken the position that [fol. 762] the rates as such are not in issue and that only the unloading charges are in issue. Here they say, perhaps inadvertently, that the carriers must prove the *rates* to be just and reasonable. If they mean literally what they say we find ourselves in accord with them.

Under a heading relating to the burden of proof respondents endeavor to make the point that the question of divisions is not here in issue. While this is technically true, it must be recognized that only the eastern lines appeared in support of the proposal; that only two eastern lines have an important interest; that the western railroads did not appear, and that southern railroads are opposed to the unloading charge because they have filed tariffs to absorb it. It is patently clear that if the eastern railroads are to receive more money out of the traffic they should obtain it by increasing their divisions rather than by imposing new burdens on the public. The eastern carriers may feel that the divisions door is closed to them because they received increased divisions from their western connections with the very purpose of compensating them for the New York terminal service on fruits and vegetables, including unloading. *Erie R. R. Co.* v. *A. & V. Ry. Co.*, 98 I. C. C. 268. We realize fully that there is no question of divisions in issue here, but we do not see how respondents can get away from the fact that the divisions of the eastern lines have already been increased for the very purpose of compensating them for the extra terminal costs on fruits and vegetables at New York, including the cost of making freight available and accessible for delivery. To make the public pay now for a service which the western railroads have already paid for in the form of increased divisions to the Erie and the Pennsylvania would be plainly unjust.

[fol. 763] Terminal conditions at other points are dissimilar

In a chapter beginning on page 30 respondents argue that similar unloading charges are in effect at interior points.

In our original brief we showed that the railroads have sought on numerous occasions to justify the difference in treatment at New York because they chose pier station delivery as their normal delivery. They have felt on all other occasions that it is unfair and improper to compare New York with interior points because of the marked differences in terminal conditions. They have gone even further than this and have argued that it is absolutely necessary for them to have the New York rates include this delivery because only through the use of the pier stations can the freight be made available to the consignees for delivery.

One of the railroad witnesses here, Mr. E. A. Hodkinson, said in a recent case:

> The practice of performing the service of loading and unloading carload freight by the carriers, or at their expense, at the port cities has been in effect from time immemorial, and was and still is occasioned by certain disabilities of the railroads serving the port of New York arising out of the geographical situation, also by reason of the competition of steamship lines serving the port cities, and by other conditions peculiar to the handling of traffic at the port cities.
>
> The Trunk Line railroads serving New York and Brooklyn do not have lines of railroad running into these points on which could be established freight stations with freight houses and team tracks, nor individual sidings, serving industrial plants, as is customary in cities, towns, and hamlets throughout other sections of the United States.
>
> [fol. 764] This is due to the peculiar geographical and physical characteristics of those points.

* * * * * * *

This detail in respect to New York has been gone into in order to show that the geographical and physical

> layout is such that it is necessary for the carriers to perform this service of loading and unloading, to the extent it is performed, at their own expense, and that the service has been thus performed for many years. In fact, this service has been performed from time immemorial, and its inception antedates the available records of the carriers. (Ex. 103).

As long ago as 1909 the then existing freight traffic manager of the New York Central testified:

> And the rule was amended on the 1st of January, 1909, so as to require owners to load and unload carload freight without any qualification whatever, except that at some points it was found necessary by reason of physical conditions to make exceptions to the rule. For example, in New York City the carriers load and unload at certain New York City stations, which are pier stations, and the cars are brought to the piers on car floats, and it would be physically impossible for the shippers or consignees to load or unload the freight from the cars; therefore it is necessary for the carriers to perform that labor there. And that is true in Brooklyn. (Ex. 103)

In 1915 another highly competent witness, Arthur Hale, who was then General Agent of the American Railway Association and chairman of several of its committees, said that the difference in practice with respect to unloading at New York is explained by the fact that the stations at New York "are merely piers, with no inland tracks."
[fol. 765] In 1924 the able chairman of the General Freight Committee of the Trunk Line Association said: "It is physically impossible for shippers (at New York) to perform these services of loading and unloading."

We call special attention to Mr. Hodkinson's statement that because of the disability of the railroads at New York it is necessary for them to perform this service at *their own expense*, that the service has been performed from time immemorial, and that its inception antedates the available records of the carriers. (Ex. 103)

Is it not a rather late hour to argue that conditions at New York are the same as those at interior points?

Reasonableness of the Total Charges

After having argued throughout the proceeding that the line-haul rates are irrelevant, and after refusing to introduce evidence as to their reasonableness, the railroads now argue beginning on page 44 of their brief that the total charges are reasonable. They reach this conclusion because these so-called unloading charges were in effect prior to the decision in *Ex Parte 168 Increased Freight Rates 1948*, and the Commission recognized in that decision the charges for unloading which had been approved in the proceeding which has now been reopened. It does not strengthen the railroads' case here to argue that the Commision has taken notice in another case of so-called unloading charges which it has authorized but concerning which it has shown sufficient doubt to reopen the entire proceeding. It is begging the question in another form.

[fol. 766] The railroads would receive double compensation for the delivery service

The Examiners are criticized for relying on *Erie R. R. Co.* v. *A. & V. Ry. Co.*, 98 I. C. C. 268, although it is difficult to conceive of any case that could be more directly pertinent. Its relevancy lies in the fact that the New York railroads have already received compensation for the terminal service at New York, including delivery, in the form of greater divisions out of the through rates granted for the special purpose of compensating them for the alleged greater expense of effecting delivery in New York Harbor. The result is inevitably that if the railroads are permited here to get away with this extra terminal charge they will have received *double compensation* for the same service. If the line-haul rates include delivery, as they clearly do, there is no excuse for a delivery charge of any type or description.

Since the railroads contend that the Examiners improperly relied upon this important decision, it is necessary to consider it in some detail. The proceeding referred to was one involving divisions out of through rates on this very traffic, fresh fruits and vegetables from points in the West to destinations in the New York metropolitan area including Duane Street station (Piers 19, 20, 21) which are some of

the very piers involved in the present proceeding. Division 4 found, among other things, that for the future the Erie Railroad should receive extra compensation for the terminal service, including the unloading of fruits and vegetables at Duane Street piers. On all traffic from the West the eastern lines get a deduction of 3.3 cents or 4.4 cents per 100 pounds, "as the case may be", as an arbitrary allowance for the New York terminal service before prorating with [fol. 767] connecting carriers. (69) This is discussed on page 75 of the present record and has frequently been considered by the Commission in its decisions.* The very purpose of this deduction is to compensate the eastern railroads for their terminal service at New York, which service includes the unloading of pier-station freight. The tariff item makes it clear that the terminal deduction covers unloading because it is to cover "station facilities and services and for floating and lightering." But the Erie was not satisfied with its divisions and argued before the Commission that they should be increased, and they were increased, in part because of the alleged expense of unloading fruits and vegetables at the piers.

The Examiner saw the relevancy of evidence relating to the deductions. When the carriers objected to reference to them he said:

> With respect to Mr. Smith's objections that we should not consider these divisional arrangements, so-called, although published in the tariff, I have this to say:
>
> The exhibits of this witness . . . deal with the earnings of the five carriers. . . . It was the testimony of this witness that the carriers would derive additional revenue from this proposed arrangement. . . . That being so, I see nothing wrong in bringing out the situation that might obtain under the tariffs. . . .

The finding of the Division in the Erie case last cited was "that the present division of the joint eastbound trans-

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* See for example *New York Harbor Case*, 47 I. C. C. 643, at page 692. The tariff is I. C. C. A-856. (97)

continental rates on fresh fruits and vegetables to Duane Street Station have been unjust and inequitable, and that for the future just and reasonable divisions will be 3 cents [fol. 768] per 100 pounds to the Erie, and of the remainder of the revenue, 27.5 percent to the lines East of Chicago and 72.5 percent to the lines West of Chicago."

Attention is called to the fact that the Commission followed the long-standing practice of according to the New York lines a terminal deduction of 3 cents before dividing the rates.* It is important to note the admission of Mr. Hodkinson (95) that the same arrangement has been made applicable to all the carriers serving New York. That is to say, they not only get their usual share of the line-haul revenue, but they get a specific deduction which the Commission gave them to cover the extra expenses involved in the New York terminal delivery of fruits and vegetables. That it was intended specifically to include the unloading service in issue here is shown on the face of the decision where it is stated: "The Erie seeks an arbitrary of $40 per car *for performing the delivery at New York . . . At Duane Street the Erie unloads the contents of the car . . . and piles the packages in the space set aside on the pier.* At that point the consignee takes delivery." (Emphasis supplied.)

Although the eastern railroads are thus compensated for the terminal service, the majority report allows them to collect compensation again in the form of charges of $1.95 and $2.50 per ton for the unloading service, this charge being admittedly a burden on the consuming public. (41)

The Commission has held, through Division 4, as to this precise traffic, that delivery, *including unloading*, is included [fol. 769] in the line-haul rates. To quote from the decision

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* The record is not clear as it might be as to the origin of the terminal deduction. It was in effect long before the Commission's decision in the case cited, but apparently not on transcontinental traffic. The decision had the effect of increasing the division of the eastern lines as to the transcontinental fruits and vegetables.

in *Fruits and Vegetables to Duane Street, New York*, 66 I. C. C. 135, 139:

> As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane Street under the line-haul rates.

The precedents strongly support the conclusions of the Examiners

In the brief of exceptions, page 21, will be found a chapter entitled "The Authorities on Which the Examiners Rely Do Not Support Their Conclusions".

So strong and so controlling are the decisions upon which the Examiners have based their conclusions that it becomes necessary for us to discuss rather fully the contention of the respondents that these decisions do not support the Examiners' conclusions.

The first case is *Lighterage and Storage Regulations at New York, supra*, where the railroads sought to increase their charges for the receipt and delivery of freight at New York. The Commission found that the assessment of any charge for the terminal service would have the effect of increasing the rates and that such an increase in the rates could not be justified without considering the line-haul service as well as the terminal service. It would be difficult to find a case more directly pertinent to the situation here because that is precisely what the railroads are seeking to do in the present case. The Commission refused to allow it to be done in the case cited, yet respondents say that the case does not support the conclusion of the Examiners.

The second case which the railroads say is irrelevant is *Erie R. R. Co. v. A. & V. Ry. Co., supra*, the divisions case [fol. 770] previously referred to dealing with the very fruit and vegetable traffic involved and with precisely the same Erie railroad piers and in part with the very unloading with which we are here dealing. The Commission in that proceeding allowed the Erie Railroad extra compensation out of its divisions for the terminal service at New York, including the unloading of fruit and vegetables at Duane Street, which unloading was stressed by the railroads, with the result that if an extra terminal charge is now imposed, it will give the railroads double compensa-

tion for the same service. Yet the railroads argue that the case does not support the conclusion of the Examiners.

The third case is *Fruits and Vegetables to Duane Street, supra,* which dealt with a proposal of the Erie to establish terminal charges on fruits and vegetables at its Duane Street piers ranging from 2½ to 4 cents per 100 pounds. It will be noted that the case dealt with precisely the same traffic that is involved here and with the same Erie piers. The Division said that the additional charge had not been justified because this terminal service had long been included in the line-haul rates. To quote from page 139 of the decision:

> The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane Street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic. * * *

[fol. 771] The next case deemed by the railroads to be of no value as supporting the conclusions of the Examiners is *Allowances for Stacking, supra,* where the question in issue is whether, as to the very fruit and vegetable traffic involved, the Pennsylvania Railroad could pay the consignees for stacking packages of fruits and vegetables in piles and sorting them so that they might be easily counted and displayed for sale. In finding the schedules not justified, Division 3 said:

> This record does not show that the shippers render any transportation service or furnish any instrumentality for use in such service. On the contrary, it shows that, instead of requiring the consignees to unload the shipments from the cars, as ordinarily required on carload shipments, respondent undertakes to make delivery in spaces assigned to the consignees on the piers, and its stevedores stack the packages in those spaces. *It appears from this record that at that point respondent has fulfilled its legal obligation as to delivery.*

> The subsequent restacking, in which the packages are sorted as to brand, size, etc., appears to be solely for consignees' benefit, and is apart from the transportation in connection with which allowances for services are contemplated or authorized by section 15(13) of the act. (Emphasis supplied).

This decision is very valuable because of the italicized language which shows that the railroads' legal obligation with respect to delivery is not fulfilled until the traffic is placed on the piers. We fully agree with the Commission that the stacking and sorting services are in the nature of special services which take place after delivery has been completed and for which special compensation may properly be expected of the shippers. There is certainly no obligation on the part of the railroads to stack and sort produce. The value of the decision lies in its clear enunciation [fol. 772] of its principle that the railroads complete their legal obligation with respect to delivery when they place the freight on the floor of the piers. We shall fail to see how such a decision can be deemed irrelevant here.

The next case is *Unloading Lumber in New York Harbor*, 256 I. C. C. 463, which the railroads cast aside because they consider the situation "significantly different" from that involved here. The respondents in that proceeding, including the same railroads that are involved here, sought to establish charges for unloading eastbound lumber from cars into lighters or barges at specified stations in New York Harbor, the unloading having been performed previously by the railroads free of charge. Quite obviously the situation was similar except that it was lumber instead of produce, but otherwise it is precisely the same situation in principle that we have here. Division 2 said:

> The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor. In *New York Harbor Facilities Applications*, 100 I. C. C. 383, the Commission found that lighterage and car floatage in New York Harbor are equivalent to necessary extensions of the rail lines of the various railroads. This conclusion was reached also in *Lighterage Cases*, 203 I. C. C. 481. The nature

and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, 61. As such a showing was not made respondents have [fol. 773] not met the requirements of the statute in that respect, and accordingly, have not sustained their burden as to the reasonableness of the proposed charge.

The next case is *Terminal Charges at Pacific Coast Ports, supra*, decided as recently as 1943, where Division 2 found that a proposal by the railroads to establish a terminal charge of 5 cents per 100 pounds, in addition to the line-haul rates, on export and import traffic, was not shown to be just and reasonable. We have already quoted (p. 23 of this brief) the language of Division 2 to the effect that there must be a clear showing that the existing charges are reasonable for the line-haul services alone or that the increased total charges are reasonable for the aggregate services.

The Examiners concluded that the same principle must be followed with respect to the unloading charges at New York even though the commodity is different and the terminal service is somewhat different. We see no escape from this conclusion.

The plain truth of the matter is that every one of the cases cited by the Examiners is directly pertinent and that many of them deal with precisely the same terminal situation at New York and with the same traffic and with the same piers. It is not easy under these circumstances to follow the argument of the respondents that these cases are not controlling here.

Summary

Railroads which have already had their divisions on fruit and vegetables increased to take care of terminal expense at New York, including the unloading of the produce, should not be permitted to collect again from the public for a serv- [fol. 774] ice which is covered by the line-haul rates, as they have been permitted to do here.

The railroads play up prominently their cost of so-called unloading at New York, but this is neither a revenue case nor a rate case. The railroads have made no showing of revenue need and they have said that the rates are irrelevant. They turn the microscope on the so-called unloading cost and ask that it be considered alone, independently of the published New York line-haul rates and independently of the divisions. This they have no legal right to ask because it is part of their obligation to make carload freight accessible to consignees.

The real motive here is to force consignees, through penalty charges, to abandon use of the pier stations and accept delivery short of New York destinations, with long and expensive truck hauls through tunnels and via infrequent ferry service and over congested streets, thus causing delay in reaching markets and interfering with the plans of public authorities to relieve street congestion and expedite the movement of vehicular traffic.

The pier stations are the only adequate rail stations for the delivery of fruits and vegetables at New York and line-haul rates are plainly published as applicable to such stations. The team tracks are notably inadequate and it has been impossible for the railroads to obtain adequate team track space because of prohibitive cost. Railroads are public servants. They are supposed to provide the public with reasonable delivery of freight. Pier stations here provide adequate service for that purpose and they have served that purpose for half a century. The railroads have no legal or moral right to impose penalty charges which are pur- [fol. 775] posely designed, and admittedly designed to force consignees to accept delivery short of New York, N. Y.

These unfair charges are harmful not only to the shipping public but to the southern railroads. The latter have already filed tariffs absorbing the so-called unloading charges because the imposition of the charges makes it impossible for them to compete with the water service. The Commission has suspended the tariffs of the southern lines in I. & S. No. 5718.

This record has destroyed completely the railroad theory that there is something fancy about the nature of the delivery at the New York pier stations for which they should receive extra compensation. In the old record there was

confusion because of references to stacking the freight, use of the piers for auction purposes, etc. On the present record it becomes clear that the railroads perform a very simple delivery by lifting the freight out of the cars and placing it on the floor of the pier, where their responsibility ends. If they perform any service beyond that, such as stacking, or sorting, they get paid extra for it.

The record is also indisputably clear that the consignees do not have access to the freight until it is placed on the floor of the pier. The railroads have a legal obligation under their line-haul rates to make delivery at a reasonably accessible point. There is no other reasonably accessible point at which delivery can be made, the team tracks being very inadequate. On other occasions, and in other proceedings before the Commission, the railroads have frankly admitted their disability in this matter as well as their responsibility for bearing the expense of making the freight available for simple delivery.

[fol. 776] The case resolves itself, therefore, to a very simple issue which the Examiners have stated very clearly:

> The principal question for determination is what constitutes delivery of the freight by respondents to the consignees or receivers, and the time when and the particular location at which it is completed. Delivery of carload freight consists of the carrier either placing the car on a team track or siding where it can be unloaded by the consignee or, where the consignee is not permitted to perform the unloading, as in this proceeding, in unloading the freight from the cars on the floats and placing it on the floor of the pier. Here, and here only, does the transportation obligation of the carrier end. That obligation is not fulfilled until the freight is placed in a location conveniently accessible to the consignees.

A collateral issue, and a very important one, is whether these two railroads should be permitted, after a half-century of service at the pier stations, to force the public to abandon the use of these stations and take delivery short of the New York, N. Y., destinations. The fact now disclosed

by the record that this is a major purpose of the railroads here is enough to condemn the proposal.

[fols. 777-778] We respectfully submit that the conclusions recommended by the Examiners should be approved.

Respectfully submitted,

Leander I. Shelley, General Counsel, 111 Eighth Avenue, New York 11, N. Y. Wilbur La Roe, Jr., Frederick E. Brown, Arthur L. Winn, Jr., Samuel H. Moerman, Continental Building, Washington 5, D. C., Attorneys for Protestant.

Dated at Washington, D. C., June 30, 1950.

[fol. 779] BEFORE THE INTERSTATE COMMERCE COMMISSION

I. & S. 5500

Unloading Charges at New York and Philadelphia

REPLY TO EXCEPTIONS OF RESPONDENTS—Filed June 30, 1950

The California Citrus League respectfully submits the following reply to exceptions of respondents filed under date of June 5, 1950 to the proposed report of Examiners Russell M. Brown and M. J. Walsh. Time for filing reply was extended to June 30, 1950.

The proposed report herein is so accurate and complete that protestant found it unnecessary to except to any portion thereof and is in full agreement with the conclusions, as well as with the carefully prepared statement of facts embodied in the report. Since the proposed report states the facts and principles of law involved so accurately and completely, it is unnecessary to make any lengthy reply to the exceptions filed by respondents. Those exceptions go al- [fol. 780] most entirely to the conclusions. They fail to point out any error whatsoever in the statement of facts presented in the proposed report.

Respondents' General Argument

In the general discussion at pages 4-7 of their exceptions, respondents complain that there were no additional facts

presented at the rehearing to warrant a change in the Commission's earlier decision and that administrative conclusions once established should not be changed.

The latter point is exactly the one that we advocated with reference to the Commission's decision of January 20, 1922, in I. & S. 1420, *Fruits and Vegetables to Duane Street, New York*, 66 I. C. C. 135. The proposal then presented was exactly the same as the proposals establishing the protested unloading charges here in question, except that only one railroad, the Erie, made the earlier proposal, while now all of the railroads serving New York are making the proposal. The Commission failed to refer to this decision in its earlier opinion in this proceeding. The respondents had failed to make any reference to the 1922 decision in their original brief in this proceeding nor did they mention it in their brief on rehearing. In their present exceptions, they attempt to dispose of it by a very brief reference (page 23). There cannot be the slightest question that the proposals presented in the two cases are exactly parallel. This parallelism is immediately apparent from a reading of the following quotation from the earlier decision (66 I. C. C. at p. 139):

> "The terminal charges present a somewhat different problem. It is proposed that they shall apply on all fruit and vegetable traffic delivered at Duane street [fol. 781] station. As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane street under the line-haul rates. * * * The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane Street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic, merely pointing out that the rates on California fruit are blanketed to all territory east of the Colorado common points and that 15 years ago, when the traffic began to be handled in the manner above described, no corresponding increase was

made in the through rates. This blanket has been voluntarily maintained by the carriers for many years and appears to have been satisfactory to all concerned. We find that the establishment of terminal charges higher than the present assorting charges has not been justified."

Exactly the same conclusion is applicable to the present case which is merely a repetition of the effort made by the Erie in 1921.

A portion of the foregoing quotation was quoted at Sheet 13 of the proposed report. This case alone is adequate authority for the conclusions reached by the proposed report. It is a precedent which has been established for more than 28 years and adherence thereto in this proceeding is in conformity with the principle advocated by respondents that administrative conclusions once established should not be changed.

With respect to respondents' contention that the record on rehearing is merely a repetition of the evidence pre- [fol. 782] sented in the original record, any one having the slightest familiarity with the record in both hearings must immediately recognize that the second hearing was much more complete than the first. The New York Port Authority presented substantial additional evidence (R. 918-976; Exhs. 73-96). The Mayor of the City of New York and other parties representing New York interests, who had not participated in the original hearing, appeared at the rehearing and protested the unloading charges. (R. 1064-1076; 1049-1063, 1076-1098; 1181-1187).

Philadelphia interests were likewise well represented at the rehearing and presented a much more complete case than had been submitted at the original hearing. (R. 1099-1180; 1187-1304; Exhs. 106-112).

In addition, Exhibit 103, offered by this protestant and received in evidence, sets forth excerpts from the testimony of various carrier witnesses in cases before the Commission heard during the past 40 years, in which testimony those witnesses gave the causes and reasons for the establishment of the unloading service at New York piers in order to make delivery on the piers to the consignees or the

receivers of freight. These cases are referred to in the discussion of the next point.

Respondents' Contention That Line Haul Rates Do Not Include Unloading

It is perfectly obvious that the proposed report, in referring to the unloading at the piers and auction platforms as being included in the line haul rates, has reference to the situations at New York and Philadelphia and is not stating [fol. 783] any general rule applicable to cars placed at team tracks or private sidings at other destinations.

The inclusion in the line haul rate of the unloading at these two points arises from the peculiar conditions and carrier disabilities at those points. The carriers themselves have taken such position in numerous cases extending over a period of the past forty years, as illustrated by the following references:

In 1909, Docket 27281, *Utica Traffic Bureau* v. *New York Central and Hudson River Railroad Company*, 18 I. C. C. 271, a witness for one of the respondents in this proceeding, explaining the exception at New York to Rule 27 of the classifications, said that the carriers performed this service because it would be physically impossible for the shippers or consignees to load upon, or to unload from, cars on the car floats alongside the piers.

In 1914, in I. & S. Docket 572, *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, it was stated by a witness appearing in behalf of all of the respondents that the physical conditions at New York were such as to make the pier delivery the only practicable method of delivering a large volume of freight and in such deliveries the freight was necessarily delivered to consignees on the piers or bulkheads, and that the railroads necessarily performed the labor of unloading the cars.

In June, 1924, in I. & S. Docket 2140, *Loading and Unloading Carload Freight at Points in Trunkline and CFA Territories*, 101 I. C. C. 394, a witness appearing for all of the respondents in said proceedings, being some of the respondents represented in this proceeding, stated that it was physically impossible for shippers to load upon or to unload from, cars on car floats alongside the piers.

[fol. 784] On April 15, 1947 in I. & S. Docket 5466, *Charges for Loading and Unloading Carload Freight*, 269 I. C. C. 25, the most recent expression of the foregoing views was given by E. A. Hodkinson, who likewise appeared as a witness in this proceeding. The carriers views as expressed by him were in the following language:

> "The practice of performing the service of unloading and loading carload freight by the carriers, or at their expense, at the port cities has been in effect since time immemorial, and was and still is occasioned by certain disabilities of the railroads serving the Port of New York arising out of the geographical situation, also by reason of the competition of the steamship lines serving the port cities, and by other conditions peculiar to the handling of traffic at the port cities * * *. This detail in respect to New York has been gone into in order to show that the geographical and physical layout is such that it is necessary for the carriers to perform this service of loading and unloading, to the extent it is performed, at their own expense, and that the service has been performed for many years. In fact, this service has been performed from time immemorial, and its inception antedates the available records of the carriers."

Since the filing of the tariffs publishing the protested charges, the carriers appear to have returned to their previous position as stated in the excerpts just quoted from Mr. Hodkinson. By Tariff Supplement 136 to C. A. Spaninger, Agent, Tariff No. I. C. C. 642 (Southern Freight Tariff Bureau No. 782) the protested unloading charges on citrus fruit from Florida to New York are being put back into the line haul rate. The tariff provision (Item 77,* p. 2 of Supp. 136) reads in part as follows:

> [fol. 785] "The rates on citrus fruit, carload, published in Section 3 of Tariff, as amended, applicable to New York, N. Y. stations named in Note A below, include the unloading charge published in Item * * *

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* This item was suspended by order of the Commission issued November 10, 1949 (I. & S. Docket 5718).

being the unloading charge at B & O and Penn New York piers here protested), such unloading charge being absorbed out of the revenue of the carriers south of Richmond, Va. on shipments interchanged at that point with R F & P and out of the revenues of carriers south of Potomac Yard, Va., on shipments interchanged at that point by Sou and its connections."

It thus appears that the publication of these protested unloading charges was a distinct and radical departure from long standing practice and policy of the carriers serving New York. It further appears that such departure was but a temporary one. The unloading charges are now back in the line haul rate on Florida citrus fruit by the above quoted declaration of the carriers parties to the Spaninger tariff. On all commodities, other than the fresh fruits and vegetables, the carriers continue to perform the unloading service at all pier stations without addition to the line haul rates. (R. 929-931)

The lines serving New York, the respondents in this proceeding, participate in the Spaninger tariff above mentioned (I. C. C. No. 642). Such participation is indicated for the several carriers as follows:

Erie Railroad Company (FX 7 No. 10; FX 8 No. 4)
Pennsylvania Railroad Company (FX 8 No. 105)
The New York Central Railroad Company and its subsidiaries (FX 8 No. 7)
The Baltimore and Ohio Railroad Company (FX 8 No. 152).

[fol. 786] These carriers serving New York thus participate in the declaration in Supplement No. 136 that "The rates on citrus fruit (the line haul rates) * * * include the unloading charge."

Respondents' Contention Regarding Separately Published Unloading Charges and Authorities Cited

Respondents are simply confusing the issue when they attempt to construe the proposed report as holding that it is unlawful to publish unloading or loading charges separately from line haul rates. The proposed report is very

clear in its analysis of the situation at New York and Philadelphia and in finding that on the facts of record the proposed unloading charges in this particular case have not been justified. Respondents' argument at pages 15-21 of their exceptions is wholly irrelevant to the issue presented in this case.

The decisions quoted at Sheets 12-14 of the proposed report and the conclusions stated by the Examiners in connection with the application of those decisions to the immediate proceeding are adequate justification for the ultimate conclusions in the proposed report. The carriers' exceptions not only fail to cast any reflection upon the logic of the argument; they are not even directed at the true issues presented in this proceeding.

We submit that the analysis of the authorities cited by the proposed report is sound and that the carriers' exceptions in this respect (pages 21-25) are unconvincing and entirely miss the real point.

The Burden of Proof

The respondents' exceptions complain that the proposed report is in error as to the burden of proof resting upon respondents. All that the proposed report says about the [fol. 787] burden of proof, so far as we can find, is:

> "The burden of proving that the assailed charges are just and reasonable is upon respondents under the provisions of Section 15 (7) of the Act. This burden has not been met." (Sheet 21)

It is impossible to understand why the carriers complain of the first sentence of this statement. It is simply in the language of the statute itself. The carriers' exceptions, at page 26, admit:

> "In this, just as in any investigation and suspension proceeding, 'the burden of proof is upon the carriers to show that the proposed rate, fare, charge * * * is just and reasonable' (Section 15 (7))".

We fail to see any difference between the statement in the proposed report and the admission stated in the carriers' exceptions. In such a situation as that presented in

this case, where long established practices are suddenly changed, with the imposition of substantial additional charges on shippers without the slightest increase in service, this burden of proof can only be met by clear and convincing evidence. And that evidence must relate to the whole of the service and not to a mere portion of it.

It seems unnecessary to repeat the discussion of the burden of proof contained at pages 29-32 of our brief on rehearing. The principles stated and followed in the proposed report are well established under a long line of Commission decisions and respondents' claims that the proposed report is in error with respect to the burden of proof are without the slightest foundation.

[fol. 788] Other Contentions of Respondents

At pages 30-31 of their exceptions, respondents argue that similar charges are applicable under similar conditions for unloading service at other points. The defect of this argument, which would be glaringly apparent to anyone having the slightest familiarity with the delivery of fruits and vegetables at other points, is that conditions are not similar. As has heretofore been pointed out in this reply, and as has been shown by quotations from carrier representatives themselves, and as is plainly evident in almost every page of the record in this proceeding, conditions at New York are entirely different and totally dissimilar from those existing at other points where unloading charges have been established. At such other points, there are adequate facilities for carlot delivery at points accessible to shippers. In New York, deliveries can be made in Manhattan only over the piers; other rail terminal facilities in Manhattan are totally inadequate to handle even a small part of the total fruit and vegetable traffic daily delivered in that area. The statement in the carriers' exceptions, "Facilities to fill every actual demand are provided" is a play upon words. The carriers know perfectly well that if there were a request on the part of the shippers for even a small portion of the fruits and vegetables to be delivered at team tracks on Manhattan Island, the rail facilities would be totally inadequate. When cars of fruits and vegetables

are brought to the piers on car floats, it is perfectly evident that the shippers cannot have access to the freight until the contents of the cars are transferred from the cars on the car floats to the pier platform. At none of the points where unloading charges are in effect is there any such situation requiring such a transfer from the car to some other [fol. 789] point before the freight can be made accessible to shippers or consignees.

It must be remembered that fruits and vegetables unloaded at the piers and placed on the pier platform are no further along toward their ultimate destinations than fruits and vegetables in cars placed on team tracks. In both cases they still have to be loaded into a consignee's truck and hauled away from the railroad premises. So the unloading performed by the railroads at the piers is not being done for the shippers or the consignees. The railroads are doing it for themselves so that they can make a delivery to the consignee. In no other way can they make a delivery at these points.

The distinction between the situation here presented and that at other points referred to by the carriers, such as Chicago and Pittsburgh, is that at those other points there are available other forms of delivery by placement at team tracks or private sidings where the freight becomes accessible to the shipper. The proposed report has correctly stated the facts and the law controlling the particular situations presented at New York and Philadelphia. There is nothing whatever in the respondents' exceptions that warrants any change in the Examiners' findings and conclusions.

It is unnecessary to discuss the carriers' argument at pages 31-37 in respect to the cost studies. In our initial brief filed in this proceeding under date of September 30, 1947, we pointed out many defects in the carriers' cost studies with respect to New York and Philadelphia. These criticisms of the carrier cost evidence still stand. However, as stated in our brief on rehearing, we have reached the conclusion that the paramount issue in this case is whether or not there should be any unloading charge at all. We prefer [fol. 790] to rest our case wholly upon the proposition that any unloading charge, whatever the amount, would be an unlawful imposition under the circumstances presented

by the present record, for the reasons so completely and convincingly stated in the proposed report.

At pages 37-43, respondents' exceptions make the argument that the advantages of pier delivery are such that shippers and receivers do not want team track delivery and that they prefer to pay the unloading charge rather than divert their traffic to other delivery points. They recognize that in the case of vegetables the number of cars delivered in the 8 months following the imposition of the unloading charges declined by 89 per cent from the number in the corresponding period in the preceding year. (Pp. 38-39). They then contend that because the volume of traffic in fruits did not decline, following the imposition of the unloading charges, the shippers and receivers must receive such collateral benefits from pier delivery that they can afford to pay the unloading charges.

This line of argument demonstrates that the railroad representatives charged with the defense of this case either are woefully ignorant of, or deliberately choose to ignore, the circumstances necessarily attending the auction sale of perishable fruits. The answer to the whole argument of the carriers is stated in the carriers' own exceptions (Page 42) where they quote from the brief of the California Deciduous shippers: "The method of auction selling prevailing in New York requires terminal delivery of fruit at a single station."

The whole matter was fully explained by Mr. Neill in his testimony at the rehearing (R. 1030). The California Fruit Growers Exchange, which is the shipper of most of the [fol. 791] California-Arizona citrus fruit delivered at New York, sells its fruit at auction. As stated in the above quotation, the method of selling at auction requires delivery at a single station. The change of an auction from one place to another is a serious matter and should not be undertaken on any temporary basis. Naturally, as long as the auction sale continues on the piers, the fruit sold at auction must be delivered at the piers. The California citrus and deciduous shippers have not undertaken to change their point of delivery for auction sale or to change their method of selling, pending the outcome of this rehearing. If the unloading charges are permanently continued, it will be necessary either to find some other place for auction sale where such

costs will not be encountered or to change the method of selling to some other means whereby fruit can be delivered without the payment of charges of this character. Once that decision is made, the deliveries at the piers will decline just as rapidly as did the deliveries of vegetables which are not tied to the piers by the auction method of selling.

It would be nothing short of silly to attempt to divert the fruit receipts from the piers to the team tracks; it is perfectly obvious that the team tracks on Manhattan cannot accommodate them. Since it is necessary, under the auction method of selling, to have all deliveries at one point, that means that the team tracks on Manhattan could be used only in the event the auction method of selling is abandoned. In the event of private sale, the demands for team track deliveries would soon far exceed the capacity of the carrier facilities and chaos would unquestionably result in the trade unless a new marketing point should be established for the New York area.

[fols. 792-799] The consequences of the permanent continuation of the unloading charges on fruits and vegetables are so serious, not only to the shippers and receivers, but also to the trade, to labor and to the whole community, that we prefer not to face them, even in contemplation, until every effort has been exhausted to correct the great error that was committed by the carriers in establishing the charges.

The proposed report herein should be adopted and approved by the Commission and an order should be issued requiring that the schedules naming the unloading charges be cancelled.

Respectfully submitted, California Citrus League, by Robert C. Neill, Chairman, Traffic Committee; George E. Farrand, 215 W. 6th Street, Los Angeles, California; Karl D. Loos, Munsey Building, Washington, D. C., Attorneys.

Washington, D. C., June 30, 1950.

[fol. 800] BEFORE THE INTERSTATE COMMERCE COMMISSION

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

I. & S. Docket No. 5500

EXCEPTIONS OF RESPONDENTS TO THE PROPOSED REPORT OF EXAMINER M. J. WALSH and APPENDICES—Filed September 11, 1951

Come now respondents in the above-entitled proceedings and respectfully except to the following ultimate conclusion in the Proposed Report of Examiner M. J. Walsh (Sheet 25):

> "Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of section 3(1) of the act. [fol. 801] The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered canceled and the proceeding discontinued."

The portions of the proposed report to which specific exception is taken include four conclusions of primary importance; (1) that respondents are obliged to show that the total charges, the line-haul rates plus the unloading charges, are just and reasonable; (2) that the unloading is a part of and necessary to delivery; the conclusion on which the line-haul rate assumption is based; (3) the charges result in undue preference and undue prejudice; and (4) conclusion with respect to the new evidence submitted at the 1951 hearings.

In addition to these primary mistakes in the basic approach to the issues, exception is also specifically taken to the narrower conclusions with respect to the alleged diversion of traffic resulting from the unloading charges, the propriety of meeting the costs of terminal services at these destinations out of increased divisions, the question as to fair treatment for the Port of New York, the treatment of

the cost of fresh fruits and vegetables to New York consumers, the plans for the development of Washington Market, the use of New Jersey team tracks for Manhattan deliveries, local traffic and labor problems, the alleged "disabilities" of respondents in making deliveries on Manhat-
[fol. 802] tan, the statement of the burden of proof and the erroneous interpretation of prior decisions of the Commission.

In addition to these specific exceptions, respondents take a further general exception to the failure of the Examiner to give proper weight to the major grounds on which respondents relied in showing that the charges are just and reasonable with particular reference to the propriety of eliminating free services performed in connection with limited segments of traffic, the benefits derived by consignees from the unloading service and the cost of the service itself.

Each of these matters will be separately treated in the argument which follows.

Summary Statement

The central argument on which the proposed report relies is the conclusion that the unloading at the New York piers is a part of and necessary to the delivery at those stations. From this conclusion the report infers that the charges may be approved only if the total charges for the entire transportation are shown to be reasonable. These conclusions are thoroughly unsound, contrary to settled Commission doctrine of many years standing and apply
[fol. 803] equally to any charge for loading or unloading carload freight and to most other accessorial services. They are in plain disregard of the provisions of Section 6 permitting the separate publication of charges for terminal services.

The unloading service under investigation in this proceeding consists of the work of removing the freight from the cars and placing it on the station floor in convenient arrangement ready for delivery to the consignee or its agent. The unloading does not include delivery, is performed by entirely different personnel, and is normally completed before the procedures incident to delivery are

begun. It cannot properly be considered to be a part of the delivery.

While the fallacy in the treatment of the concept of delivery pervades the entire proposed report and is the basic error in it, the conclusions in the report are additionally erroneous even if the delivery concept were valid. Thus, even if the unloading were to be treated as a part of the delivery at the stations, the additional service performed in providing station platform delivery wholly justify the charges under investigation. Receivers of carload freight are entitled, in return for charges based on line-haul rates, to delivery of freight in cars on tracks at a reasonably convenient point. Nowhere in Official territory do the carriers perform the additional service of unloading carload freight from cars and placing it on their station platforms. [fol. 804] In all cases except at New York where the carriers deliver carload freight to patrons on their station platforms, they perform the unloading only at an additional charge. Thus, even if the unloading were properly treated as incident to the delivery, the peculiar character of the delivery, requiring the performance of additional services not normally provided under the line-haul rate, justifies the additional charges.

Further, even if there were some merit to the conclusion that respondents are obliged to prove the reasonableness of the line-haul rates, they have fully met the burden of proof in that connection. They have shown that the line-haul rates are the same, or made on the same basis, to all points in Official Territory whether or not the freight is unloaded by the carriers and delivered on station platforms. At all other points in the territory where that service is provided, additional charges are assessed. By the most decisive test of the reasonableness of rates, the comparison with like rates in the same territory, the total charges for the service provided on these shipments are shown to be just and reasonable.

These charges have been published pursuant to repeated admonitions from the Commission that carriers discontinue providing free services, particularly loading and unloading services, and particularly the additional services performed at New York Harbor. The charges do no vio-

[fol. 805] lation to and do not affect the general rate structure on these commodities but serve only to place New York and Philadelphia on a basis comparable to the basis of rates applicable throughout the territory. The cost of the service has increased enormously and can no longer properly be absorbed. It applies only on those shipments on which the receivers desire unloading and platform delivery. The advantages to the receivers from the unloading service shows that the charges are fully justified by the value of the service.

It is only by ignoring the decisive evidence proving the reasonableness of these charges by standards on which the Commission normally relies and by accepting an unsound and technical argument that the proposed report reaches its conclusions.

Argument

I. History of Case and Statement of Basic Facts

By decision dated October 4, 1948 (272 I. C. C. 648), the entire Commission sustained the principle of these unloading charges and the amounts thereof. They became effective on November 1, 1948, and have been in effect contin-[fol. 806] uously since then.

At the request of various protestants, a rehearing was held in September, 1949, at which protestants failed to present any new material facts or arguments or to show any factual errors in the Commission's decision dated October 4, 1948.

In *Ex Parte* No. 168 and *Ex Parte* No. 175, these unloading charges were exempted from increases.

By Notice dated October 10, 1950, the Commission provided for a further hearing for the presentation of certain additional evidence as follows:

> "Upon further consideration of the record in the above-entitled proceeding, it appears that the record is

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[1] Pursuant to Rule 91(d) of the Rules of Practice, no separate abstract of evidence is included herein, but appropriate record references are given throughout to statements of fact.

deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing.

At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team tracks on Manhattan Island and in Jersey City, N. J. Among other things, such evidence should show the difference in, and cost [fol. 807] of, switching services required on cars accorded pier delivery and those accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate.

The above-entitled proceeding will be assigned for further hearing at times and places hereafter to be announced."

Said further hearing was held on June 4 and 5, 1951, at Brooklyn, New York, before Examiner M. J. Walsh, at which the evidence specified by the Notice dated October 10, 1950 was received. Since the evaluation of this new evidence depends on the case as a whole, full discussion thereof will be deferred to Section II C (1) hereof. The significance of the new evidence, however, is that it disposes of protestants' contention (which respondents submit is immaterial in any event) that the handling of fresh fruits and vegetables at stations is cheaper than at team tracks and that, accordingly, the railroads should unload free at stations. The fact is that station handling is more [fol. 808] expensive than team-track handling, and the

figures to that effect are contained in the first two paragraphs on Sheet 12 of the Proposed Report. The new evidence also shows that the cost of the unloading operation has increased materially since the Commission's decision in 1948.

Since the Commission's decision in 1948 contains complete and detailed factual statements, which have not been challenged by protestants and as to accuracy of which there is no question, that decision is printed as Appendix F hereto in lieu of attempting to restate the facts in different and perhaps less accurate language. The cost of the unloading operation, however, has gone up substantially since 1948, and the current figures are contained in Section III C hereof.

Administrative conclusions once reached should not be changed except on a showing of mistaken facts or additional facts which justify different conclusions.[2] Protestants have made no such showing here in justification of their request that the Commission reverse itself.

[fol. 809] II. The Basic Errors in the Proposed Report

A. The Line Haul Rate Conclusion

The sole basis in the Examiner's "Findings and conclusions" for his conclusion that the unloading charges are not shown to be just and reasonable is contained in the following sentences on Sheet 25:

> "The compensation for the unloading of the fruits and vegetables performed by the respondents for more than 50 years was included in line-haul rates. The addition of a charge for this unloading service performed before delivery requires clear and convincing proof that the practice of unloading without an added charge is

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[2] *Traugott Schmidt & Sons* v. *M. C. R. R. Co.*, 23 I. C. C. 685; *Alabama Asphaltic Limestone Co.* v. *Akron & B. R. R. Co.*, 194 I. C. C. 275; *Seaboard Air Line Ry. Recs.* v. *Carolina & N. W. Ry. Co.*, 194 I. C. C. 185; *A. Jacob & Co.* v. *New York Central R. Co.*, 223 I. C. C. 256; *Cities Service Oil Co.* v. *Alton R. Co.*, 203 I. C. C. 255.

unfair to the respondents *because of the inadequacy of the line-haul rates for the total services rendered.*" (Italics added.)

In other words, the theory of the Examiner is that unloading charges are automatically not shown to be just and reasonable unless the carriers performing the unloading prove that the line-haul rates from origin to destination are "inadequate".

This theory of the Examiner, however, was expressly repudiated by the Commission in *Charges for Loading and Unloading Carload Freight*, 269 I. C. C. 25 (1947),[3] which authorized general increases in the charges of Official Territory lines for loading and unloading carload freight with-[fol. 810] out proof as to the line-haul rates. In that case, the protestants advanced the *identical* theory embraced herein by the Examiner, and the Commission repudiated it in the following language, which is quoted in full because of its pretinency here:

> "It is the position of the protestants that the level of line-haul rates maintained by the respondents includes, in part, the cost of loading and unloading service, and that as this service has been voluntarily established the respondents should not at this time be permitted to increase the separate loading and unloading charge without first justifying the level of the through charges which would result. In our opinion it does not necessarily follow that the respondents should not be required to justify the level of each and every rate which may be applied to the line-haul transportation of freight which may be accorded a loading or unloading service. The contentions of the protestants are similar to those in *Loading and Unloading Carload Freight*, 101 I. C. C. 394, which proceeding dealt with a proposal by the carriers to establish charges for loading and unloading services where no charges theretofore had been maintained. On page 413 of the report in that proceeding, division 2 said:

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[3] Petition for reconsideration denied by Order dated October 29, 1947.

Protestants particularly urge that the line-haul rates include loading and unloading, and that under the law [fol. 811] respondents not only have to justify the charge for those services but the burden is upon them to show that the line-haul rates heretofore contemplating the loading and unloading services are reasonable when demanded by respondents for the road haul alone. Respondents answer that while it may be true that the line-haul rates to and from the points in question include loading and unloading in the tariff sense, there was no extension or increase in the rates to cover the cost of such services. Many of the line-haul rates to and from these points have been prescribed or approved by us, and our reports do not indicate that we have given any consideration to the cost of unloading carload freight in arriving at such rates. The same line-haul rates are assessed on shipments to and from industrial sidings or outlying team tracks at these points although the loading and unloading is not performed by the carriers. The same rates, or the same bases of rates, apply to or from other points in the same group or for a similar distance, and the rates do not include loading or unloading. All of these facts indicate that the general measure of the rates to and from the points in question are not unreasonable for the line-haul service alone, and warrant the conclusion that if the carriers justify the charge for the loading and unloading [fol. 812] services, they have borne their burden of proof under the law.

We see no basis for a different conclusion here. This loading and unloading service is available to all shippers of carload freight (except bulk freight, livestock, lumber or automobiles), in pieces or packages. The line-haul rates which apply are the same as those which apply on traffic where no loading or unloading service is performed; and those which apply on the protestants' traffic also apply on traffic of other shippers and on traffic of forwarders which perform their own service. They apply on that traffic regardless of whether or not a loading or unloading service is performed. We cannot properly evaluate the reasonableness of a rate or

rates on basis of the revenue received thereunder from one shipper or from a class of shippers to the exclusion of revenue received thereunder from the general public as a whole. While it is true that neither the present nor the proposed charges are completely compensatory in and of themselves, it does not necessarily follow that in determining the lawfulness thereof, lawfulness of the line-haul rates also, from which the carrier must recoup losses that result from performance of the loading or unloading services, must be established. These line-haul rates, many of which have been prescribed or approved by this Commission, must, unless otherwise [fol. 813] shown in a proper proceeding, be presumed to be just and reasonable."

So far as we have been able to find, the reasoning of the Commission in *Charges for Loading and Unloading Carload Freight, Supra,* has never been modified or even questioned in subsequent cases. The Examiner does not discuss that case or even cite it in the Proposed Report.

In its 1948 decision in this case, the Commission went into the question of the line-haul rates and said (page 662):

"Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates. In prescribing or approving rate adjustments for fresh fruits and vegetables, however, these terminal services usually have been considered in connection with the rates to widespread destination areas. The relative level of the rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading.

For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates. The establishment of specific charges for unloading at New York and Philadelphia without reference to the [fol. 814] levels of the line-haul rates is justified. Such charges are in substantially the same category as those for switching, transit, refrigeration, and various other

special services for which separate charges are published."

It is not questioned that the rates on fresh fruits and vegetables from the important origin points are blanketed over substantial eastern areas around New York and Philadelphia. For example, the rates from California are the same to Rochester, Syracuse, Baltimore and Washington as to New York and Philadelphia. Similarly, the rates from Florida are the same to Wilmington and Camden as to Philadelphia, and the same to Newark and Trenton as to New York. Likewise, the rates from Texas are the same to Trenton and the Delmarva Peninsula as to New York. Exhibits 4-12, inclusive, show the extent of such blankets in detail. At all points within such blankets the consignees pay the same line-haul rates.

In addition, even within the New York and Philadelphia areas, the same line-haul rates apply to team tracks and private sidings, where the consignees do their own unloading, as to the stations where the carriers do the unloading.

If the Commission should now adopt the Examiner's theory, the legality of unloading charges throughout the [fol. 815] country generally would be open to attack, despite the fact that the Commission has admonished the carriers to abolish where possible the practice of free unloading of carload freight.[4]

While the Examiner's theory—that unloading charges are automatically not shown to be just and reasonable unless the carriers performing the unloading prove that the line-haul rates from origin to destination are "inadequate"—has been expressly repudiated by the Commission, the

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[4] The following appears in *Loading and Unloading Carload Freight*, 101 I.C.C. 394, 398 (1925):

> "In *The Five Per Cent Case*, 31 I. C. C. 351, at page 408, we directed the railroads in official territory to ascertain to what extent, if any, these services (free unloading) constituted an unjust burden upon carriers or resulted in unjust discrimination among shippers. Ever since the decision in that case in 1914 the carriers have been undertaking to eliminate these free services."

use of such theory in this case would be especially unwarranted.

In *Ex Parte* No. 175, the carriers requested a 15% increase (with a maximum of 15 cents per 100 pounds) in the interterritorial rates on fresh fruits and vegetables. The Commission authorized a 6% increase with a maximum of 6 cents. In cutting down the requested increase, the Commission gave serious weight to the "further consideration, that at this time, no unnecessary obstacle be interposed to efforts of the government to stabilize prices."[5] In other words, the Commission in cutting down the requested in-
[fol. 816] crease in the line-haul rates did so, in part at least, because of the stabilization program. Under such circumstances, it would be especially unwarranted for the Commission, on the Examiner's line-haul theory, also to remove the unloading charges which, admittedly, are entirely consistent with the stabilization program. Assuming that the stabilization program is, to some extent, a ceiling on increased line-haul rates, the Commission should protect wherever possible the continuance of other charges on the same traffic which are clearly permitted by the ceiling. To do otherwise would be to deprive the carriers of revenues which they need in the public interest.

In *Ex Parte* 175 the Commission recognized the need of the carriers for additional revenue. On transcontinental citrus, for example, the *Ex Parte* 175 increase to the Eastern Carriers amounts to less than $7.00 per car. The increase on California citrus to New York based on weight of 39,200 pounds under the various *Ex Parte* proceedings follows:

Ex Parte	166	$21.56 per car
" "	168	9.70 " "
" "	175	6.47 " "
Total		$37.73

[fol. 817] The Examiner would take away the unloading charge of approximately $38.00 per car which would leave

[5] *Ex Parte* No. 175—Decision dated August 2, 1951—Sheet 45, reflected in the price structure and their continuance consequently will not add to the inflationary pressure.

the Eastern Carriers worse off than they were prior to *Ex Parte* 168. In the aggregate, the unloading charges amount to about $2,000,000.00 a year.

Furthermore, the unloading charges were wholly exempted from the increases in *Ex Parte* No. 168 and *Ex Parte* No. 175. Since the unloading charges have been in effect continuously since November 1, 1948, they are already reflected in the price structure and their continuance consequently will not add to the inflationary pressure.

There is another reason why the Examiner's theory does not fit this case. It is well known that competition with Florida imposes a low ceiling on the rates moving tremendous volumes of perishables from the far west and southwest to New York and Philadelphia. This low ceiling takes the form of maxima which the carriers themselves have proposed in all recent *Ex Parte* cases and which the Commission has authorized. For example, in *Ex Parte* No. 175, the authorized increase in the line-haul rates on deciduous fruit from California to New York was from $1.73 per 100 pounds to $1.79 per 100 pounds[6]—an increase of 6 cents per 100 pounds, or only 3.5%. This compares with the 6% increase [fol. 818] on transcontinental traffic generally, which itself was to some degree depressed by the stabilization program, and which is substantially less than the 9% general increase within the East found needed by the eastern carriers. Similarly small increases, due to Florida competition, were authorized in the previous *Ex Parte* cases. The unloading charges, however, are unobjectionable from the standpoint of competitive relationships because they apply equally, in terms of cents per 100 pounds, to traffic from all origins.

In its decision in this case, the Commission said (page 649): "Respondents' proposals reflect an effort on the part of the delivering lines to secure increased revenues from the fruit and vegetable traffic terminated at New York and Philadelphia." The fairness and lawfulness of such effort seem even clearer today—indeed the public interest in adequate railroad revenues requires it. The unloading charges, which are entirely proper as reasonable charges for

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[6] L. E. Kipp, Agent, T. C. F. B., Tariff No. 44-K, I. C. C. No. 1508, Item 1120-H.

services rendered, and which are wholly consistent with the general rule that carload freight should be unloaded by or at the expense of the consignees, are certainly not improper, even on the Examiner's theory, in the light of the existing depression in the line-haul rates.

[fol. 819] Finally, the Commission's Notice dated October 10, 1950, pursuant to which the rehearing on June 4 and 5, 1951, was held, required the presentation by the carriers of certain data relating to station versus team-track costs, but required no data as to line-haul costs, although protestants from the start of this case have consistently urged the line-haul theory repudiated in *Charges for Loading and Unloading Carload Freight, supra.* This fact, coupled with the Commission's decision in this case (page 662) that the "establishment of specific charges for unloading at New York and Philadelphia, without reference to the levels of the line-haul rates is justified," makes the Examiner's revival of the line-haul theory somewhat difficult to comprehend.

Therefore, the "Findings and Conclusions" of the Examiner do not support his conclusion that the unloading charges are not shown to be just and reasonable.

B. The Conclusion as to Delivery

The argument adopted in the proposed report to justify the reference to the line-haul rate argument may be briefly stated as the proposition that since carriers must perform the unloading of cars in order to provide station platform delivery at a public station the unloading is necessary to and a part of that delivery and therefore included within [fol. 820] the carriers' obligation under the line-haul rate. The theory is frequently stated throughout the proposed report but nowhere amounts to more than this proposition. It is apparently tendered as a rule of law of general application. That conclusion, whether a rule of law or a combined conclusion of law and fact having application only at New York, is inherently unsound and incorrect and is contrary to the great mass of the evidence in this proceeding, the law as established by the decisions of the Commission and the law as declared in the courts.

1. The Conclusion Ignores the Decisive Evidence as to whether Carriers are Obliged to Unload

In reaching its conclusion that unloading is part of delivery, the proposed report necessarily ignores the decisive considerations showing that conclusion to be in error. It is correct that no rule of universal application can be written defining the relative obligations of carriers and shippers in the origination and termination of freight. As a factual matter, and by virtue of tariff changes over the course of the past 30 years, carriers in Official Territory have no obligation to load or unload domestic carload freight except at New York. As to whether carriers should have such an [fol. 821] obligation, the decisive considerations are far wider than the narrow ground on which the proposed report relies and include the considerations of the rate structure, the service actually provided, the physical condition of the facilities, the custom of the carrier, the cost of performing the service, the adequacy of other facilities and the effect of the unloading charges upon the movement of traffic.

The importance of these factors was noted in the Commission's decision in *Railroad Commissioners of Florida* v. *F. E. C. Ry. Co.*, 42 I. C. C. 616, 626, wherein the Commission, in approving a $2.00 charge for switching cars to private sidings said:

> "Whether or not a particular kind of delivery is in the nature of an additional service, or whether it is such a delivery as the carrier must perform without additional charge, is a question of fact to be determined by examining the history of the rates, the nature of the service, the physical condition of the land and tracks, the custom of the carrier, and other pertinent evidence."

All of the considerations named tend to show that these charges are just and reasonable and that the carriers should not be obliged to perform the unloading except upon the payment of additional charges. Before proceeding, how- [fol. 822] ever, to a discussion of these questions, it should be shown that the conclusion in the proposed report is itself incorrect.

2. The Unloading is Separate from Delivery

The only possible ground on which the conclusions of the proposed report can be accepted is the erroneous factual assumption that unloading is included within the delivery required of the carriers. Substantially all the evidence militates against this conclusion. The proposed report is factually in error in its conclusion at sheet 14 that the transportation obligation of the carrier ends when the freight is placed on the floor of the pier. At that point, the freight remains in the carriers' possession and receivers do not yet have a right to take it away. The actual delivery has not yet been begun.

The delivery of freight consists of the transfer of its possession from the carrier to the receiver. At the pier stations, after the unloading is completed and the freight stacked on the pier floor, the particular packages for particular receivers must be ascertained, counted and signed for in order to transfer the possession and custody of the freight to the receiver and thereby to terminate the carriers' obligation with respect to it. None of these activities are [fol. 823] a part of the unloading and none of the costs incurred by the carriers in making the delivery are included in the costs on which respondents rely to justify the charges.

The proposition adopted in the proposed report is further shown to be incorrect in its reliance upon the sorting and stacking charges assessed on the piers. Like the unloading, the sorting and stacking is performed prior to delivery. Like the unloading, it must be completed before the carriers have completed their obligation under the line-haul rates. The sorting and stacking is, morever, necessary to the kind of delivery requested by the receiver. The sorting and stacking is performed, normally, in the course of the unloading. It is performed by the same employes who perform the unloading and is intrinsically a part of the unloading operation. The proposed report erroneously assumes that the freight is originally stacked indiscriminately on the station floor. At Philadelphia the sorting is universally performed as a part of the unloading. At New York it is normally a part of the unloading and it is only when the receiver requests sorting after the freight has been stacked on the pier that there is a second handling of the freight

(Tr. 333-334). The normal procedure at both New York and Philadelphia is that the freight is sorted by the unloading gang while it is being placed on the station floor. The [fol. 824] entire argument adopted in the proposed report tending to show that the unloading is a part of the delivery applies equally to show that the sorting and stacking is a part of the delivery.

In fact, the unloading of the cars is separate from delivery and is an accessorial service beyond the service contemplated by the line-haul rates in the same way as is the sorting and stacking. The same reasons which justify and require separate charges for sorting and stacking justify and require separate charges for unloading. The only possible difference between the two services so far as this issue is concerned is the fact that an unloading service without sorting may be less onerous than an unloading service with sorting. Both unloading and sorting, however, and the station platform delivery which they provide, are substantially more onerous than the normal team track or on private siding delivery contemplated by the rates.

Thus, irrespective of the major conclusions on which the decision should rest, the proposed report is incorrect even on the narrow ground on which it stands. As will be shown in the succeeding sections, the decisive considerations bearing on this issue show clearly that the unloading charges are just and reasonable.

[fol. 825] 3. The Line-haul Rates Do Not Contemplate Unloading

The most important of the decisive considerations in determining whether it is reasonable to assess additional charges for the unloading is the rate question as to whether the rate structure contemplates the unloading service. In fact, it does not. As shown in Exhibits 7 through 12, the same rates or the same basis of rates applies on all this traffic throughout Official Territory and in no case do the carriers perform an unloading service under the line-haul rates. There was a time in the past when the carriers did perform the unloading of the cars at a number of specified points within the territory but that practice has been progressively restricted, the last points at which a free unloading

service was provided being New York and Philadelphia. Not only do the rates on this traffic not include unloading but there is no carload traffic terminated anywhere in Official Territory on which carriers perform the loading or unloading of carload freight except at New York. There is no sound basis, therefore, either in the rates or the rate history, for the conclusion that these rates contemplate or require an unloading service.

In a number of proceedings before this Commission in which the level of the line-haul rates was in issue, carriers [fol. 826] have included in their evidence an explanation of the unloading service at those points where it was then performed. In none of those cases, however, is there any recognition in the Commission's decision that the unloading service affected the Commission's decision or the level of the rates. Obviously, in view of the fact that the same rates or the basis of rates have always applied irrespective of the unloading, there is no justification for the assumption that the unloading service ever had any material effect upon the level of the rates.

4. The Physical Condition of Delivery Facilities Justifies the Charges

The treatment in the proposed report of the issues as to the condition of delivery facilities nowhere faces the question squarely but wholly confuses the question as to availability of other facilities and the separate argument as to the identity of unloading and delivery. The fact is, as shown by the evidence, that the alternative facilities, both at Philadelphia and New York, are fully adequate and that the charges are applicable and are paid only by those receivers for whom the charges are fully justified by the benefits derived from the service.

Beginning first at Philadelphia, the evidence shows that the stations at which the bulk of the fresh fruit and vege- [fol. 827] table traffic are delivered are located 3.5 and 4 miles from the market to which it is destined and that they provide both platforms where the carrier unloads and of team tracks where the receivers unload. The Examiner found with respect to the team track facilities that "there is no indication that these facilities are inadequate to ac-

commodate the fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such services. However, team-track delivery is not desired for fruit, the auction facilities being more desirable" (Sheet 22). Thus, at Philadelphia, there is no issue as to the adequacy of the alternative facilities provided and receivers are at liberty to designate either the station platforms or the team tracks as the place at which the freight should be delivered. The unloading charges apply only to those shipments as to which special services are performed at the receiver's request.

The situation at New York is not materially different. The proposed report should have made the same findings with respect to the New York traffic as those quoted above with respect to the Philadelphia traffic. The pier stations at New York are located near Washington Market to which the freight is ultimately destined, and the team tracks are located at distances ranging between 1.5 and 4 miles, including both the New Jersey and Manhattan team tracks. [fol. 828] Nowhere in the entire record is there any evidence that these team tracks are inadequate. Nowhere is there any evidence that anyone desiring team track delivery has been denied such facilities. The evidence clearly shows that at New York, just as at Philadelphia, team track delivery is not desired for fruit, the station facilities being more desirable.

Carriers have an obligation to deliver freight at reasonably convenient points considering all the circumstances surrounding the physical conditions at the destination. The proposed report agrees with the contentions of protestants that the entire New York metropolitan area is a single unit and should be treated as such. Protestants and the proposed report also agree that it is wholly impracticable to expand present team tracks on Manhattan Island. The record shows clearly the reasons why new team track facilities, if any were needed, should be erected in New Jersey rather than on Manhattan. The more important New Jersey team tracks, Henderson Street and Pavonia Avenue, are much nearer the produce market than the team tracks at Philadelphia and even the most distant team tracks at New York or no more distant than are the team tracks at

Philadelphia. Thus, even if there were a demand for team track deliveries which could not be met by existing facilities on Manhattan Island, the New Jersey team tracks provide [fol. 829] a reasonable and adequate facility for the receipt of freight destined to Manhattan.

It has been suggested that the use of New Jersey team tracks will result in highway congestion. The same objection may be made to any team track delivery. Present team track, both in Philadelphia and in Manhattan are all located at a distance equal to or greater than the distance from the market than are the New Jersey team tracks.

Further, the proposed report has relied on a pseudo-Section Six argument in its contention that shipments billed to New York, N. Y., must be delivered at that point. Even if that argument were valid, it would not be material to the issue here. The issue in this proceeding relates only to the question whether carriers have made available reasonable facilities for the receipt of freight. It is immaterial to that issue whether such facilities are located within the political and geographical limits of the billed destination or not.

The argument applies only to the question as to the terms of the tariff description of "New York, N. Y." Were there any need for a revision, the tariffs could readily be amended to show that the New Jersey team tracks have facilities available for traffic billed to "New York, N. Y." So long as the facilities are made available and are reasonable under all the circumstances, the carriers' obligation is fulfilled.

[fol. 830] The discussion as to the failure of the respondents to make the freight "accessible" to receivers in cars on car floats is relevant in this proceeding only as it relates to the adequacy of facilities. Obviously, freight may not be made accessible to receivers both in the cars and on the station platform. The proposed report itself recites the fact that if these stations are to continue as public facilities the unloading must be performed by the carriers. The receivers have the option either to unload the freight themselves on team tracks or to take delivery on station platforms with the expectation that the freight will be unloaded by carriers.

The carrier is obliged to maintain such facilities as are necessary to meet the needs of the shipping public. Where

the circumstances are such, as at Philadelphia and New York, as to require the maintenance of a public station, the carriers must provide service for all who desire it without discrimination. They cannot, moreover, be required to convert their public stations into private warehouses. Where the public demands and desires station delivery, a delivery of that kind is provided to all who ask for it. The carriers, however, are not obliged to turn over possession of their public facilities either to individuals or groups of individuals. Yet only by converting their public stations into private warehouses could the carriers lawfully permit [fol. 831] receivers to perform their own unloading and then only onto leased space on these platforms. *Freight Forwarding Investigation*, 229 I. C. C. 201.

In substance, accordingly, receivers are not entitled, as a matter of right, to the special kind of delivery provided at these stations. They are entitled to reasonable facilities. The team tracks in Manhattan, Jersey City and Philadelphia fully meet all the reasonable requirements of the receivers under all the circumstances of the case. Even where the facilities are not adequate to handle all the traffic seeking them, they may still be adequate if the circumstances show that the carrier has done all it may reasonably be required to do in order to provide such facilities. *Constructive and Off-track Freight Stations*, 156 I. C. C. 225; *Tulsa Traffic Asso.* v. *St. L.-S. F. Ry. Co.*, 49 I. C. C. 644, 647.

Further, carriers are not required to provide the same facilities at all stations. Thus, the fact that team tracks serving Manhattan are not located immediately adjacent to the piers and the fact that some are located in New Jersey does not tend to show that the present facilities are inadequate. *Palmer's Dock H. & P. Board of Trade* v. *Penn. R. R. Co.*, 9 I. C. C. 61, 66-7; *National Asso. Waste Material Dealers* v. *D. L. & W. R. R. Co.*, 98 I. C. C. 606, 612.

[fol. 832] The obligation of carriers is to provide adequate facilities. The evidence in this case shows that there is no unsatisfied demand for team track facilities either in New York or in Philadelphia. It shows that carriers have provided a service of substantial benefit to the receivers which receivers wish to have continued even at a charge, a service which is substantially more onerous than the alternative team track delivery, a service which has become so enor-

mously expensive that carriers may no longer absorb the cost. Under these circumstances the carriers have amply satisfied their obligation with respect to delivery in providing either the normal team track delivery without additional charge or the station delivery with the additional charges assessed.

5. The Custom of the Carriers Shows the Propriety of These Charges

An additional decisive consideration as to the reasonableness of the charges and the obligation of the carrier to provide station delivery is the custom of the carriers. The evidence shows that shippers have always loaded and unloaded carload freight except under unusual circumstances, that carriers performed the loading and unloading at a relatively few points and that they have, for the past 25 years, gradually eliminated all such free service, New York [fol. 833] being the only point remaining at which such service is performed without additional charges. Thus, both by tariff provision and in fact, carriers have gradually eliminated all such free service. Even if it might be said that there was at one time an occasional instance in which the loading and unloading was provided, the custom has certainly changed and the present custom is that charges are assessed for the service involved here.

6. The High Cost of the Unloading Service Precludes Its Continuance Without Additional Charges

In many instances carriers have, over the course of the years, and in response to the needs and convenience of their patrons, provided additional services. When conditions permit such services to be performed at relatively low cost, the carriers may reasonably be expected to continue them. Where, however, circumstances so change as to increase the cost of the special services, the carriers are reasonably entitled to assess charges for such special services. In this instance, the costs of providing the service have become enormous, particularly when added to the unusually high costs of the remainder of the terminal service at these two points. The cost of providing the special services should be borne by the receivers who benefit from it rather than by the general public.

[fol. 834] 7. The Charges are Justified by Their Effect on the Movement of Traffic.

There is some language in the proposed report which tends to indicate a conclusion that traffic has been diverted to motor trucks as a result of these charges. The contrary is the fact. It is shown elsewhere in these exceptions that the unloading charges have not resulted in a diversion of traffic from these stations. In fact, the evidence indicates that the station delivery has tended to promote the movement of traffic to these stations rather than to divert it even when charges are assessed for the unloading service.

C. The Issue Under Section 3 of the Act.

In his "Findings and conclusions", the Examiner concludes that "Upon further hearing the Commission should find that the charges under consideration * * * are also in violation of section 3(1) of the act." There is nothing in the "Findings and conclusions" to support that conclusion, but the following appears on Sheet 24:

> "Nor can it be successfully argued that the through rates in effect prior to November 1, 1948, did not include the charges for the unloading of the freight by respondents, because respondents have continued to perform such unloading without charge in respect of other commodities at the identical New York [fol. 835] pier stations at which charges are collected for unloading fruits and vegetables. For instance, canned fruit juices originating at points in Florida are unloaded without additional charge, other than the line-haul rate, at the same New York piers at which charges are collected for unloading fruits and vegetables. As there is keen competition between fresh fruits and fruit juices in household consumption, the assailed unloading charges are unduly prejudicial to fresh fruits and unduly preferential of fruit juices in violation of section 3(1) of the act."

In its decision in this case, the Commission said (page 662):

> "Protestants allege that sections 2 and 3 of the Interstate Commerce Act would be violated if charges are made for unloading fresh fruits and vegetables at

the respective piers, while continuing the free unloading of other commodities at the same locations. Circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables. * * * On this record it has not been shown that there would be violations of either sections 2 or 3 of the act."

The failure of protestants at the first hearing to establish the similarity of circumstances and conditions [fol. 836] necessary to support a finding of undue prejudice and preference was not corrected at the rehearing. Only bare allegations of the existence of competition among commodities were made—the same sort of general allegations as were made at the first hearing. Although protestants were put on notice as to their failure, they either were unable to, or chose not to, come forward with the required proof. Certainly, the Examiner cites no such proof anywhere in his proposed report.

Aside from the question as to the intrinsic merit of these conclusions, it is clear that the proposed report would create more discrimination than it would cure. Throughout Official Territory carriers assess rates made on the same basis as the rates to Philadelphia and New York, yet it is only at New York that other freight is unloaded without additional charges. If these charges were discontinued these same commodities would be unloaded at the pier stations and no comparable service would be provided at any other stations in all of Official Territory. Certainly the competition between fresh fruits and vegetables unloaded at these stations with fresh fruits and vegetables delivered at other stations is much more severe than the alleged competition between fresh and canned fruits and vegetables. At Philadelphia the discontinuance of these [fol. 837] charges would result in the free unloading of this class of traffic alone, all other carload traffic being unloaded either by the shipper or at an additional charge.

The Commission has repeatedly held that general declarations as to the competitive relationship of commodities will not support a finding of undue prejudice. For example,

in *Barrett Co.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 172 I. C. C. 319, 333, the Commission said:

> "While undue prejudice and preference may be established by a preponderance of evidence, the evidence must be such as to make reasonably clear how and where the prejudice and preference result from a rate maladjustment of which complaint is made. They may not be assumed or left to mere inference. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue prejudice and preference."

The Commission has consistently adhered to the principle enunciated in *Barrett Co.* v. *A. T. & S. F. Ry. Co. supra*, the more recent decisions citing that case being: *Rockford Brick & Tile Co.* v. *C. & N. Ry. Co.*, 251 I. C. C. 237, 238; *J. G. Hoffstot* v. *Monongahela Ry. Co.*, 248 I. C. C. 248, 254; and *Traffic Bureau, Lynchburg C. of C.* v. *C. & O. Ry. Co.*, 234 I. C. C. 765, 768.

[fol. 838] Other than asserting that competition exists between the commodities, protestants made no actual showing of competition and offered no evidence to indicate that the alleged prejudice suffered by protestants is a source of positive advantage to their alleged competitors. It has long been an established doctrine of the Commission that such evidence is necessary to support a finding of undue prejudice. In *Sand, Gravel and Crushed Stone from Ind. and Ill.*, 181 I. C. C. 373, 393, the Commission said:

> "We have repeatedly held that undue prejudice within the meaning of the act ordinarily requires the prejudice suffered by one party to be the source of positive advantage to the one alleged to be preferred and that a competitive relation exists between the parties concerned."

And recently, in *Kohler Co.* v. *Alton & S. R.*, 263 I. C. C. 667, 672, the Commission declared that:

> "Preference and prejudice are not prohibited unless they are undue, and to be undue they must be shown

to be a source of advantage to the parties or the traffic alleged to be favored and detrimental to the other parties or traffic. General declarations of the character herein presented as to competition unsupported by evidentiary facts are not sufficient. Preference [fol. 839] and prejudice must be proved by clear and unmistakable evidence, and may not be based upon theory or assumptions. *Hoffstot* v. *Monongahela Ry. Co.*, 248 I. C. C. 248, and decisions therein referred to."

Protestants stated during the hearings that competition existed between citrus fruits and other food products, such as citrus fruit juices, canned juices, vegetable juices, canned fruit and dried fruit. In answer to this it is sufficient to cite the decision in *Fort Smith & W. Ry. Co.* v. *A. T. & S. F. Ry. Co.*, 216 I. C. C 411, 433, wherein the Commission said:

"Complainants claim also that the denial of the transit privilege on canned goods and dried fruits while the arrangement is accorded to several other highly competitive food products in the all-rail service results in undue prejudice to the former and undue preference to the latter. They point out that the privilege is denied on tomato juice, on canned fruits used for desserts, and on canned beans and fresh canned string beans, but granted on citrus-fruit juices, dessert preparations, and on dried beans, although it is claimed the several commodities compete with each other. Complainants have not shown the extent and effect of such competition. They have presented no evidence concerning the [fol. 840] relative value of these commodities or the rates applicable thereon. Nothing is shown as to the volume of movement or transportation characteristics. *The mere fact that a commodity competes with other specified commodities, without evidence as to the transportation characteristics of the alleged preferred commodities, is insufficient to support an allegation of undue prejudice. Art Marble Co.* v. *Atlanta & W. P. R. Co.*, 167 I. C. C. 34. * * * Preference, to be unlawful, must be undue, and prejudice to one commodity, to be undue, must be such that it shall be a source of positive

advantage to another. *Indianapolis Board of Trade* v. *Baltimore & Ohio R. Co.*, 129 I. C. C. 675. Here no such showing has been made and the mere statement that the commodities are competitive is insufficient to support the allegation." (Emphasis supplied.)

In *Jacksonville C. of C.* v. *Atlanta & W. P. R. Co.*, 211 I. C. C. 509, 514, the Commission stated:

"Only as to cottonseed oil did they touch upon competition between complainants and users of the commodities at certain points in Georgia, and then only to the extent of asserting that competition existed. Such evidence is not sufficient on the question of competition."

It has been the policy of the Commission, in considering issues of undue preference and prejudice, to view the question in a practical light and to require evi- [fol. 841] dence with respect to the nature, value, similarity and use of the commodities involved in such issues. The attitude of the Commission is well expressed in *American Agricultural Chemical Co.* v. *Aberdeen & R. R. Co.*, 225 I. C. C. 610, 628, wherein it is said:

"Questions of undue preference, whether between persons, localities, or commodities, must be treated practically and not from a narrow viewpoint. The statute does not contemplate that all commodities having one or more like constituent elements in varying degrees must take the same rates. There must be sufficient similarity between them to make them competitive in the same market and that competition must be commercially important. The purposes for which the commodities are produced and generally used, the extent of their interchangeability, and their relative money and inherent values, are cogent facts to be considered in determining whether there is such competition. The competition must also be substantial and cause injury to complainants."

Protestants have failed to present the proof required to support a finding of undue prejudice and preference.

Furthermore, it should be noted that, at Philadelphia, the carriers have, since the first hearing, established unloading charges on freight generally.[7] As to New [fol. 842] York, as the Examiner states (Sheet 3), "consideration is being given to the establishment of unloading charges on traffic other than fresh fruits and vegetables, but * * * as yet no definite conclusion in respect of such action has been reached."

Accordingly, the unloading charges are not unlawful under Section 3 of the Act.

D. The Rehearing on June 4 and 5, 1951.

The Examiner's "Findings and conclusions", discussed in full under Sections II-A and II-B hereof, make no reference to, and are in no way based on, the team-track versus station cost evidence received at the rehearing on June 4 and 5, 1951. While the Examiner's conclusion rests entirely on matters unrelated to such evidence, it should be discussed herein because it was called for by the Commission's Notice dated October 10, 1950. The significance of such evidence is that it disposes of protestant's contention (which we submit is irrelevant in any event) that the handling of fresh fruits and vegetables at stations is cheaper than at team tracks and that, accordingly, the railroads should unload free at stations. The fact is that station handling is more expensive than team-track handling. The new evidence also shows that the cost of the un- [fol. 843] loading operation has increased materially since the Commission's decision in 1948.

1. The New Evidence.

In response to said Notice, the railroads presented evidence in great detail showing "the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team tracks on Manhattan Island and in Jersey City, N. J." and similar evidence with respect to costs at Philadelphia.

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[7] Supplement 151 to Agent C. W. Boin's tariff I. C. C. No. A-848.

The railroads' cost studies show that it costs far less to handle carloads of fruits and vegetables at team tracks than at stations. For example, on the Erie (Exhibit No. 146), the cost per loaded car at the 28th Street team track on Manhattan is $45.44 as compared with $46.00* per loaded car (exclusive of the cost of unloading) at the Duane Street Piers. On the New York Central (Exhibit No. 150), which has the most extensive team tracks on Manhattan Island, the team track cost per loaded car is only $22.30, as compared with $38.02 or $43.94, depending on the route of movement, per loaded car (exclusive of the cost of unload-
[fol. 844] ing) at Pier 17. Similar results are shown for Philadelphia. For example, on the Pennsylvania (Exhibit No. 149), the total cost per car unloaded at the Produce Terminal (including cost of unloading) is $109.36, compared with only $39.64 for regular team track handling. On the Baltimore and Ohio (Exhibit No. 152), the total cost per car unloaded at the Auction Sales Platform (including cost of unloading) is $75.94, compared with only $27.66 for regular team track handling.

While the total costs shown in these studies vary depending upon the methods used in computing the costs and conditions local to the various lines, they show clearly the salient facts requested in the Commission's Notice, viz., the differences in the cost of station delivery as compared with team track delivery.

The composite cost of handling fruits and vegetables, including unloading, for all pier stations on Manhattan Island during the year 1950 was $90.11 per car (excluding Jersey City waterfront expenses). The composite cost of handling fruits and vegetables at all team tracks on Manhattan Island during the year 1950 was only $30.40 per car (also excluding Jersey City waterfront expenses). See Appendix A hereto. Thus, the actual facts are that the cost per car for pier handling in 1950 was $59.71 more than the cost of handling at Manhattan team tracks. This
[fol. 845] excess cost is 173% of the unloading revenue per car collected under the tariff, using the Erie's revenue

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*Certain insignificant changes in this figure were discussed at the hearing.

as typical. The Record shows that the Erie's average revenue for unloading for the year 1950 was $34.45 per car ($685,088 ÷ 19,885, page 2, Exhibit No. 155).

The railroads' cost studies dispose completely of protestants' contention that the railroads ought to unload free at stations because of a claimed saving from the use of stations as compared with team tracks. This claimed saving just does not exist.

The protestants did not seriously challenge the accuracy of the railroads' cost studies, but attempted to rebut them through a survey by Ford, Bacon & Davis, Inc. (Exhibit No. 158). The instructions given that firm were to study "the cost of expanding and operating railroad team-track yards on Manhattan Island to handle the fresh fruit and vegetable traffic normally unloaded at pier stations." (Exhibit No. 158, page 1.)

The simple difference between the railroads' cost studies and the Ford, Bacon & Davis survey is that the former are based on the actual handling of existing business in accordance with existing practices in the trade, while the latter is based on the imaginary handling on Manhattan team tracks of all business now handled on the piers.

The basic fallacy of the Ford, Bacon & Davis survey is [fol. 846] that it assumes, contrary to the fact, that team-track delivery would supplant pier delivery if the railroads had more team tracks on Manhattan Island. The Record shows that such would not be the case.

As pointed out in Section III B hereof, the trade wants pier delivery, rather than team-track delivery, because of the benefits that go with pier delivery. These benefits exist wholly apart from the number of linear feet of team tracks on Manhattan Island, and the construction of additional linear feet would not change those benefits. For such reason, the piers would continue to be used whether or not the imaginary team tracks of Ford, Bacon & Davis were constructed.

Respondents' existing team tracks on Manhattan Island are now adequate to handle all of the fresh fruits and vegetables that the trade wants handled on team tracks,

and there is not one bit of evidence in this Record to the contrary. Although the trade today has the option of team-track delivery or pier delivery, protestants failed to show even one request for Manhattan team-track delivery that the railroads could not fill. The Ford, Bacon & Davis survey itself shows that the volume of Manhattan team-track deliveries of fresh fruits and vegetables is substantial, being 14,833 carloads in 1950. (Exhibit No. 158, Appendix No. 20.) The unloading charges, of course, [fol. 847] do not apply at team tracks where the consignees perform their own unloading.

That survey also shows that the existing team tracks of respondents on Manhattan Island have at present a working capacity substantially in excess of the total use now made of them, even on "peak days" with an allowance of 50% for holdovers from the previous day. Taking the Pennsylvania, Erie, Baltimore & Ohio and New York Central together, these railroads have an existing Manhattan team-track capacity of 541 cars (Exhibit No. 158, Appendix No. 19—line 12, as modified by explanation of lines 12 and 13 on page 17 of Exhibit No. 158), with "peak day" receipts of all freight (fresh fruits and vegetables and all other freight) of only 226 cars (line 2). Allowing for holdovers of 50% from the previous day gives 130 cars (line 10) which, when added to the "peak day" receipts of 226 cars, makes 356 cars. Subtracting 356 cars from 541 cars leaves 185 cars, which represents the excess capacity of existing Manhattan team tracks even on a "peak day" basis with a 50% allowance for holdovers. Actually, this figure is too low since the "peak days" are not the same on all railroads and prudent operating practices could level off the "peak days" as required if volume at any time approached capacity. But even on the basis assumed by Ford, Bacon & Davis, it appears that the respondents [fol. 848] today have substantial unused Manhattan team-track capacity available for the fruit and vegetable trade if additional team-track deliveries were desired.

Under such circumstances, it serves no useful purpose whatsoever to imagine the construction of additional Manhattan team tracks which are not needed or wanted. Ac-

cordingly, the Ford, Bacon & Davis survey is without meaning in this case.

While the Ford, Bacon & Davis survey has no bearing on the issues in this case, some comments about its failure to prove what it purports to prove can be made. It should be noted that the Examiner fails even to mention the infirmities of the survey.

In the first place, it can be noted that the cost of delivery of fruits and vegetables, including unloading, at pier stations during 1950, exceeds substantially what would be the composite of team-track delivery if all cars of fruits and vegetables handled at piers on Manhattan during 1950 were handled on team tracks, even when computed on the basis of the imaginary costs shown by Witness Poor's Exhibit No. 158. In Appendix C hereto, there is computed the composite cost of all cars of fruits and vegetables handled at team tracks and piers on Manhattan during 1950 by adding to the cars handled at pier [fol. 849] stations for each railroad the actual cars handled at its team tracks on Manhattan. The result shows that the composite cost of team-track delivery computed even on the basis used by Witness Poor is only $70.07 per car, or $20.04 less than the present cost of pier delivery of $90.11 as shown in Appendix A hereto.

In the second place, as far as the Erie is concerned, it can be pointed out that Ford, Bacon & Davis were able to arrive at relatively high costs per car at their imaginary expanded team tracks on Manhattan only by (1) including extensive viaducts, at sole railroad expense for construction and maintenance, to carry 11th Avenue over the expanded yards; (2) making the Erie's expanded yards big enough to handle vegetable traffic, formerly handled at the Erie's piers but now handled on New York Central team tracks; (3) making the Erie's expanded yards big enough to handle fruit traffic, formerly handled at the Erie's piers but now handled on the Pennsylvania piers, and at the same time providing for such traffic in the expanded team tracks of the Pennsylvania, and (4) including in the assessed valuation for New York City real estate taxes the value of buildings and fixtures, and demolition

cost thereof, which would have to be torn down to make room for the expanded team tracks.

[fol. 850] Because of the imaginary nature of the expanded team tracks, the Erie has not undertaken to evaluate in dollars all of the excessive costs in the Ford, Bacon & Davis survey. However, Appendix D hereto shows that item (1) above alone amounts to $20.67 per car for the Erie Railroad.

As to the Pennsylvania, the Ford, Bacon & Davis survey is based upon wholly imaginary and fallacious assumptions of fact as shown in the figures in Appendix E hereto, in which the assumed costs of that survey are recomputed on a more realistic basis. These figures are not submitted as a statement of actual or even probable costs. They are submitted only to show that the Ford, Bacon & Davis survey is wholly unreal.

The Ford, Bacon & Davis survey rests on assumptions as to the team track capacity which would be required to handle the traffic which might seek team track delivery on Manhattan if there were no pier delivery. It makes two wholly unfounded assumptions as respects the Pennsylvania in assuming a diversion from Henderson St., Jersey City, of 35 cars and in making an arbitrary and unexplained addition of 30 cars. Since the survey itself shows in Appendix 4 that the volume and proportion of freight unloaded at Henderson Street has expanded over the years [fol. 851] unaffected by unloading charges, the only justifiable assumption is that if the pier stations were discontinued the greater portion of the traffic would seek Henderson St. team tracks rather than the team tracks at 37th Street.

As to the actual volume which might be expected to be unloaded at 37th Street if the pier stations were discontinued, respondents submit that capacity for receipts of 120 cars per day fully meets the Pennsylvania's obligations. That figure compares with the 1950 daily (excluding Saturdays, Sundays and Holidays) average of only 68 cars (16939 ÷ 250; Exhibit No. 158, Appendix 20). Carriers are not obliged to maintain facilities to care for sudden and unusual spurts in demand. It is sufficient if they maintain such facilities as will be utilized with uniformity and regu-

larity throughout the year, *Montana W. & S. R. Co.* v. *Morley*, 198 Fed. 991, 998; *Logan Coal Co.* v. *Penna. R. R. Co.*, 154 Fed. 497.

On the basis of the assumption that 120 cars might be diverted from the pier station and making the same assumptions as are made in Exhibit 158, Appendix 19, as to holdovers and other traffic, the total capacity needed at 37th Street would be 195 cars and the additional capacity would amount to 65 cars. It should be noted that these figures are just as defensible as the figures in the Ford, Bacon and Davis survey, but it is impossible to predict [fol. 852] what changes in operating practices might result from a discontinuance of the pier stations. It is safe to assume, however, that the Pennsylvania, as well as the Erie, would not undertake the enormously expensive construction contemplated by the survey.

However, on the basis of this assumption of a need for an additional capacity of 65 cars and proceeding along the lines of Exhibit 158, it might be assumed that the tracks contemplated in the survey bordering on 12th Avenue, comprising parts of lots 1088, 685 and 684 might be considered necessary if the pier stations were discontinued.

The computations as to the resulting costs, on an assumed receipt annually of 16,900 cars (present handling at pier stations) appear in Appendix E hereto. That computation shows that the fixed charges for the new team tracks would be $8.10 per car and not the figure of $64.07 in Exhibit 159. Using that figure for fixed charges and assuming that direct operating costs would remain the same, the cost of team track delivery for added traffic on the Pennsylvania would be $43.04 below the present cost of pier station delivery including unloading.

The Ford, Bacon & Davis survey is based on an assumption of the construction of team tracks under conditions resulting in enormously high costs. The great bulk of the cost for the additional team tracks [fol. 853] as computed in the survey, are the cost of viaduct, ramps and bridges to avoid interference with existing streets and railroads in the lots chosen in the study for new team tracks. If the team tracks were placed in lots 1088, 685 and 684 or similar locations where such structures

are avoided, the cost would be enormously reduced. It is perfectly absurd to assume that if carriers were to construct additional team tracks, such team tracks would be located on property which would require the use of such amazingly expensive construction as is assumed in the Ford, Bacon & Davis survey.

Thus, while the Ford, Bacon & Davis survey is based on a wholly imaginary and fallacious approach, even on the basis of that approach, a realistic treatment of actual conditions shows that the cost of team track delivery is lower than pier station delivery by more than the amount of the unloading charges.

Therefore, not only is the Ford, Bacon & Davis survey wholly imaginary in nature and without meaning in this case, but its allegations of costs are, on their face, subject to serious objections.

2. The Examiner's Charge of Non-Compliance.

The Examiner, in support of protestants' argument, makes the serious charge that (Sheet 11) "respondents have failed to respond in any substantial way to [fol. 854] the terms of" the Commission's Notice dated October 10, 1950, claiming that the railroads should have presented a study showing what it would cost them to construct and operate imaginary team-tracks on Manhattan Island if there were no piers. In other words, the Examiner charges that the railroads should have made a hypothetical study of the same type as the imaginary survey made by Ford, Bacon & Davis. There is no basis for such charge.

The language of the Commission's Notice is clear and simple. It says that the railroads will be expected to present evidence to show the "difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team tracks on Manhattan Island and in Jersey City, N. J." This language is entirely in the present tense, contains no verbs in the subjunctive tense, makes no suggestion that any assumptions should be made, and relates entirely to the existing costs of handling existing business. The Notice

goes on to state that "such evidence" should show, among other things, (1) "the difference in, and cost of, switching services required on cars accorded pier delivery and those accorded team-track delivery" and (2) "any difference in costs resulting from the fact that pier delivery does not re- [fol. 855] quire an investment in team-track facilities." Again, the language of the two specifications, relating back to "such evidence", deals wholly with the present, contains no verbs in the subjunctive tense, makes no suggestion that any assumptions should be made, and relates entirely to the existing costs of handling existing business.

The following sentence, relating to Philadelphia, and using the present tense "exist" and the expression "similar evidence", makes the meaning of the Notice abundantly clear:

> "Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences."

The railroads' evidence, which sets forth separately the costs of handling fresh fruits and vegetables at Manhattan piers, at Manhattan team-tracks[9] and at Jersey City team-tracks, show simply and clearly the "difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team tracks on Manhattan Island and in Jersey City, N. J.", including "the [fol. 856] difference in, and cost of, switching services required on cars accorded pier delivery and those accorded team-track delivery" and "any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities."

It is interesting to note that the Examiner does not charge the railroads with a failure to present a study showing the

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[9] In 1950, 14,833 carloads of fresh fruits and vegetables were handled on Manhattan Team-tracks (Ex. No. 158, Appendix No. 20).

hypothetical costs of handling fruits and vegetables on imaginary team-tracks at Jersey City—where costs would be substantially less than on Manhattan—, although it is obvious that if the railroads failed, such failure occurred equally at both locations.

The Examiner's charge of non-compliance is particularly difficult to understand in the light of what transpired at the pre-hearing conference on November 8, 1950, at which the same Examiner presided. There was a great deal of discussion relating to the time which should be accorded the railroads to study the time consumed at existing yards (page 17), value of real estate comprising existing yards (page 17), cost of handling traffic from Jersey City (page 19), cost of pier operations (page 19), switching operations (page 20) and the like—all relating to existing operations. Not one word was said, or inference raised, at the pre-hearing conference to the effect that the Commission's Notice required any hypothetical studies of imaginary operations. [fol. 857] Protestants, in fact, claiming that the railroads were requesting too much time for the preparation of the necessary studies, charged that the railroads already "have these cost studies and have had them for several years, when this case was first heard in this building in 1947" (pages 13-14), that "it seems to me most of these figures are in the books today except the actual operating items" (page 20), and that "as to overhead items, the books are already complete, such as investment values and land values and things of that type" (page 20). Certainly, protestants could not have thought that the railroads could reach into their files and pull out hypothetical studies covering the costs of constructing and operating imaginary team tracks on Manhattan Island.

The Examiner himself says (Sheet 11):

> "The record shows that it would be impossible to expand rail facilities on Manhattan Island to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York. The high cost of land on Manhattan Island, and the time required for handling cars across float bridges during

periods of peak volume of traffic, would render team-track delivery impracticable."[10]

[fol. 858] The Examiner's construction of the Commission's Notice necessarily assumes, and we submit improperly, that the Commission would require the railroads to submit useless evidence relating to an impracticable operation. The law does not require the performance of a vain act (74 I. C. C. 461, 462). The Commission, in fact, has said that it is not concerned with "theoretical but seemingly impracticable conditions" (United States Pipe & Foundry Co. Terminal Services, 277 I. C. C. 727, 736).

It seems clear to us that protestants, sometime between the pre-hearing conference and the rehearing, conceived the strategic idea of charging the railroads with non-compliance with the Notice in an effort to lend some emphasis to the imaginary survey they retained Ford, Bacon & Davis to make.

Accordingly, there is no basis for the Examiner's charge that the railroads failed to comply with the Commission's Notice.

III. Miscellaneous Exceptions

1. Alleged Diversion.

The Examiner cites (Sheet 7) the claim of protestants that the unloading charges have caused the diversion of some traffic from the rails to the trucks. This claim is com-[fol. 859] pletely answered by Exhibits 137 and 138. For example, while rail receipts of citrus during 1949 declined by 34.6% in the Eastern District, as compared with 1947, the decline at New York amounted to only 14.1% and at Philadelphia only 12%, despite the unloading charges. For fruits and vegetables as a whole, the corresponding decline in the Eastern District was 22.8%, as compared with only 19% at New York and only 8.9% at Philadelphia. In 1950,

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[10] As shown in Section III B hereof, the trade does not want additional team-track deliveries on Manhattan Island in any event. The trade wants station delivery, rather than team-track delivery, because of the benefits they receive from station delivery.

the volume of citrus unloaded at New York piers remained substantially the same as in 1949, except for the diversion of approximately 4,000 cars to the boat line then operating (Exhibit 140).

2. Divisions.

The Examiner cites (Sheet 25) the position of protestants that respondents should seek higher divisions in lieu of the unloading charges. This position is unsound because divisional arrangements among carriers have little bearing on the reasonableness of rates charged the public for services rendered.[11]

In *Erie R. R. Co.* v. *Alabama & V. Ry. Co.*, 98 I. C. C. 268, the Erie was accorded a terminal allowance of 3 cents per 100 pounds (since increased under the *Ex Parte* cases) on transcontinental traffic delivered at piers or on team tracks [fol. 860] at New York City, but such allowance was granted on account of all the extraordinary heavy expenses east of Croxton yard in New Jersey, including switching and floating across the Hudson River. The Erie itself participates in this terminal allowance to the extent of 27½%, since it is deducted before prorating the line-haul revenue east and west of Chicago. To the extent, however, that the terminal allowance can be said to represent divisional recognition of the unloading, such recognition represents only a very small fraction of the unloading cost.

There is no terminal allowance at New York on traffic other than transcontinental, and there is no terminal allowance whatever at Philadelphia.

The suggestion of protestants that the Commission should take divisions into account in this proceeding is similar to the request made by certain parties in *Ex Parte* No. 168 (272 I. C. C. 695, 704-5) with respect to which the Commission said:

> "This request for broadening the issues to include the reasonableness of the divisions of the joint revenues accruing to the respective carriers from the in-

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[11] *Florida R. R. Commissioners* v. *A. & R. R. R. Co.*, 144 I. C. C. 603, 621 (1920).

creases authorized in the last 30 months would require a thorough and painstaking investigation into the lawfulness, under section 15 (6) of the act, of the respective divisions among the rail carriers of the many thousands of joint rates now in effect throughout the country. Such an investigation [fol. 861] would largely duplicate the issues being heard in other important pending proceedings that are being actively prosecuted and defended by individual carriers and groups of carriers. We need not cite them. We know by experience in such proceedings that under the law each is a major undertaking, and requires laborious and extensive painstaking correlation, analysis, and study of the facts as a basis for our determination. Enlargement of the scope of this proceeding to include inquiry into the justness, reasonableness, and equitable character of the divisions of joint rates generally, or even of the divisions of joint rates on a major commodity or commodity group, would so delay the progress of this rate proceeding as to defeat the ends of justice. This request, therefore, must be denied."

The payment by the public of charges for unloading carload freight has been approved by the Commission throughout the country generally, and no exception should be made at New York and Philadelphia.

3. Fair Treatment for the Port of New York.

Respondents are entirely in accord with the view that no action should be taken in this case, or any other case, which would result in disadvantage to New York as a port or favoritism to other ports, thus making "an island town out of New York City" (Tr. 1066). Most of the respond- [fol. 862] ents are heavily dependent upon export and import traffic through the Port of New York for sorely needed revenues. However, these unloading charges do not in any way affect, or relate to, export or import traffic through New York. There is no connection whatsoever between the perishable traffic destined to New York and the export and import traffic through New York. No relationship exists between the two. Respondents are unable, therefore, to see

how these unloading charges could possibly affect, one way or another, New York's export and import business. While we agree wholeheartedly that New York's export and import business should be fully protected, we submit that the unloading charges on fruits and vegetables could not possibly have an adverse effect on New York's status as a major port.

4. Cost to New York Consumers.

Protestants have also cited the total amount of the unloading charges at New York and have contended that they are borne by the consumers (Tr. 1065, 1182).

Respondents, of course, admit that the unloading charges are paid by someone, and we accept the view that the consumers pay them, just as the consumers in the final analysis meet the costs of all materials, labor and services which go into the production and distribution of everything that is [fol. 863] consumed. There is nothing special or unusual about the unloading charges in this respect. The desire to protect consumers is entirely understandable and commendable, but the mere fact that charges are paid by consumers does not make them unlawful. Otherwise, no charges for anything could ever be made. In this case, the pier delivery of perishables results in unchallenged benefits, and it is a fair inference that the benefits, as well as the charges, are passed along to the consumers. It can hardly be argued that the trade retains the benefits but passes on the costs.

Further, the unloading charges represent such a small part of the ultimate price that they are almost insignificant. For example, on oranges, the unloading charges are only $1.95 a ton, or less than one-tenth of one cent a pound. If housewives are paying more for perishables than they should, the explanation lies elsewhere. Furthermore, New York City is to a large extent dependent upon railroad transportation for its food supplies, some of which are hauled long distances, and for that reason has a vital interest in the maintenance of strong and financially sound railroads in accordance with the National Transportation Policy.

5. Plans for Washington Market.

This record contains so little data concerning the "plans" for the "rehabilitation" of Washington [fol. 864] Market that little discussion thereof is possible. We do know, however, that such "plans" were opposed by the Industry Committee for the Improvement of Washington Market (Tr. 1089, 1093), and that such Committee is composed of every single factor in the fruit and vegetable industry including wholesalers, receivers, auction companies, truckmen, loaders, purveyors, inspection services, cooperage companies, and union labor (Tr. 1051). The spokesman for that Committee stated that he was authorized "to present the views of the wholesale fruit and vegetable industry of this City" (Tr. 1050). In the face of such apparently united opposition, it seems hardly possible to contend that such "plans" would be adopted were it not for the unloading charges.

6. New Jersey Deliveries.

As to deliveries on the Jersey bank of the Hudson River, the responsibility of the railroads is to make such reasonable facilities available in Jersey as may be necessary to respond to the wishes and needs of the trade. If Jersey deliveries are desired, deliveries can be made there as far as respondents are concerned. The railroads profess no control over the industrial labor situation which was said to have resulted in a "complete breakdown" when "merchants began the practice of sending trucks over to the various [fol. 865] New Jersey railroad yards to pick up loads directly from team-track" (Tr. 1080). Unless this industrial labor problem is ironed out, it would seem that any possibility that the consignees, as stated by Mayor O'Dwyer, "would go over to the Jersey side and would make that the final unloading point" is somewhat remote. However, if it is ironed out, the flow of commerce within the Port of New York will be freed in the interest of those consignees who may desire Jersey deliveries.

7. Local Traffic and Labor Problems.

The objections stated by the Committee for the Rehabilitation of Washington Market were that the charges created labor difficulties and resulted in increased trucking from

New Jersey. As to the labor difficulties resulting, it is apparent that even if receivers transferred all the traffic to team track deliveries, only 250 out of 6,200 members of Local 202 would be affected (Tr. 1093-98).

Much more significant, however, is the fact that the question as to distribution of work between rival unions is not material to the issues here. A similar plea was presented to the Commission in *Port of New York Authority* v. *Baltimore & O. R. Co.*, 248 I. C. C. 165, in which the Port Authority unsuccessfully sought a finding that the differential in rates on grain from Buffalo to North [fol. 866] Atlantic Ports was unreasonable. The Port Authority there showed that not all the members of the union having jurisdiction over the loading of vessels were then employed. In disregarding that evidence, the Commission said:

> "* * * While we appreciate the difficulties of workers engaged in the handling of grain at New York, nevertheless under the law the greater public interest and the rights of the respective carriers must, as we view it, take precedence over the interests of groups of individuals. Moreover, it must be borne in mind that the loss to laborers at New York results in some gain to the laborers at Philadelphia and Baltimore. Furthermore, it is not the function of this Commission to see to it that work is equitably distributed through the adjustment of freight rates" (p. 181 of 248 I. C. C.).

Thus, the question as to the jurisdiction of unions and the distribution of union jurisdiction over the work of unloading railroad cars and loading trucks is not relevant to the issues here.

Witness Papa, as well as some others, also referred to the fact that deliveries on Jersey team tracks (and the same no doubt applies to deliveries on Manhattan team tracks although the latter were not mentioned) entail trucking from such team tracks to final destination and that such [fol. 867] trucking is expensive and causes traffic in the streets which would not otherwise be there (Tr. 1461, 1466). This is obviously so, except as trucking from team tracks supplants trucking from the piers which would otherwise

occur. The point is that any "trucking" disadvantages from team tracks further emphasize the benefits to the trade of pier delivery.

The problem of traffic congestion caused by trucks is not a new one to government, and there is no evidence herein that local police power is impotent to make such proper rules and regulations as may be required in the public interest. Obviously, that is a problem upon which no intelligent judgment can be formed on the evidence submitted on this record, involving complex local problems far beyond the scope of the powers of the Interstate Commerce Commission. The Commission cannot be blind to the problems of the local municipality. It cannot, however, determine the legality of these charges on the basis of their effect upon the motor vehicle traffic problems of the City of New York. It has in the past refused to consider that such issues were within the scope of its investigation. In *Handling Charges on Cement, Fertilizer and Salt*, 93 I. C. C. 640, 643, it was said:

> "While it is true that the Congress has expressed a policy looking to the development of [fol. 868] public terminals at port cities, it has not delegated to us authority to enforce that policy. The scope of our activities is limited by the terms of the interstate commerce act. It follows that unless the proposed charges are found to be in contravention of some provision of the act, it is beyond our power to condemn them * * *. Nor does it seem to us to have been contemplated that a policy of developing public terminals at port cities is to be carried out by imposing unnecessary expense upon shippers and traffic, which would defeat a policy of real terminal improvement."

However, the matter of trucking perishables from Jersey appears, at the moment, to be somewhat academic in view of the fact that the Union "met with the receivers and told them that effective a certain date we would not pick up any merchandise in New Jersey" (Tr. 1469). This witness also testified that "there is a constant stream of telephone calls and personal visits to my office to talk to me directly" by receivers "pleading" for the opportunity to "pick-up" in

New Jersey (Tr. 1470). What the remedy may be for these people who want Jersey delivery is not before this Commission for decision. While the extent of the "demand" for Jersey delivery cannot be determined in any detail from this record, it can be said that Jersey team tracks, as [fol. 869] well as Manhattan team tracks, are available as far as the railroads are concerned for those who elect to use them. For those who elect pier delivery, however, the usual rule, as stated by the Commission, should apply: "The general rule is that shippers must load or unload carload freight or make provision therefor at their own expense. Where the carriers perform this service a charge usually is made" (272 I. C. C. at p. 649).

8. The "Disability" of Respondents.

The Examiner's conclusions with respect to carriers' disability are completely incorrect and unsound. At sheet 23, for example, appears the following statement which seems to be the most complete and accurate statement on this subject in the proposed report: "The unloading of the freight by the carrier onto the pier platform is due to the physical inability of the carrier to make delivery of the freight to the consignee at billed destination, without performing such unloading. Such inability is clearly a carrier disability for which consignees should not be subjected to additional unloading charges."

The conclusion that there is a carrier disability in connection with this proceeding is completely unfounded. The fact is that the carriers' present facilities meet every demand of [fol. 870] the receivers. There is no evidence whatever anywhere in this proceeding that any receiver has requested or desired any type of delivery which carriers were unable to supply. It is therefore wholly erroneous to conclude that the pier stations result from a carrier disability.

The unloading is performed not because of any disability of the carriers but in order to provide the type of delivery which the receivers desire. The situation at New York is no different from that at any other point in Official Territory. In all instances where the receivers desire a station platform delivery, that kind of delivery is provided with an additional charge for the unloading service. The un-

loading is not performed in order to compensate for a carrier disability but to provide the type of delivery ordered by the receiver.

Further, even if the present team track facilities on Manhattan Island were inadequate to meet all the needs and desires of the receivers for such deliveries, the objection with respect to "billed destination" could be met by the simple device of changing the description of "New York, N. Y." in the tariffs to include the New Jersey team tracks. Such a change would be wholly proper since, as protestants so earnestly contend, the New Jersey area is part of the same metropolitan district as are the pier stations, the Man- [fol. 871] hattan team tracks and Washington Market. The New Jersey team tracks, moreover, are no further distant from the market than are the team tracks serving the market in Philadelphia. The New Jersey team tracks are the obvious and proper location for expanding team track facilities for patrons located on Manhattan Island. From the standpoint of the reasonableness of the rates and charges, a delivery in New Jersey is wholly practicable and proper.

The theory advanced in the proposed report wholly disregards the accepted right of carriers to limit the type of services and facilities provided at particular stations. Carriers are free to provide additional services at their discretion, subject only to the requirement that they provide reasonable alternative facilities without additional charges and that the charges for the special services do not result in prejudice or preference. If, in order to provide particular facilities or a particular service at a particular station, the carriers cannot practicably release the freight to the receiver before the special service is performed, the special service is not thereby appropriated into the line-haul rate. In *New England Coal and Coke Co.* v. *N. & W. Ry. Co.*, 33 I. C. C. 276, the complaint assailed separate charges for trimming coal loading into vessels on the [fol. 872] ground that the delivery of the freight to the consignee was an obligation of the carrier as a part of its line-haul service. The Commission found that that contention had no merit on the ground that a proper delivery could be made in a form and in conjunction with a service

which did not permit the consignee to take possession of the freight before the special service was performed. The language of the Commission is equally applicable here.

Further, it clearly appears that Manhattan receivers for many years, in increasing volume, requested delivery of their freight at New Jersey rather than on the piers. With respect to this very situation, the Commission has repeatedly found that where the receivers voluntarily took delivery at a location short of that which might have taken it, the carrier had fully satisfied its obligation under the rates. *S. Berger* v. *P. R. R. Co.*, 115 I. C. C. 697, *Long* v. *A. C. L. R. Co.*, 120 I. C. C. 601.

Even where the carrier required a change in the point of delivery from pier station to New Jersey team tracks, the Commission found that the change was wholly justified even though the rate remained unchanged. *Bahrenburg Bro.* v. *A. C. L. R. Co.*, 24 I. C. C. 560, *Onion Rates to New York, N. Y.*, 30 I. C. C. 528.

[fol. 873] 9. The Statement of the Burden of Proof.

A further error is the statement of the burden of proof at sheet 25 in requiring proof that the line-haul rates are "unfair." The Act requires only that charges be shown to be just and reasonable. It authorizes the publication of separate charges. The issue here relates only to the reasonableness of the charges under investigation. The standard as to whether the charges are "fair" to the carriers is not one authorized by the Act and is only remotely relevant to the issue of the reasonableness of the charges.

More importantly, the requirement that carriers show that the absence of a charge "is unfair to the respondents because of the inadequacy of the line-haul rates for the total services rendered" suggests that carriers must show that the rates are non-compensatory for the services rendered.

Even if the proposed report were correct in injecting the issue as to the line-haul rates into this proceeding, the most that respondents would be required to show would be that the total charges were just and reasonable for the services performed.

There is no valid support for the statement of the burden of proof adopted in the proposed report. As noted elsewhere herein, the respondents have fully met the only burden which can properly be required of them [fol. 874] in showing that the addition of these charges is reasonable in the light of the measure of the rates on these commodities at all other points in Official Territory.

10. The Cases Cited.

The cases on which the proposed report relies in support of its finding that the carriers are obliged to prove the reasonableness of the total charges do not support that conclusion. There is language in both *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, and *Fruits and Vegetables to Duane Street, New York*, 66 I. C. C. 135, which tends to indicate that where special services are performed carriers must prove the reasonableness of the total charges. Neither of those cases, however, were decided on the narrow issue presented here. In both of them the additional charges involved consisted of additional charges for a portion of the services necessary to bring the freight to the destination station. In this instance all the services in question are performed after the arrival of the freight at that station. They are, therefore, more remote from the line-haul services than were the services involved in those proceedings.

In view of the fact that the Commission established a contrary doctrine in the leading case on the point, *Loading and* [fol. 875] *Unloading Carload Freight*, 101 I. C. C. 394, these decisions cannot be said to be controlling at the present time. Throughout the period since 1925 when the present doctrine was established, the Commission has generally adhered to it and has uniformly approved the publication of new charges or advances in existing charges for loading and unloading carload freight wholly on the basis of the cost of that particular service.

The decision in *Allowances for Stacking*, 179 I. C. C. 780, concerned only the additional service of sorting the freight by brand and size. It found only that that service was not one which the carriers might lawfully grant an allowance. It was not concerned with the question as to whether addi-

tional charges for the other special services provided at these piers were lawful.

In *Unloading Lumber at New York Harbor*, 256 I. C. C. 463, the Commission specifically confined its decision to the particular unloading service involved in that proceeding. The unloading service was one performed in connection with east-bound lumber and was performed, not at destination, but in the course of the line-haul movement to the destination. In declining to approve the charges the Commission confined its decision to the peculiarities of the service then before it, saying "the nature and incidents of the unloading service here considered established beyond a [fol. 876] doubt that it is inextricably bound up with the line-haul service." The service in question here is not performed in the course of the forward movement of the freight but only after it has arrived at the destination station. There is, accordingly, nothing in that decision which supports the Examiner's conclusions here.

The decision in *Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673, specifically exempts from the implications of the language of that decision the loading and unloading of carload freight and says specifically that "a carrier cannot reasonably be compelled to absorb such charges."

Since all these decisions relate to services different from those involved here, all of which are much more closely associated with the forward movement of the freight from origin to destination they do not support the conclusions in the proposed report.

11. The Long Continuance of the Free Unloading Service.

In the summary conclusion at sheet 24 of the proposed report, it is recited that respondents have voluntarily provided the unloading service without separate charges for approximately 50 years, and the context of the report would indicate that the Examiner relied on this circumstance as a separate ground for his conclusion. The [fol. 877] length of time during which respondents have provided free service is of no substantial importance in considering the issues in this proceeding.

However long the respondents may have absorbed the

cost of these services, the issue as to the reasonableness of the charges assessed and the legality of the publication of separate charges remain unaffected. If the length of time were of importance, it could be justified only by a policy of freezing the present rate structure and forbidding adherence to the admonitions of the Commission to eliminate such additional services. Carriers have, moreover, frequently assessed new charges without a change in the service provided and have frequently discontinued special services without a change in the rates. New charges have been published and approved for redemption of passenger tickets (*Service Charge for Redemption of Unused Tickets*, 278 I. C. C. 447), for handling hand baggage (*Stopher* v. *Cincinnati Union Term. Co., Inc.*, 246 I. C. C. 41), for loading and unloading carload freight (*Loading and Unloading Carload Freight*, 101 I. C. C. 394), for switching at industrial plants (*Ex Parte* 104 Pt. II), and for use of carrier freight platforms and warehouses (*Allowances for Stacking*, 179 I. C. C. 780; *Freight Forwarding Investigation*, 229 I. C. C. 201).

Other new charges have been published and have become effective without suspension for loading and [fol. 878] unloading carload freight at Philadelphia, pick-up-and-delivery service and for passenger coach seat reservations.

In each of these instances, new charges became effective without change in the line-haul rates and without a change in the service provided. In each of these instances, the service for which a charge was assessed had been rendered without charge for many years. In each instance the service developed as an accommodation to the public or as a means of meeting competition and was continued over a period of years until the cost of performing the service became so great as to require that the free service be discontinued and separate charges be assessed. In each instance the carriers and the Commission justified the charge, at least in part, on the ground that the cost of such services should be borne by those who receive the benefit of the service rather than by the public as a whole.

Further, the carriers have in a number of instances discontinued particular services at particular stations. A

primary example is the discontinuance of pick-up-and-delivery service approved by the Commission in *Pick-up and Delivery Cancellation in New England*, 277 I. C. C. 745.

In all of these instances, the level of the total charges has been increased or the amount of service has been reduced without any change in the level of the [fol. 879] basic rates and fares applicable to the basic service. The only change has been the elimination of a portion of the existing service or the addition of new charges without a change in the service. It is the obligation of the carriers and the Commission constantly to review the practices and charges of railroads to distribute the burden of transportation costs more fairly among all users of railroad transportation. The length of time during which a special service has been provided for the benefit of a small portion of the shipping public is of little importance. To the extent that the proposed report gives any substantial weight to the length of time during which the free unloading service has been provided, it is in error.

IV. The Merits of the Case

1. These Unloading Charges are Consistent with the Trend Towards the Elimination of Free Unloading of Carload Freight and the Admonition of the Commission that the Carriers Should Assess Special Charges for Special Services.

The general rule is that shippers must load or unload carload freight or make provision therefor at their own expense. Where the carriers perform this service a charge usually is made. Rule 27 of the Consolidated Freight Classification provides in part as follows:

> [fol. 880] "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL rating or rates, except where tariff of carrier at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier."

In its decision in this case, the Commission said (272 I. C. C. 648, 650 (1948)):

> "There has been a gradual elimination of so-called free unloading of carload freight by the carriers in official territory. It does not appear that there are points other than New York and Philadelphia that are exceptions to the general rule that the obligation of unloading carload freight rests with the shippers. Formerly, the carriers made exceptions to this rule at Chicago, Buffalo, Pittsburgh, and certain port cities to meet competitive situations at those points and for some time where loading and unloading of carload freight was performed by the carriers there was no charge. In 1924, however, the carriers began discontinuance of this practice where appropriate. During that year tariffs became effective which provided for loading and unloading charges at the interior cities just mentioned, but not at the ports. This difference in treatment was due principally to water competition. Water carriers generally load and unload at [fol. 881] their own expense and apparently the rail lines then felt that they could not compete effectively if they were to establish loading and unloading charges in the absence of similar charges by the water lines. Loading and unloading by the railroads, without charge, was continued at the port cities for some years thereafter. In the years following 1925, loading and unloading service by the carriers without charge, was discontinued at many other interior points in official territory until finally New York and Philadelphia remained the sole exceptions."

The facts stated in the foregoing quotation have not been challenged by protestants.

In addition, these charges are consistent with the rate-making policies which the Commission has repeatedly admonished the carriers to follow. In *Emergency Freight Charges*, 215 I. C. C. 439, 464 (1936), the Commission stated:

> "They (the carriers) should explore intelligently every avenue of improving their situation, not only

> individually, but collectively, through coordination of services and facilities, through revision of the rate structure to meet changed conditions, and in such other ways as are open to them."

In the case of the peculiar situation at New York, it was observed in *The New York Harbor Case*, 47 I. C. C. 643, 734 (1917) that:

> [fol. 882] "The unusual cost of the terminal service at the port of New York and the plans of the carriers serving the port to invest many millions of dollars in new terminals adds peculiar interest to the question whether the railroads can continue indefinitely their policy of rendering valuable terminal services without imposing specific terminal charges therefor. * * *"

The Commission has also asked the carriers to amend their tariffs so as to require those shippers who receive the benefit of extra services not accorded to shippers generally to bear the burden of the cost of such additional services. In *1915 Western Rate Advance Case*, 35 I. C. C. 497, 630, the Commission said:

> "Special services in particular localities should be paid for by a special charge and the cost not distributed generally upon all the rates on a commodity."

In *Freight Forwarding Investigation*, 229 I. C. C. 201, 237 (1938), the Commission made an extensive investigation of the practices of the carriers with relation to forwarder traffic including the practice of loading cars for forwarders free of charge. Their conclusion with respect to this traffic was as follows:

> "Respondents * * * will be expected promptly to examine into the cost of loading and unloading [fol. 883] forwarder traffic at their various terminals, with a view to revising at an early date the tariff charges for such services so that they will adequately cover the cost thereof. * * *"

Further, in its general discussion of its findings in that investigation, the Commission made the following comment at page 302:

> "Practices which encroach upon respondents' revenues and impair their ability to render efficient service to the public must be condemned. * * * If extraordinary services are to be performed appropriate charges should be established for them."

Accordingly, the unloading charges in this case are consistent with the trend towards the elimination of free unloading and the admonition of the Commission that the carriers should assess special charges for special services.

2. Consignees of Fresh Fruits and Vegetables Receive Worthwhile Benefits from Station Delivery and the Unloading Which is a Necessary Part Thereof.

In its decision in this case, the Commission, referring to the delivery of fresh fruits and vegetables by the Erie at its Duane Street piers at New York, said (272 I. C. C. 648, 653 (1948)):

> [fol. 884] "The Erie is informed with respect to the contents of the cars, the names of the consignees, and other pertinent details in connection with the shipments long prior to their arrival at Duane Street piers. This permits notification to the receivers of the freight in advance of arrival and enables the carrier to allot space on the piers for each consignment. In this latter respect the Erie piers are mapped out in such a way as to give each consignee a specified location for the contents of the cars after unloading. Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers. Practically all of the citrus fruits and fresh fruits other than citrus, after being unloaded on the piers, are sold at public auction in rooms specially assigned for that purpose. These rooms, made available by the Erie solely for the auctions, are located on the second floor piers 20 and 21. Prospective bidders usually inspect the fruit while it

> is on display on the pier floor. This takes place prior to the auction. Cantaloupes and melons, as a rule, are not sold at auction but are bought at private sales on the pier floor where the packages are displayed. Fresh or green vegetables, particularly those not top-iced, frequently reach the consignee without prior sale at the piers. With the exception of tomatoes they are not sold at auction."

[fol. 885] The facts stated in the foregoing quotation have not been challenged by protestants.

The Commission also said in its decision (page 653) that the described operations of the Erie and the practices in connection therewith are typical of other unloading operations at New York conducted by the principal respondents.

Based on the foregoing facts, the Commission concluded in its decision (page 655) that "Pier delivery affords consignees the advantages, not available in connection with team-track delivery, of displaying their produce to prospective purchasers and the added privilege of auction sales of a considerable portion of the traffic in question, both at convenient locations," and that (page 663) "The protesting shippers have also received worthwhile benefits."

There can be no question about these benefits, because protestants themselves have urged that they want station delivery rather than team-track delivery.

For example, a representative of the Philadelphia auction company, whose remarks are equally applicable to conditions in New York, testified (Tr. 695):

> "Now, this unloading charge will most certainly cause a great hardship, not only to our company but the consignees for whom we sell. The auction method of [fol. 886] selling—I believe the basic principle of it is unloading whereby the buyer has a true picture of what he is buying. We do not sell by sample at auction. I do not believe it is possible to display the wares of these consignees from any form of team-track which we have in Philadelphia. I know it is practically a physical impossibility to make deliveries from team-tracks where so many sizes are involved."

The Brief, dated September 26, 1947, of the California Grape and Tree Fruit Association and the California Growers and Shippers Protective League argued this (p. 14):

> "The method of auction selling prevailing in New York requires terminal delivery of fruit at a single station."

In fact, the station delivery of fresh fruits and vegetables at New York and Philadelphia constitutes one of the most unusual services accorded by the railroads anywhere in the country. The station floors in effect are a huge wholesale store where the perishables are displayed, inspected and sold, either at private sales or in adjacent auction rooms. In addition, these stations are conveniently located near the primary fruit and vegetable markets.

[fol. 887] Conclusive statistical proof that the receivers of fresh fruits generally and some vegetables want station delivery rather than team-track delivery is set forth at pages 13-19 of "Respondents' Brief on Rehearing" dated December 1, 1949. The only possible conclusion is that the trade profits from station delivery, otherwise it would not prefer station delivery to team-track delivery.

In fact, the Examiner himself says (Sheet 22) that "team-track delivery is not desired for fruit, the auction facilities being more desirable" and that "delivery on the terminal platforms is more advantageous than team delivery." At Sheet 6, he said:

> "In taking pier station delivery, the fruit and vegetable trade has the advantage of displaying the entire contents of the car, thus affording the buyer the benefit of a thorough examination of the freight; of using the pier facilities as a sales' mart; and of occupying auction-room facilities without special charge therefor."

As was stated by the Commission in its decision (page 655): "It is clearly indicated that it is impracticable for the shippers to perform the actual unloading operations." In other words, station delivery necessarily throws the burden [fol. 888] of unloading on the railroads. Since the trade, because of the attendant benefits, wants delivery at stations where the carriers have to do the unloading, rather than at

team tracks where the carriers do not have to do the unloading, it is clearly reasonable that the trade should assume the expense of such unloading in accordance with the usual rule.

3. The Cost of the Unloading Has Increased Substantially since the Commission's Decision in 1948.

In its decision in this case (272 I. C. C. 648), dated October 4, 1948, the Commission said (pages 662-663): "Respondents have justified their proposals. In reaching this conclusion we have given due consideration to all pertinent facts of record, particularly the evidence with respect to the cost of the service. * * * The present expense of unloading is such that respondents should no longer be required to furnish such service without adequate compensation."

The following table, relating to the Erie, whose unloading costs are typical of all lines, shows the extent to which the present cost of unloading exceed the cost on which the Commission's decision in 1948 was based:

[fol. 889]

Comparison of Current Unloading Costs Per Ton and Unloading Costs Per Ton as Shown in Exhibit 147, with Unloading Costs Per Ton as Shown In Original Exhibit 23.

	Original Net Cost Per Ton as Shown on Exhibit 23	Net Cost Per Ton as Shown on Exhibit 147	Current Net Cost Per Ton Giving Effect to Latest Wage Increase [2]	% Incr. of Net Cost Per Ton as Shown on Exhibit 147 Over Original Net Cost Per Ton	% Incr. of Current Net Cost Per Ton over Original Net Cost Per Ton
Citrus Fruit	$1.2206	$1.7621	$1.9245	44.36%	57.67%
Fresh Fruits (other than citrus)*	1.7242	2.4897	2.7180	44.40%	57.64%
Fresh or Green Vegetables (top iced)*	2.0538	2.9642	3.2405	44.33%	57.78%
Fresh or Green Vegetables (not top iced)*	1.2096	1.7434	1.9133	44.13%	58.18%
Cantaloupes and Melons	1.8202	2.6259	2.8729	44.26%	57.83%

* Not cold pack or frozen.

[2] The figures shown in this column give effect to a wage increase of 12½¢ an hour retroactive to April 1, 1951, granted to employes of Seaboard Terminal and Refrigeration Company, which performs the unloading for the Erie under contract. These figures are not in the Record since this latest wage increase was not taken into account in the preparation of Exhibit 147.

The Examiner, in the first full paragraph on Sheet 8, does not give the cost figures shown on Exhibit 147, introduced at the second rehearing, but uses the figures introduced at the first rehearing.

Since the present unloading costs are substantially greater than in 1948, the justification for the unloading charges is even clearer today.

[fols. 890-891] Conclusion

These unloading charges have been in effect continuously since November 1, 1948, and their continuance is clearly permitted by the stabilization program. The removal of the charges would take away from the Eastern carriers more revenue on this traffic than they were granted in the line-haul rates under *Ex Parte* No. 166, 168 and 175, collectively the increases permitted in which was held down by the stabilization program.

The Commission's decision in 1948, approving these unloading charges, was based on facts which have not been challenged by protestants. No new material facts were presented at the rehearings, and no sound reason has been advanced why the Commission should reverse itself.

The unloading charges are consistent with the general rule that carload freight should be unloaded by or at the expense of the consignees. The trade wants station delivery, rather than team-track delivery, because of the benefits they derive from station delivery, and they should pay for the unloading at stations in accordance with the usual rule.

Accordingly, the Commission's 1948 decision should be sustained and this proceeding discontinued. Oral argument is requested.

Respectfully submitted, Francis L. Brown, A. P. Donadio, Lockwood W. Fogg, Jr., Paul V. Miller, M. C. Smith, Jr., Counsel for Respondents.

September 11, 1951.

[fol. 892]

APPENDIX A

Composite Cost Per Car* of Handling Fruits and Vegetables at Manhattan Pier Stations (Including Unloading) and at Manhattan Team Tracks, Year 1950.

	No. Cars	Cost Per Car	Total Cost	Composite Cost Per Car
Present Cost Per Car:				
Pier Stations (including unloading):				
Pennsylvania Railroad	16,939(a)	$107.92(c)	$1,828,057	
Erie Railroad	19,615(a)	74.65(d)	1,464,260	
New York Central Railroad	1,888(a)	61.05(e)	115,262	
Baltimore & Ohio Railroad	1,896(a)	119.86(f)	227,255	
Total	40,338		$3,634,834	$90.11
Manhattan Team Tracks:				
Pennsylvania Railroad	— (b)	—	—	
Erie Railroad	233(b)	$ 30.26(g)	$ 7,051	
New York Central Railroad	12,144(b)	22.30(h)	270,811	
Baltimore & Ohio Railroad	2,456(b)	70.46(i)	173,050	
Total	14,833		$ 450,912	$30.40

* Excluding Jersey City waterfront expenses.

(a) Exhibit No. 158, Appendix 20, Line 1.
(b) Exhibit No. 158, Appendix 20, Line 2.
(c) Exhibit No. 158, Page 40, Line 5.
(d) Exhibit No. 158, Page 41, Line 11.
(e) Exhibit No. 150, Page 1, $30.78 (Total cost per car, pier 17, less yard service) plus $30.27, page 9.
(f) Exhibit No. 154, Page 1.
(g) See Appendix B, hereto.
(h) Exhibit No. 150, Page 1.
(i) Exhibit No. 153, Page 1.

[fol. 893]

APPENDIX B

Cost of Delivering Fruits and Vegetables at 28th Street Team Track

Total (Exhibit No. 146, Page 1, Line 18)		$45.44
Less: Jersey City Waterfront Expenses—		
Yard Switching, Lines 1, 2 and 4	$10.49	
Float Bridge Operation, Page 7, Line 10, Divided by 14.8	1.24	
Total Direct Jersey City Waterfront Expenses	11.73	
Overheads at 10.90%, and proportion of non-revenue expense 3.02%	1.67	
Return on Investment in Yard Facilities in New Jersey (Exhibit No. 146, page 13, Lines 5, 6 and 7)	1.46	
Return on Investment Jersey City Float Bridge (Exhibit No. 146, Page 17, Line 6 ÷ 14.8)	.32	
Total		$15.18
Cost of delivering fruits and vegetables at 28th Street, New York City, excluding Jersey City waterfront expenses		$30.26

[fol. 894]

Appendix C

Estimated Composite Cost Per Car for Manhattan Team Track Delivery of All Cars of Fruits and Vegetables Which Were Delivered to Team Tracks and Piers on Manhattan Island in 1950, Based on Poor's Exhibit No. 159.

	No. Cars (a)	Cost Per Car	Total Cost	Composite Cost Per Car
Pennsylvania Railroad	16,939	$109.37(b)	$1,852,618	
Erie Railroad	19,848	70.22(c)	1,393,727	
New York Central Railroad	14,032	22.30(d)	312,914	
Baltimore & Ohio Railroad	4,352	70.46(e)	306,642	
Total	55,171		$3,865,901	$70.07

(a) Total at pier stations and team tracks shown in Appendix A.
(b) Exhibit No. 159, Appendix 25, Page 2, Column C.
(c) Exhibit No. 159, Appendix 26, Column C, erroneously shows cost of $71.00 per car. The present cost in Column B should be $30.26 instead of $38.68, see Appendix B, hereto. The corrected cost per car for Column C should be $70.22.
(d) Exhibit No. 150, Page 1.
(e) Exhibit No. 153, Page 1.

[fol. 895]

Appendix D

Viaduct Costs Per Car to Carry 11th Avenue Over Erie Railroad's Expanded Twenty-Eighth Street Yard, as Imagined by Ford, Bacon & Davis.

		Added Costs		
		Unit	Unit Cost	Annual (Col. A)
Line 14	Depreciation	$4,260,225	1.56%	$66,460
15	Insurance	4,260,225	$0.15 per $100	6,390
16	Public Improvements—Maintenance	4,260,225	1%	42,602
21	Taxes	3,621,191*	$3.22 per $100	116,602
24	Proportion of Overhead		10.90%	25,294
25	Proportion of Non-Revenue Expense		3.02%	7,772
36	Return on Investment	4,260,225	6%	255,614
	Total			$520,734
	Total cars			25,187
	Average Per Car			$ 20.67

* 85% of $4,260,225.
Source: Exhibit No. 159, Appendix 26.

[fol. 896]

Appendix E

Recomputation of Cost for the Pennsylvania of Delivery of Cars on Imaginary Manhattan Team Tracks (Based on Exhibit 158)

Reconstruction of Appendix No. 21

Line No.	Item		Amount
1.	Land Cleared for Construction		$ 786,334.12
2.	Yard Construction		195,000.00
5.	Dock Facilities		289,600.00
6.	Total Estimated Direct Costs including Contingencies & Engineering		1,270,334.12
7.	Interest During Construction		95,275.06
8.	Total Estimated Cost		1,365,609.18
9.	Return on Investment (6% of line 8)		81,936.55
10.	Real Estate Taxes		37,376.72
11.	Fixed Rentals		6,500.00
12.	Depreciation		11,000.00
13.	Total Annual Fixed Charges		$ 136,813.27
14.	Total Number of Cars per annum		16,900.00
15.	Fixed Charges per car		$ 8.10
Line 1.	Land Cleared for Construction, Value of Land, Block Nos. 1088 & 685 (p. 1)		$ 685,700.00
	Demolition Cost (p. 6)		29,149.20
	Contingencies 10%		71,484.92
			$ 786,334.12
Line 2.	Yard Construction		
	Excavation Blocks 685 & 1088		$ 9,000.00
	1/3 of remaining cost		186,666.00
			$ 195,666.00
		(say)	$ 195,000.00
Line 10.	Real Estate Taxes		
	Total Estimated Cost of Project		$1,365,609.18
	Assessed Valuation 85%		1,160,767.80
	Tax Rate		3.22
	Annual Tax Amount		37,376.72
Line 11.	Fixed Rentals		
	40th Street Crossing Easements (6)		$ 3,000.00
	39th Street Crossing Easements (6)		3,000.00
	12th Avenue Crossing Easements (1)		500.00
			$ 6,500.00
Line 12.	Depreciation		
	Grading 1/3		$ 77.00
	Pavement 1/3		1,949.00
	Viaduct and Ramps		.....
	Bridges		.....
	Float Bridge		9,002.00
	Total		$ 11,028.00
		(say)	$ 11,000.00

[fol. 897]

Reconstruction of Table on Page 38

(Pennsylvania)

1.	Cost of Facilities	$1,365,609.18
2.	Number of Perishable Cars	18,900.00
3.	Return on Investment	81,936.55
4.	Depreciation Taxes & Rentals	54,876.72
5.	Total Fixed Charges	136,813.27
	Cost Per Car	
6.	Direct Operating Expenses	$ 56.78
7.	Depreciation Taxes & Rentals	4.85
8.	Return on Investment in Expanded Yard Facilities	3.25
9.	Total Fixed Charges	8.10
10.	Total Cost of Delivering Potential Perishable Traffic at 37th Street	64.88

Reconstruction of Table on Page 40

(Pennsylvania)

1.	Total Cost of Delivering Potential Perishable Traffic at 37th Street	$ 64.88
2.	Present Cost of Delivering and Unloading Perishable Traffic at Piers 27 and 28	122.73
3.	Jersey City Waterfront Expenses	14.81
		$ 107.92
6.	Difference	43.04

[fols. 898-934] Appendix F. Omitted. Printed side page 55 ante.

[fol. 935] Before the Interstate Commerce Commission
Investigation and Suspension Docket No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

Reply to Exceptions—filed October 17, 1951

The ability of the experienced hearing Examiner who proposed the "Second Report on Further Hearing" in this proceeding is well known throughout transportation circles; but if any further evidence thereof were required it is supplied by the clarity, conciseness and logic of the Proposed Report wherein the facts are succinctly stated and the principles of law applicable thereto properly set forth.

There is very little, if any, disagreement between respondents and protestants as to the true facts regarding

the method by which the rail carriers accomplish, and for the past sixty or more years consistently have performed, delivery of fruits and vegetables and other commodities at the pier stations in New York City. These admitted facts as to how the transportation is completed are given effect in the Proposed Report by the application of long established principles of law, fundamental in the American concept of [fol. 936] transportation. The Proposed Report not only takes cognizance of the additional facts introduced into the record since the original Report of the Commission (October 4, 1948, 272 ICC 648), but also recognizes and applies the correct legal principles to which the attention of the Commission was invited by the numerous Petitions for Reconsideration filed by the Protestants following the original Report. Undoubtedly, the order of June 9, 1949, reopening the proceeding for rehearing, was a recognition by the Commission of the validity of Protestants' complaints as set forth in those Petitions, as well as being the initial step in rectifying the serious character of the departure from established principles inherent in the original Report. In effect, the erroneous conclusions of that Report were set aside, and both of the Examiners' proposed reports seek to put into effect the proper conclusions and remove the inequity and injustice of the unlawful and unjust unloading charges being collected by the delivering carriers.

In general, the "Exceptions of Respondents to the Proposed Report of Examiner M. J. Walsh" (September 11, 1951) do not complain of the findings of fact contained in the Proposed Report, but deal almost exclusively with the "ultimate conclusion" that "the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of section 3(1) of the act." (Page 1—all page references unless otherwise specified are to pages of Respondents' Exceptions).

We shall not reiterate all the citations and matters set forth in former briefs herein, nor shall we attempt to discuss in detail all of the arguments in the 92 pages [fol. 937] (and six appendices) of those Exceptions. We believe it will suffice to refer generally to the more im-

portant fundamental facts that are amply supported by the record.

A basic error of the former report was the failure to give legal effect to the finding on pages 654 and 655 of 272 ICC (as pointed out by ground 7 on pages 6 and 7 of our Petition for Reconsideration) as follows:

> A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. It is clearly indicated that it is impracticable for the shippers to perform the actual unloading operations.

The more important findings of fact, amply supported by the record, as set forth in the Second Report on Further Hearing, are the following:

> Through rates apply on fresh fruits and vegetables, in carloads, from points in the various producing areas throughout the country to stations in New York and Philadelphia. Respondents proposed to establish charges as follows for unloading these commodities at the points indicated, in addition to the line-haul rates: * * * No charges such as those under consideration have applied on this traffic in the past. (sheet 2 of Proposed Report)
>
> The arrangements as to unloading at New York and Philadelphia, which have been in effect for many years, and also the unloading charges under considera- [fol. 938] tion are covered by exceptions to the governing classification, whereby it is contemplated that the carriers shall perform the unloading of fresh fruits and vegetables without interference from the consignees or receivers. It is provided that such unloading service will be performed only at designated sta-

tions. Prior to November 1, 1948, when the charges under consideration became effective, there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic at the stations specified. The charges which became effective on that date apply only on fresh fruits and vegetables and not on other traffic. It is indicated, however, that consideration is being given to the establishment of unloading charges on traffic other than fresh fruits and vegetables, but that as yet no definite conclusion in respect of such action has been reached. (sheet 3)

The railroads established their delivery terminals on the waterfront indicated during the latter part of the nineteenth century and have concentrated their fruit and vegetable deliveries in this area. * * * Respondents do not accord the consignees the option of performing the unloading. Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery. (sheet 4)

As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are car-floated and unloaded. * * * All parties to the proceeding agree that it is not feasible to expand the present team-track facilities on Manhattan Island. The team-track capacity on [fol. 939] Manhattan Island of the following carriers is: * * * All of these team tracks are heavily used for non-perishable freight. Team-track delivery on Manhattan Island in lieu of delivery at the pier stations could not be accorded on the volume of fresh fruit and vegetables consigned to New York. Because of these limited team-track facilities, the bulk of the fresh fruit and vegetable traffic consigned to New York is delivered at the piers hereinbefore indicated. Only one of the respondents, the New York Central, has an all-rail line into Manhattan Island for the

delivery of freight. * * * This line has limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers. In fact many of the cars of fresh fruits and vegetables delivered by that carrier for trading in the wholesale market are moved by car float to its pier station (pier 16 and 17) in the vicinity of Barclay Street. (sheet 5)

The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available. When the cars are unloaded they are immediately returned empty to the New Jersey side, and other car floats are placed at the piers for unloading. So expeditious is the unloading service that it permits of the use of the same platform space for unloading and stacking freight two and sometimes three times each night on which unloading is performed.

There are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purpose of inspection, but they are not permitted to take delivery of their freight from that facility. [fol. 940] The pier floor is the first place where, after the freight has been unloaded, delivery can be taken. The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from or loaded into cars on car floats. (sheet 6)

Team-track delivery on Manhattan Island is to some extent dissimilar to pier-station delivery, although in both operations the movement across the Hudson River is identical. However, when cars for team tracks reach Manhattan Island they are accorded additional switching. After placement on the team track the consignee has two days' free time to unload the car. After unloading, the car is switched to the float bridge

and reloaded on a car float for movement to the New Jersey shore. There is more car detention and more switching, and the unloading is substantially slower in respect of team-track delivery than is the simultaneous unloading of all cars at pier stations. A witness on behalf of the Erie stated that pier-station delivery on Manhattan Island is the most efficient method which that carrier has been able to organize. So efficient is the operation that the Erie has handled in one day, at piers 20 and 21, as many as 367 cars of fruits and vegetables. It never handles less than 50 cars a day. This method of delivery has been utilized by the Erie for more than 60 years. (sheet 7)

Fresh or green vegetables, particularly those not top-iced, frequently reach the consignee without prior sale at the piers. With the exception of tomatoes, they are not sold at auction.

Vegetables are generally removed from the piers within 3 or 4 hours after having been unloaded by the carrier. After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away. (sheet 8)

[fol. 941] The record shows that it would be impossible to expand rail facilities on Manhattan Island to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York. The high cost of land on Manhattan Island, and the time required for handling cars across float bridges during periods of peak volume of traffic, would render team-track delivery impracticable.

The notice of October 10, 1950 assigning the proceeding for further hearing, stated, among other things, that:

> At this further hearing * * * respondent railroads will be expected to present evidence to show the difference in costs to them * * * Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded pier delivery and those accorded team-track delivery and any difference in costs resulting

from the fact that pier delivery does not require an investment in team-track facilities.

* * *

The respondents have failed to respond in any substantial way to the terms of that notice. They have not shown what investment would be required for the construction in Manhattan of team tracks necessary to accommodate delivery of the fruit and vegetable traffic. (sheet 11)

The theory pursued by respondents assumes that as to both piers and team tracks the existing facilities are adequate to accommodate the entire volume of fruit and vegetable traffic destined for Manhattan delivery. This assumption is incorrect, because the record establishes that only a relatively small part of the total volume of such traffic can be accommodated on the existing team tracks, and that the greater portion [fol. 942] must be handled on the piers which are of ample capacity to handle the entire traffic. (sheet 12)

On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the costs that would be incurred by them for expanded team-track deliveries, and that the "difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities" disfavors the investments that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs incident to operation of such expanded facilities. (sheets 13, 14)

There is no question as to the applicability of the line-haul rates from the various points of origin to New York. The principal question for determination is what constitutes delivery of the freight by the respondents to the consignees or receivers, and the time when and the particular location at which it is completed. Delivery of carload freight consists of the carrier either placing the car on a team track or

> siding where it can be unloaded by the consignee, or where the consignee is not permitted to perform the unloading, as in this proceeding, in unloading the freight from the cars on the floats and placing it on the floor of the pier. Here, and here only, does the transportation obligation of the carrier end. That obligation is not fulfilled until the freight is placed in a location conveniently accessible to the consignee. This method of delivery of fresh fruits and vegetables has, for more than 60 years, been included in the line-haul rates on such traffic from the various origins to New York piers. It must be so included because the [fol. 943] transportation service is not completed until delivery has been made. Section 1(3) of the act defines transportation to include, among other things, all services in connection with delivery of the property transported. Extra charges may, however, be assessed for accessorial services, such as sorting or stacking the fruits and vegetables for display purposes after unloading the freight on the pier platform; but unlike delivery, these services, for which extra charges are usually collected, are not included in the line-haul rate. (sheet 14)
>
> In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant. (sheet 15 of Proposed Report)

Certain basic facts are conceded by Respondents. For example, at page 4 of the Exceptions, it is stated: "The unloading service under investigation in this proceeding consists of the work of removing the freight from the cars and placing it on the station floor in convenient arrangement ready for delivery to the consignee or its agent." And, on the same page, it was further said: "Receivers of carload freight are entitled, in return for charges based on line-haul rates, to delivery of freight in cars on tracks at a reasonably convenient point."

The factual determination appropriate in this proceeding is: what is that "reasonably convenient point"—i.e., where

and when does the transportation terminate by delivery. When that fact is once determined, it then becomes merely and simply a question of law. The line-haul charges include full compensation for all services rendered up to the point of delivery.

It is also conceded by Respondents (page 29 of Exceptions) that "Carriers have an obligation to deliver [fol. 944] freight at reasonably convenient points considering all the circumstances surrounding the physical conditions at the destination." Such circumstances with respect to the Manhattan delivery are fully shown in the Record, and no conclusion therefrom is possible except that "respondent undertakes to make delivery in spaces assigned to the consignees on the piers, and its stevedores stack the packages in those spaces" and that it is "at that point respondent has fulfilled its legal obligation as to delivery." The last quoted language is that of the Commission nearly twenty years ago with respect to the unloading of Florida fruits and vegetables onto the Pennsylvania piers—*Allowances for Stacking Fresh Fruits and Vegetables at New York, N. Y.*, 179 ICC 780.

It is further argued by Respondents (page 31) that: "The receivers have the option either to unload the freight themselves on team tracks or to take delivery on station platforms with the expectation that the freight will be unloaded by carriers." It is thereby conceded that the pier delivery or unloading is a substitute for team-track delivery. Either form of delivery is included in the line-haul charges. Indeed, the exact fact that the line haul rates on California and Florida fruits and vegetables include delivery, and specifically the unloading onto the New York piers, has been determined in many cases—

Florida R. Commrs. v. *Aberdeen & R.R. R. Co.*, 144 ICC 603.

Southeastern Vegetable Case, 200 ICC 273.

Atlantic Coast Line R. Co. v. ***Arcade & A.R. Corp.***, 194 ICC 729.

Division of Rates, Official and Southern Territories, 234 ICC 175.

Allowances for Stacking, 179 ICC 780.

[fol. 945] *Fruits and Vegetables to Duane St.*, 66 ICC 135.

Erie Railroad Co. v. *Alabama & Vicksburg Ry. Co.*, 98 ICC 268.

The specious argument that "like the unloading, it (sorting and stacking) must be completed before the carriers have completed their obligation under the line-haul rates" (page 24 of Exceptions), was the point involved and disapproved in *Allowances for Stacking*, 179 ICC 780.

Respondents further argue that "the delivery of freight consists of the transfer of its possession from the carrier to the receiver" (page 23), and they contend that "when the freight is placed on the floor of the pier," it "remains in the carriers' possession and receivers do not yet have a right to take it away. The actual delivery has not yet been begun." It is true that all obligation of the carrier does not cease until the physical possession of the freight is transferred to the consignee. However, it is likewise elemental that the carrier obligation as to transportation, its obligation as a carrier, terminates upon an actual or a constructive delivery. Certainly no one can argue successfully that after a certain point the obligation of the carrier would be that of a warehouseman only. The important question here is when the delivery is made, when the transportation service is completed, all of which is service embraced in the line-haul charges.

The main point involved here is the familiar one involved in the many proceedings in Ex Parte 104, *Practices of Carriers Affecting Operating Revenues or Expenses.* For example, in the Eighty-Seventh Supplemental Report of the Commission (Division 3), 281 ICC 23, 45, it was said:

[fol. 946] We find that the existing line-haul rates of respondents must be construed to cover the delivery and receipt of shipments at reasonably convenient points; that the present points of interchange described of record constitutes such reasonable points; that the common-carrier transportation which respondents are obligated to perform begins and ends at the present points of interchange; and that all services beyond these points are in excess of those required in simple

> switching and team track delivery, and are industrial or plant services which it is not the duty of respondents to perform.

Likewise, when the freight is unloaded and placed on the pier platform at a convenient point accessible to consignees, "such a convenient delivery point marks the * * * end of what is termed 'line-haul' transportation, and is the extent of the service which may be performed under the line-haul rate" (*United States* v. *United States Smelting, R. & M. Co.*, 339 U.S. 186, 94 L.ed. 750). The unloading is an integral part of the transportation which respondents are obligated to perform, and the transportation ends at that point after unloading; and all services beyond that point, such as sorting, stacking, display, etc., "are in excess of those required in simple switching and team track delivery, and are industrial * * * services which it is not the duty of respondents to perform." Of course, there is already a separate charge for sorting and stacking, separate and apart from and additional to the line-haul charges.

The argument of Respondents on "The Merits of the Case," is set forth under three headings, viz:

> "1. These Unloading Charges are Consistent with the Trend Towards the Elimination of Free Unloading [fol. 947] of Carload Freight and the Admonition of the Commission that the Carriers Should Assess Special Charges for Special Services." (Page 80)
>
> "2. Consignees of Fresh Fruits and Vegetables Receive Worthwhile Benefits from Station Delivery and the Unloading Which is a Necessary Part Thereof." (Page 84)
>
> "3. The Cost of the Unloading Has Increased Substantially since the Commission's Decision in 1948." (Page 89)

Respondents urge that the "usual rule" requires payment "for the unloading" (p. 91). Yet, nowhere in the Exceptions is there a single authority for their proposition that there is any such "usual rule." Nowhere is there any separate unloading charge in addition to the line-

haul rate, except where team-tracks are adequate, where delivery can be and is made without the necessity for carrier unloading, and where consignees request the performance by the carriers of unloading as an additional or special service *after* the freight is made available for delivery at a reasonably convenient and accessible delivery point.

At all points where unloading charges are assessed, "the consignees are, however, permitted to perform such unloading." (Sheet 21 of Proposed Report). Such is not the case at either New York or Philadelphia. At these two deliveries, the carrier unloading is not a "Special Service" but is a necessary completion of the duty of transportation. Also, as correctly stated by the Examiner:

> "The fruit and vegetable terminals and the unloading operations at Baltimore, Pittsburgh and Chicago, as indicated, are not comparable with those at Philadelphia" and at New York.

[fol. 948] The consignees at New York have no option as to the type of delivery, and the opportunity of unloading by their own labor is denied by the carrier.

The bare statement of Respondents' point 2 above indicates that "Unloading" at New York "is a Necessary Part" of "Station Delivery."

Presumably all consignees receive a benefit, and a worthwhile benefit, from any type of delivery to them of their freight. They pay for those benefits by paying the line-haul freight charges.

The increasing "Cost of the Unloading" as a part of the cost of performing transportation has been thoroughly investigated and considered during the recent past in many general revenue cases, not separately as such but in the over-all expenses of the carriers in providing transportation service.—Ex Parte 162, Ex Parte 166, Ex Parte 168, and Ex Parte 175. In each of those proceedings, there have been substantial increases in the transportation rates and charges.

The only justification submitted by Respondents for the "reasonableness of the line-haul rates" is the fallacious argument that "they have shown that the line-haul rates

are the same, or made on the same basis, to all points in Official Territory whether or not the freight is unloaded by the carrier and delivered on station platforms" (p. 5 of Exceptions). The true situation, of course, is that to all destinations the line-haul rates provide for a delivery, whether on team-tracks, pier platforms, or otherwise. Nowhere is there an unloading charge in circumstances comparable to those at New York and Philadelphia.

Finally, it is respectfully urged that the conclusions of the Examiner's Proposed Report be adopted, viz:

> [fols. 949-985] The burden of proving that the addition to the line-haul rates of separate charges for the unloading services performed by the respondents is just and reasonable and not otherwise unlawful was and is upon the respondents, under the provisions of section 15(7) of the act. This burden has not been met. Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of section 3(1) of the act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered canceled and the proceeding discontinued.

Respectfully submitted, Florida Citrus Commission, and Growers and Shippers League of Florida, By Gordon Stedman, Secretary-Manager; M. W. Wells, Attorney, Maguire, Voorhis & Wells, 1007 Florida Bank Bldg., Orlando, Florida.

October 18, 1951.

[fol. 986] BEFORE THE INTERSTATE COMMERCE COMMISSION
I. & S. No. 5500

UNLOADING CHARGES, FRUITS AND VEGETABLES—
NEW YORK AND PHILADELPHIA

REPLY TO EXCEPTIONS OF RESPONDENTS IN BEHALF OF THE PORT OF NEW YORK AUTHORITY—filed October 18, 1951

Statement

The specific exception of respondents is directed to the recommended findings "that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of section 3(1) of the act," that "the ultimate finding in the prior report should be reversed" and that "the schedules naming these unloading charges should be ordered cancelled and the proceeding discontinued." The specific exception is followed on the pleading by a statement that "the portions of the pro-
[fol. 987] posed report to which specific exception is taken include four conclusions of primary importance", referred to in the further discussion of respondents as "primary mistakes". Then follows a shotgun assault upon "narrower conclusions". Confusion that might otherwise result from the failure of respondents to conform strictly to the requirements of the General Rules of Practice, more particularly Rule 96, may be avoided only by keeping in mind throughout consideration of the pleading and arguments for respondents that no error of fact is shown at any point in the comprehensive declarations and discussions of respondents. Arguments submitted in their behalf are based upon a serious misconception of the pertinent law of the case and this will be shown conclusively in the discussion that follows.

Stated in summary form, respondents deny that they are obliged to show that the total charges—the line-haul rates plus the unloading charges—are just and reasonable; they deny that the unloading is a part of and necessary to delivery notwithstanding the admitted fact that the shipper or consignee is not given access to the property in the car

and can take delivery only after unloading; they evidently admit the facts upon which the finding of discrimination is based but contend that the charges in issue do not result in a third section violation, and, finally, as to the so-called "primary mistakes", they are critical of the report dealing with evidence on further hearing, or certain of it.

If the conclusions of the proposed report are sound in their denial of any one of the primary propositions urged by respondents, there can be no escape from the ultimate conclusion that the respondents have wholly failed to sustain the burden of proof or justification. Care- [fol. 988] ful reading of the proposed report will afford a sufficient demonstration of the soundness of each and all of the conclusions and findings of the able Examiner. Its very logic and brevity, refuting clearly and conclusively the arguments for respondents, may well serve as a pattern for the present discussion.

Wherefore, comes now protestant, The Port of New York Authority, to submit its reply to the said exceptions of respondents and in support thereof to respectfully say:

1. There is no denial of the fact that unloading of fruits and vegetables at the New York piers is essential to accomplish delivery of the property to the consignee or other person entitled to receive the said property. Nor is there any denial of the fact that the service rendered in moving the property from the car standing on a car float into a position where it is accessible to the consignee is essential to complete the transportation contract in conformity with the tariff schedules of respondents. Indeed, these facts are admitted by respondents. But notwithstanding these clearly admitted facts, the same carriers now contend that it is "thoroughly unsound" and "contrary to Commission doctrine of many years standing" to hold that unloading at the New York piers is a part of and necessary to delivery at these stations or to infer therefrom that the charges may be approved only if the total charges for the entire transaction are shown to be reasonable. (Exc. p. 3) To merely state the propositions urged by respondents is sufficient to indicate the utter disregard of the settled law by the carriers responsible for this extraordinary document

while at the same time ignoring their own practices extending over a period of more than five decades. A further [fol. 989] misconception of the law is evident in the assertion that the conclusions to which respondents refer "are in plain disregard of the provisions of Section 6 permitting the separate publication of charges for terminal services." (Exc. p. 4) Are not these respondents aware of the conclusions in I. & S. No. 5146* (1943), holding that a proposal to establish a charge for terminal service in addition to the line-haul rates "is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul service alone, or that the increased total charges are reasonable for the aggregate services?" Other cases directly in point are cited in the discussion that follows.

2. Contrary to the summary statement of respondents, it is perfectly obvious from the uncontradicted facts of record that the unloading** service in issue is nothing more nor less than a service of delivery—a movement of property from the car float, to which the consignee is denied access, to a pier or platform where it is for the first time made accessible to consignee. In the case of team-track service the delivery is accomplished by moving the car containing the property to a location conveniently accessible to consignee; but since the cars cannot be placed on the piers and since consignee is not permitted on the car floats, delivery [fol. 990] is there necessarily accomplished by moving the

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* *Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673, 677.

** The expressions "unloading charge" and "unloading service" are misleading. The carriers employ these expressions for the purpose of strengthening their case, it being usually the duty of consignees to unload carload freight. But here the consignees have no access to the cars and cannot unload if they want to. *The charge here in issue is a charge for making the freight accessible to the consignees,* and for this reason the additional charge is unlawful. Use in this brief of the expression "unloading charge" is not to be understood as conceding that the charge here in issue is in fact a charge for unloading the car, for it is no such thing.

property. It is, of course, immaterial whether the personnel engaged in the unloading operation are operating under contract with respondents or are employed directly by the carriers. It is elementary that a carrier may perform its transportation obligation through either form of procedure. Respondents are manifestly further in error in their argument that the unloading service "cannot properly be considered to be a part of the delivery." (Exc. p. 4) If the service were not a part of the delivery, it would be necessarily a part of the line-haul preceding delivery and as such obviously included fully, as it is now, in the line-haul rate; it is in fact a delivery service, a service required to complete the transportation contract. The position of respondents is anomalous.

3. Respondents assert further that "even if the delivery concept * * * were valid", the reference being to the proposed report, "the additional service performed in providing station platform delivery wholly justifies the charges under investigation." (Exc. p. 4) The conclusive answer is found in the fact that the pier stations were established by respondents many years ago to accommodate traffic for which team tracks or other more costly facilities would otherwise have to be provided to enable them to fulfill their common carrier obligations. They are the result of common carrier disability. As clearly indicated on the present record, adoption of the pier station plan of delivery rather than making provision for more difficult and expensive facilities for delivery has saved the respondents many millions of investment dollars and, doubtless, even greater amounts over the years in the way of economical operating costs.

[fol. 991] 4. In advance of discussion concerning the detail, protestant would put definitely at rest the utterly misleading observation (Exc. pp. 4-5) of respondents that nowhere in Official territory do the carriers perform service of unloading carload freight from cars and place it on their station platforms, and that in all cases except at New York where the carriers deliver carload freight to patrons on their station platforms, they perform the unloading only at an additional charge. This point is argued rather exhaus-

tively by respondents but nowhere within the framework or detail of that argument will there be found a single fact to show similarity in any respect of the transportation conditions existing at the inland stations to which respondents refer with the peculiar transportation factors that have impelled them, many years ago, to adopt the pier station plan of delivery, requiring unloading of the freight, at the New York Harbor piers. In other words, what the respondents fail to point out is the fact that unloading at inland or interior stations to which they refer is accomplished after delivery of the property to the shipper or consignee, whereas delivery at the pier stations can be accomplished only by moving the property from the car to the pier station platform.

5. The assertion for respondents that they have met the burden of proof with reference to reasonableness of the line-haul rates is supported by nothing better than a statement that the line-haul rates are the same, or are made on the same basis, to all points in Official territory whether or not the freight is unloaded by the carriers and delivered on station platforms, and by the further observation in that connection that at all other points in the territory where that [fol. 992] service is provided, additional charges are assessed. Here again it must be constantly borne in mind that the respondents are comparing totally unlike factors, and this is obvious from the simple fact that unloading service at the interior points in Official territory is accomplished after delivery of the property, whereas unloading at the piers in New York Harbor is essential to accomplish delivery of the property.

6. There is no real substance to the claim of respondents that the charges in issue "have been published pursuant to repeated admonitions from the Commission that carriers discontinue free services" and this is true for the reasons in chief that (1) the respondents provide no free services in the movement of the traffic in issue and (2) for all the services which they render, they have been and are abundantly compensated by the establishment and application of rates and charges that have been repeatedly increased from time to time under the general authorities granted by this

Commission. It may well be that the cost of service has increased substantially but it is equally true that the compensation received by these respondents for the service rendered has also been greatly increased. Full and fair compensation for the transportation service in issue is embraced within the rate structure covering the transportation of fruits and vegetables, a rate structure which has been increased greatly over the years, and respondents are not entitled to a segregation of transportation operations and rates applied to a through transportation service in order to make effective a further surcharge upon the line-haul rates and charges now and heretofore in effect.

[fol. 993] On a proposed report which has withstood successfully the painstaking and critical review of these respondents, the Examiner has reviewed in detail the evidence presented on this comprehensive record, applied the pertinent law of the case as it has been interpreted and applied by the Commission in cited cases that have gone before and announced his findings and conclusions in language that is clear, specific and beyond the possibility of successful challenge. The respondents have not even alleged an error of fact. They have shown no error of law. The proposed report should be adopted by the Commission and the proceeding thus brought to a fair and prompt conclusion.

It will be understood that, as in former briefs and pleadings of this protestant, the discussion herein is directed exclusively to the issue as it affects the Port of New York and its vital interests. For convenient reference, the discussion follows in general the order of the pleading and brief to which the reply is directed.

Argument

History of the Case and Statement of Basic Facts.

The statement of respondents that "by decision dated October 4, 1948, the entire Commission sustained the principle of these unloading charges and the amounts thereof" is no more than a half truth. The majority finding at that stage of the proceeding holds merely that the schedules referred to are just and reasonable. Chairman Lee, Commissioners Aitchison, Splawn and Alldredge dissented. Commissioner Patterson, being necessarily absent, did not

participate in the disposition of the proceeding. Commissioner Johnson did participate. The report reviews the facts before the Commission at that time and comments [fol. 994] briefly upon those facts. It establishes no principle or precedent—quite the contrary. It is a departure from settled precedent as is clearly shown on the proposed report.

As respondents correctly suggest, further proceedings were sought by various protestants and such proceedings have been had. It is quite apparent that the matter did not come finally to rest with the decision of October 4, 1948.* Less than a year after the date of that decision, the unloading charges in issue were the subject of comment in the report on Ex Parte No. 168 in which said charges were exempted from the increased rate findings made in that proceeding. *Increased Freight Rates, 1948*, 276 I. C. C. 9, (Finding 21). At p. 51 of the report it is observed that on the petitions of a number of protestants the unloading charge proceeding had been reopened for rehearing. As further stated (*ibid.*) the carriers did not undertake any justification "bearing directly upon this feature." The proceeding continued open when the decision in Ex Parte No. 175 was made and again the unloading charges were exempted from the increased rate findings.

On October 10, 1950, the Commission served its notice in this proceeding stating that the record was "deficient in respect of certain evidence which seems to be important" and in due course the matter was assigned for further hearing. At the said hearing substantial further and comprehensive evidence was submitted by protestants. As stated at Sheet 11 of the proposed report, "the respondents have failed to respond in any substantial way to the terms of that notice." The deficiencies attributable to the failure of [fol. 995] the carriers to respond in any substantial way have been supplied by protestants in the fullest possible measure.

Respondents assert that "station handling is more expensive than team-track handling." (Exc. p. 9) In that

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* *Unloading Charges, Fruits and Vegetables, N. Y. and Phila.*, 272 I. C. C. 648.

connection reference is made by respondents to the first two paragraphs at Sheet 12 of the proposed report. The assertion for respondents is too broad and the reference to the proposed report is incomplete. The detail reviewed at Sheet 13 of the report should also be read in that connection, the said detail showing, among other things, that the costs per car shown by the Pennsylvania for delivering and unloading fruits and vegetables at Piers 27-28 and of the Erie for delivering like traffic at Duane Street piers includes certain waterfront expenses at Jersey City, the elimination of which would result in lower costs. It is said further at Sheet 13 that the estimated costs per car of team-track deliveries in Manhattan, as shown by protestants, which includes no expenses at Jersey City, would exceed the cost of delivery at Piers 27-28 by $12.99 and that the estimated cost for delivering and unloading at Duane Street piers would exceed the estimated cost of expanded team-track delivery by only 51 cents. The facts have been reviewed thoroughly on the brief of this protestant on further hearing dated August 1, 1951, and are summarized adequately on the proposed report of the Examiner. Certainly those facts afford no substantial support for the position of respondents.

To the argument of respondents that cost of the unloading operation has increased substantially since 1948, it is sufficient to reply that the rates and charges applied to the fruit and vegetable traffic under consideration have [fol. 996] also been substantially increased, a fact that is clearly admitted on this record. There is no successful denial of the proposition that compensation for the service rendered, including delivery plainly embraced within the line-haul rates, as protestant contends, has been increased to cover such additional operating expense as has been incurred by respondents in the handling of that traffic. The purpose of the findings in the Ex Parte increased rate proceedings is clearly expressed and there can be no successful denial of the proposition that the findings so made have served fully that declared purpose to increase the revenues of respondents sufficiently to meet increased operating costs.

Respondents conclude their discussion concerning history of the case with the observation that "administrative conclusions once reached should not be changed except on a showing of mistaken facts or additional facts which justify different conclusions." Protestant has no quarrel with that proposition—quite the contrary. It contends that the very principle invoked by respondent serves only to support the position of protestant.

The Examiner has cited and discussed adequately on the proposed report the administrative conclusions and the principles applied by the Commission in connection therewith over a period of years leading back to and including the decision in *Lighterage and Storage Regulations at New York*, 35 I. C. C. 47, submitted and decided during the year 1915. As correctly stated by the Examiner (Sheet 14), it was found in that proceeding that the assessment of any charge for terminal handling, the service having theretofore been performed under the line-haul rate, would have the ef- [fol. 997] fect of increasing that rate; and that a proper justification of such an increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate. Among other cases cited and discussed by the Examiner are the following, i.e.: *Erie R. Co.* v. *Alabama & V. Ry. Co.*, 98 I. C. C. 268; *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, in which the Commission (Div. 4) found that "As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane Street under the line-haul rates", and that the establishment of terminal charges higher than the then existing sorting charges have not been justified (Sheet 15); *Bills of Lading*, 52 I. C. C. 671, 701, under the provisions of which "it is not only essential that the shipper should have notice of the arrival of his goods, but that the carrier should place them in an accessible position to be received by him and removed" (Sheet 15); *Unloading Lumber at New York Harbor*, 256 I. C. C. 463, in which the Commission (Div. 2), citing *New York Harbor Facilities Applications*, 100 I. C. C. 383, the *Lighterage cases*, 203 I. C. C. 481, and comparing *Lighterage and Storage Regulations at New York*, found that, under factual circumstances and conditions similar to those shown in the present pro-

ceeding, respondents had failed to sustain their burden as to the reasonableness of the proposed charge, saying in that connection that "respondents may not now segregate a component of that (line-haul) service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable"; *Terminal Charges at Pacific Coast Ports, supra,* in which the Commission (Div. 2) found that a proposal by respondents therein to establish a terminal charge [fol. 998] in addition to the line-haul rate was not shown to be just and reasonable, stating in that connection that "their proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services." Then too, there is reference at Sheet 25 of the proposed report to *Florida Railroad Commrs.* v. *Aberdeen & R. R. Co.*, 144 I. C. C., 603, and to *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I. C. C. 729, also cited, among others, on the brief of this protestant dated December 1, 1949.

The line-haul rate conclusions of the Examiner are supported by all pertinent authority.

The Examiner states correctly that "compensation for the unloading of the fruits and vegetables performed by the respondents for more than 50 years was included in the line-haul rates" and in that connection concludes further, with abundant support, that the addition of a charge for the unloading service requires clear and convincing proof that the practice of unloading without an added charge is unfair to the respondents because of inadequacy of the line-haul rates for the total services rendered. There is no such showing and since the burden of proof is certainly upon respondents it is quite apparent that they have wholly failed to sustain their position.

Respondents' expressed conception of the "theory of the Examiner" is entirely too narrow. It is hardly necessary to suggest that the Examiner indulges in no theorizing concerning the burden upon respondents. The proposed

[fol. 999] report is clear and conclusive in its holding that, to quote from Sheet 25 thereof:

> The burden of proving that the addition to the line-haul rates of separate charges for the unloading services performed by the respondents is just and reasonable and not otherwise unlawful was and is upon the respondents, under the provisions of Section 15(7) of the Act. This burden has not been met.

The decision in I. & S. No. 5466, *Charges for Loading and Unloading Carload Freight*, 269 I. C. C. 25,* upon which respondents rely, affords no substantial support for their position. The said proceeding was directed to schedules proposing to establish increased charges for certain "accessorial services" provided for by them on carload traffic moving from and to Chicago, Ill., St. Louis, Mo., and other points in Official territory. Among those accessorial services were certain items of loading and unloading of carload freight. A service that is accessorial is a service in addition to that required with respect to a particular undertaking. In the I. & S. case referred to it consisted, in the main, of service rendered in behalf of freight forwarders. As stated at p. 26 of the report, "the principal shippers who request these services are freight forwarders generally, and two of the principal points at which service is performed are Chicago and St. Louis." The position of respondents in that proceeding is indicated by their contention that there is nothing in the national transportation policy or in the provisions of the Act pertaining to forwarders "which could be [fol. 1000] interpreted to mean that the freight forwarding industry should be fostered and preserved at the cost of the rail lines." The decision has no relevancy to the proceeding at bar. The record here deals, not with forwarder traffic nor with any accessorial service but, rather, with the service of simple delivery of property essential to complete the transportation contract by movement from point of

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* It may be observed that the case cited was decided by Division 2, consisting of Commissioners Aitchison, Splawn, and Alldredge, each of whom dissented in the original decision on the present case.

origin to destination and delivery at destination. There can be no successful denial of the proposition that delivery is essential to complete the transportation contract; that failure of such delivery would amount to actionable conversion by the carrier; and that delivery can be accomplished only by placing the property in a location where it is conveniently accessible to the consignee or other person entitled to receive the property. That is all the respondents do in the case of pier deliveries of fruits and vegetables.

The factual detail of the case cited is wholly unrelated to that involved in the case at bar. The law of the cited case has no application to the instant proceeding for the very simple reason that the facts are unrelated. The cases are clearly distinguished in the report itself. At p. 30 thereof the Division quotes as follows from *Lighterage and Storage Regulations at New York, supra:*

> The assessment of any charge for terminal handling, the service having heretofore been performed under the freight rate, would have the effect of increasing that rate; and a proper justification of such an increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate. * * *
>
> The Commission strongly favors the analysis of service and rates as an aid to their measurement and comparison. But it holds that, where a terminal service has heretofore been treated by the [fol. 1001] carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through services.

In that early decision the Commission found that the proposal therein to charge shippers for the loading or unloading of freight was not justified for the following reasons, namely, (a) it would be discriminatory as between shippers of different commodities, (b) the assessment of

any charge for terminal handling, "the service having heretofore been performed under the freight rate, would have the effect of increasing that rate; and a proper justification of such an increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate."

In the recent decision cited by respondents the Division quotes also from the report in *Loading and Unloading Carload Freight*, 101 I. C. C. 394, and that quotation is employed as a part of the argument for respondents. (Exc. pp. 11-13) The same case has been heretofore repeatedly cited and made the subject of argument by respondents. See, for example, the origing brief of respondents, their exception brief of June 5, 1950, and their brief with respect to the further hearing.

Referring in that proceeding* to the facts there shown, it was concluded that "the general measure of [fol. 1002] the rates to and from the points in question are not unreasonable for the line-haul service alone, and warrant the conclusion that if the carriers justify the charge for the loading and unloading services, they have borne their burden of proof under the law." There is no real or substantial basis for such conclusions in the case at bar. On the contrary, all the pertinent precedent and all the facts of record now before the Commission establish clearly and conclusively the proposition that the delivery service in issue is an integral part of the transportation from point of origin to point of destination and essential to make the property accessible to the shipper or consignee and thereby to accomplish delivery required to complete the transportation contract under the line-haul rates.

Respondents complain that the Examiner does not discuss the case upon which they rely "or even cite it in the proposed report." (Exc. p. 14) Of course, the Examiner does not cite or discuss the said case and the reason is perfectly obvious, namely, that it has no relevancy whatever to the issue involved in the case at bar. Its discussion in the

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* It is pertinent to observe that the decision in that case was made by Division 2 and reported by Commissioner Aitchison who was then Chairman of the Division.

present proceeding could serve only to confuse and possibly mislead. Nor did the Commission cite the said case in its original decision herein or elsewhere in the proceeding, notwithstanding respondents did cite the case in their briefs and relied strongly upon it.

The Commission doubtless saw clearly through the superficial argument for respondents in the original case and the Examiner has penetrated the shallow basis of the argument made by the respondents at the present stage of the proceeding. As was suggested in the introductory statement, there must be no confusion of delivery services and opera- [fol. 1003] tions at interior points, involved in the cases cited, with the wholly different factual detail incident to delivery at the pier stations which the respondents have elected to employ at New York in lieu of providing team tracks that would otherwise be required.

Respondents admit that, to quote from p. 17 of their brief of August 1, 1951, in this proceeding, "The obligation of carriers is to provide reasonably adequate facilities for the receipt and delivery of freight." They assert that the said obligation, with respect to carload freight, is fully met when they provide reasonably accessible team tracks. To that observation should be added the qualification that the team tracks must not only be reasonably accessible but must be adequate to reasonably accommodate the traffic. In the present case the record heretofore reviewed shows conclusively that the available team tracks located on Manhattan Island are utterly inadequate to accommodate the traffic in fruits and vegetables normally moving to New York, wherefore the respondents have provided the pier stations in order to accommodate the traffic and meet their common carrier obligations.

At pp. 16-17 of the argument for respondents reference is made to Sheet 45 of the mimeographed decision in Ex Parte No. 175 at which point the Commission deals, in general, with the item of price stabilization. It is not clear how the respondents would apply the theory there expounded to support the position taken by them on the exceptions. Certainly they are altogether in error in their assertion that "admittedly" the unloading charges are consistent with the stabilization program, since no admission is imputable

to this protestant. Indeed, the position of protestant in opposition to the said charges is the reverse of that [fol. 1004] asserted by respondents. It is perfectly apparent that the addition of these unloading charges to the cost of these important food products can tend only to inflate the prices that must be paid by the consumer.

Whatever may have been the need of the petitioners in Ex Parte No. 175 for additional revenue on the citrus fruit traffic, there is no valid justification for increasing rates, charges, or revenues of these individual carrier respondents by imposition of charges in addition to the substantially increased line-haul rates allegedly to compensate for an additional service which does not actually exist. The compensation for the said service is included in the line-haul rates and has been so included for more than 50 years.

With reference to the duration of the unloading charge, upon which respondents rely (Exc. p. 18) it is sufficient to reply that continued maintenance of unlawful rates and charges affords not even a color of validity to the application of such rates and charges in the future. It is doubtless true that rates frequently found unreasonable by this Commission had been theretofore in force for varying periods of time, but the fact does not justify or excuse the existence of such unreasonable structures and certainly affords no justification for their continued maintenance.

Respondents are on equally tenuous grounds in their argument concerning the alleged effect upon transportation rates of competition in the movement of perishable traffic to the East, from the South and Southwest, on the one hand, and from transcontinental origins, on the other hand. The level of the line-haul rates, all of which require delivery of the property, and all of which include compensation for such delivery, certainly affords no support for the position of respondents.

[fol. 1005] Protestant finds no occasion for detailed argument by way of reply to the quotations of respondents from the original report in this proceeding, (Exc. p. 14, 19-20) since the case is now before the Commission on reopening and whatever may have been said on the original decision may be subject to review and reformation in the light of the comprehensive record on further hearing.

Respondents err in their contentions with reference to obligation of the carriers in the matter of unloading.

It is doubtless true that no rule of universal application could be written defining the relative obligations of carriers and shippers in the origination and termination of freight. One of the best illustrations of this may be found in the sharp contrast of transportation circumstances and conditions shown in the unloading cases cited by respondents,* on the one hand, and the wholly different transportation circumstances and conditions incident to the New York Harbor operations in issue. However, there can be no successful denial of the proposition that property delivered to and accepted by a common carrier for transportation from point A to point B, for example, must be delivered to the consignee or other person designated in the bill of lading at point B; otherwise, and assuming the property is still in possession of the carrier, as it is in the present case, until delivered on the pier station, the carrier would be subject to an action by way of conversion, as already suggested.

Although asserting that carriers in Official territory have [fol. 1006] no obligation to load or unload domestic freight, New York is referred to by respondents as an exception. As protestant understands the argument of respondents, it is admitted that there is a duty on the part of the carriers to unload at New York and in that argument for respondents there is found, by necessary implication, a further admission that the controlling considerations with reference to New York are different from those considered in the loading and unloading cases which they have cited and upon which they rely. Respondents urge further that "as to whether carriers should have such an obligation" the decisive considerations are wider than the ground upon which the proposed report is said by them to rest. Included among those considerations (strange as it may seem, in view of the arguments heretofore made by the same carriers that the line-haul rates are neither in issue nor pertinent) is "the rate structure." (Exc. p. 22)

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* *Charges for Loading and Unloading Carload Freight, supra,* and *Loading and Unloading of Carload Freight, supra.*

It is admitted further that "the physical condition of the facilities" and "the custom of the carrier", among others, are among the factors that must be considered. (Exc. p. 22) This protestant has no quarrel with that argument—quite the contrary. It has contended throughout the proceeding that the rate structure, the physical situation and the custom of the carriers are controlling considerations. The Examiner makes no mistake in his reference to those matters, including the custom of the carriers over a period of 50 years or more in making delivery under the line-haul rate or in his statements concerning inadequacy of the Manhattan team tracks. As stated at Sheet 5 of the proposed report, "team-track delivery on Manhattan Island in lieu of delivery at the pier stations could not be accorded on the volume of fresh fruits and vegetables consigned to New York. Because of these limited team-track fa- [fol. 1007] cilities, the bulk of the fresh fruit and vegetable traffic consigned to New York is delivered at the piers * * *." See also the discussions at Sheets 12 and 13 of the report. As stated at Sheet 25, already referred to, compensation for the unloading service in issue was for 50 years "included in the line-haul rates." Protestant contends that it continues to be so included in the line-haul rates and the proposed report is properly conclusive on that proposition. Yet the respondents, now in apparent agreement with protestant that the rate structure is a pertinent consideration, have heretofore taken the position that the line-haul rates are irrelevant. (Prop. Rep., Sheet 15)

The considerations referred to and others reviewed adequately on the proposed report of the Examiner show clearly and conclusively the obligation of respondents to make delivery of the fruit and vegetable traffic in issue without charge in addition to the line-haul rates which already include compensation for the service. Manifestly, to accomplish such delivery, an admitted duty of respondents, the property must be made available to the consignee or other person entitled to receive it.

The argument that the unloading service is separate from delivery is opposed to the facts and is patently untenable.

The Examiner holds correctly, at Sheet 14 of the proposed report, that "delivery of carload freight consists of the carrier either placing the car on a team track or siding where it can be unloaded by the consignee, or where the consignee is not permitted to perform the unloading, as in this proceeding, in unloading the freight from the cars on the floats and placing it on the floor [fol. 1008] of the pier. Here, and here only, does the transportation obligation of the carrier end. That obligation is not fulfilled until the freight is placed in a location conveniently accessible to the consignee." As further and correctly stated by the Examiner at the same point, "this method of delivery of fresh fruits and vegetables has, for more than 50 years, been included in the line-haul rates on such traffic from the various origins to New York piers. It must be so included because the transportation service is not completed until delivery has been made."

The very simplicity of the legal principle by which the obligation of a common carrier to make delivery is defined precludes any real opportunity or excuse for further argument concerning it. At the same time it serves to thoroughly discredit the far-fetched theories upon which respondents rely—theories which are, in the main, not only contrary to the elementary law of the case but also directly opposed to the established facts.

Application of the governing principle in the present proceeding is equally clear. Taking a simple illustration, it may be assumed that a shipment is tendered to and accepted by the carrier at Los Angeles for transportation under the customary bill of lading contract terms to John Doe at Manhattan Island, New York, N. Y. By that transaction the carrier undertakes to transport the said property to its usual place of delivery at said destination. For the said service of transportation from origin to the usual place of delivery at destination a rate of $1.79 per 100 pounds is provided in the published line-haul tariff schedules of the carriers then in effect. To complete that transporta-

tion contract and to comply with the provisions of the line-haul tariffs, the carrier is obviously required, not only [fol. 1009] to transport the property from Los Angeles to New York, but also to deliver the property to the designated consignee. In event of failure to so deliver the property, assuming it to be still in the possession of the carriers, as in this case, there is manifestly a conversion.

There is no denial or contradiction of the pertinent facts concerning the movement of this fruit and vegetable traffic from the various origins to pier stations and the unloading thereat from cars standing on the car floats to the platform of the stations. There is no denial or contradiction of the fact that the consignee or other person entitled to receive the property is denied access to the cars standing on the car floats at the piers and is not permitted by the carriers to perform the unloading service. Admittedly, the property is not placed in a position where the consignee or other person entitled to delivery could have access to it until it is removed from the cars standing on the car floats and placed on the pier station.

As further stated by the Examiner, Section 1(3) of the Act defines transportation to include, among other things, all services in connection with delivery of the property transported. (Prop. Rep., Sheet 14) It is the fundamental duty of every carrier under its line-haul rates to make a proper and lawful delivery; for its line-haul service does include delivery. *Los Angeles Switching Case*, 234 U. S. 294, reversing 188 Fed. 229; *Danciger* v. *Cooley*, 248 U. S. 319, affirming 98 Kans. 38, 484.

The argument for respondents that freight placed on the floor of the pier remains in the carrier's possession and that actual delivery has not at that point begun is patently thin and tenuous. The argument holds, necessarily that the property continues in the course of transportation [fol. 1010] from point of origin to destination during the unloading service and until that operation is completed, after which the property is delivered into the possession of the consignee. In other words, by way of analogy, while property to be delivered on a team track is moved to point of delivery by the carrier as a service admittedly included in the line-haul rate, property to be delivered at the pier

stations, which have no tracks for accommodation of the cars, is moved to the floor of the pier. In the case of team tracks, property is made conveniently accessible to the consignee by moving the car containing the property to a team track location available to the consignee; in the case of pier station delivery, movement of the property itself to the floor of the car is the equivalent of delivery by car onto the team tracks.

Respondents evidently overlook the definitions of Section 1(3) of the statute to which the Examiner correctly refers as including all services in connection with the delivery of the property transported. It would seem quite immaterial whether the unloading service be treated as a line-haul service or as a service in connection with the delivery of property, so far as the transportation obligations of the carriers are concerned. A service in connection with the delivery of property transported is a service of delivery, and this obvious fact cannot be dispelled by any finespun theory such as that relied upon by respondents. The unloading service is clearly included under the rates provided by the line-haul tariffs.

Respondents assert further that the report is incorrect in its "reliance" upon the sorting and stacking charges assessed on the piers. (Exc. p. 24) Since the exception is not specific, it is not possible to discover on this comprehensive proposed report just what the respond- [fol. 1011] ents intend to criticize. Perhaps it would be sufficient under the circumstances to again point by way of reply that the respondents have alleged no error of fact with reference to sorting or other charges assessed on the piers. The proposed report would grant nothing more than a simple delivery to which protestants are manifestly entitled.

On the other hand, if the argument of respondents with reference to sorting and stacking is intended to be a part of the theory advanced by them to support the proposition they urge that unloading is separate from delivery, it is sufficient to here again observe that there is no claim here that the carriers should do anything more than accomplish a simple delivery, which includes the unloading operations

which are rendered in connection with and are a part of delivery—operations admittedly required to make the freight available to the consignee. Nothing further is proposed under the conclusions and findings of the proposed report.

For more than half a century the line-haul rates have included the transportation service in issue. They continue to include that service. By long-continued maintenance the respondents so admit.

Respondents assert that "the most important of the decisive considerations in determining whether it is reasonable to assess additional charges for unloading is the rate question as to whether the rate structure contemplates the unloading service." By that definition the respondents plainly admit that which they have heretofore repeatedly denied, that is to say, they now admit the proposition that the rate structure under which the traffic moves is entitled to consideration. Yet they have failed to produce a single line [fol. 1012] of evidence concerning the reasonableness or lawfulness otherwise of the line-haul rates, having heretofore contended consistently that the said rates were not a relevant factor.

The definition of respondents is faulty since it affords no basis on which to determine what a rate structure may or may not contemplate. It should be reformed to read substantially as follows: "A decisive consideration in determining whether it is reasonable to assess additional charges for making the property available to the consignee is the rate question as to whether the line-haul rates include that service." Protestant has established the affirmative of the proposition covered by that definition. It is immaterial that the same basis of rates may apply on traffic moving elsewhere throughout Official territory and that the carriers do not perform unloading at such other Official territory points. The argument for respondents is disingenuous. As we have pointed out repeatedly, in our discussion of the car unloading cases and throughout the briefs, no fair or proper comparison can be made of the practice at inland points with the practice at the New York pier stations. The deci-

sions upon which respondents rely, and the factual considerations in connection therewith, have no relevancy to the issue and certainly afford no support whatever for the position of respondents.

In that same connection it is pertinent to again refer to p. 21 of the exceptions at which point respondents observe that "As a factual matter * * * carriers in Official Territory have no obligation to load or unload domestic carload freight except at New York." Then follows a discussion by respondents of what they are pleased to call the decisive considerations, all of which said considerations clearly sup- [fol. 1013] port the proposition that the obligation of the carriers to unload the fruit and vegetable traffic at the pier stations is, and always has been, a part of their obligation attaching to the through transportation from the several origins of the tonnage to the point of delivery on the pier stations.

It appears clearly from the record that the respondents are well aware of their obligation in that connection, not only because the unloading has been included in the line-haul rates for more than half a century but because of the admissions of prominent railroad representatives referred to on the briefs of this protestant.* It will be sufficient at this point to quote the statement of Mr. E. A. Hodkinson, a witness in the original proceedings herein and also in the proceeding on further hearing, which was made in a recent case:

> The practice of performing the service of loading and unloading carload freight by the carriers, or at their expense, at the port cities has been in effect from time immemorial, and was and still is occasioned by certain disabilities of the railroads serving the port of New York arising out of the geographical situation, also by reason of the competition of steamship lines serving the port cities, and by other conditions peculiar to the handling of traffic at the port cities.

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* See pp. 47-48 of protestant's brief of December 1, 1949, and pp. 33-34 of protestant's brief of August 1, 1951, on further hearing.

> The Trunk Line railroads serving New York and Brooklyn do not have lines of railroad running into these points on which could be established freight stations with freight houses and team tracks, nor individual sidings serving industrial plants, as is customary in cities, towns, and hamlets throughout other sections of the United States. This is due to the peculiar geographical and physical characteristics of those points.
>
> * * * * * * * * * *
>
> [fol. 1014] This detail in respect to New York has been gone into in order to show that the geographical and physical layout is such that it is necessary for the carriers to perform this service of loading and unloading, to the extent it is performed, at their own expense, and that the service has been thus performed for many years. In fact, this service has been performed from time immemorial, and its inception antedates the available records of the carriers. (Ex. 103)

See also quotations from testimony or other statements of other able representatives of the railroads appearing on the brief of December 1, 1949, in which the carriers have clearly admitted their disability as to team-track delivery at New York and have repeatedly justified the non-imposition of unloading charges. As heretofore suggested, the respondents have, indeed, recognized the well-settled principle that the service of delivery is necessarily included as a part of the through transportation from origin to destination. The Examiner is on solid ground in his conclusion that it is legally impossible to hold that freight has been delivered to the consignee while still in cars on the car floats to which the consignee is denied access.

Team-track facilities at New York are not and never have been within the scope of the present record adequate for accommodation of the fruit and vegetable traffic. The carriers have elected to provide and operate the pier stations in lieu of the more costly team-track facilities and service.

Respondents complain that the treatment in the proposed report of the issues as to the condition of the delivery

facilities nowhere faces the question squarely but "confuses the question" as to availability of other facilities. [fol. 1015] Reference is made in that connection to "the alternative facilities", in which the respondents apparently intend to include the pier stations. There is no controversy concerning the adequacy of the pier stations for accommodation of the fruit and vegetable traffic handled over those stations. There is no contradiction, as protestant understands the record, of the fact that the team-track facilities at New York are utterly inadequate to accommodate the traffic. The evidence for protestant shows that expenditures of many millions of dollars would be required to make them adequate.

Respondents are altogether in error in their assertion that the situation at New York "is not materially different" from that described by them with reference to Philadelphia. The factual detail with reference to the physical facilities is spread upon the record in considerable detail and there is no justification or excuse for clouding the issue by asserting, as respondents do, that the conditions at New York respond fully to those described by respondents with reference to Philadelphia. The contrary is true. Of course, no part of the record is cited by respondents to support their argument in that connection and protestant confidently asserts that no such support will be found at any point on this comprehensive record.

Referring to the team tracks at New York, respondents assert boldly and in utter disregard of the facts, that "nowhere in the entire record is there any evidence that these team tracks are inadequate." The direct reference of respondents is to the Manhattan team tracks. In that connection it is pertinent to observe that a vitally important part of the record on further hearing is made up of evidence showing the enormous costs that would necessarily [fol. 1016] be incurred to provide a sufficient expansion of team-track facilities at New York to take care of the fruit and vegetable traffic. See particularly the testimony of witness Poor, reviewed on protestant's brief on further hearing dated August 1, 1951.

As heretofore shown, the disability under which the railroads labor at New York is their own. It is not the

fault of shippers or consignees that the railroads have failed to provide sufficient team-track facilities for the delivery of fruits and vegetables at New York. It was undoubtedly because of the physical and geographical situation at New York that the railroads made the pier stations the normal freight stations on Manhattan Island. In most parts of the United States team tracks constitute the normal and principal method of delivery; but the reverse is true at New York.

Respondents admit that "carriers have an obligation to deliver freight at reasonably convenient points considering all the circumstances surrounding the physical conditions at the destination." (Exc. p. 29) It is also admitted that "the carrier is obliged to maintain such facilities as are necessary to meet the needs of the shipping public." (Exc. p. 31) They argue inconsistently that new team-track facilities, if needed, should be erected in New Jersey rather than Manhattan. It will be recalled that on the brief of this protestant dated December 1, 1949, the deliberate attempt of respondents to deny reasonable service to the public and to save money for the railroads by forcing on the public a very inconvenient, expensive and wholly unsatisfactory method of delivery on the opposite side of the harbor was discussed. In that connection the following extract from the cross-examination of witness Webb, a competent Pennsylvania Railroad system witness, was submitted:

> [fol. 1017] Q. (By Mr. La Roe) You do not prefer that carload shipments of fruits and vegetables be delivered over there (in New Jersey) rather than at the pier stations, do you?
>
> A. (By Mr. Webb) I certainly do.
>
> Q. You do?
>
> A. Yes, sir.
>
> Q. Why?
>
> A. Why? That takes all the difficulties and the expense of lighterage, a very unusual expense for delivery of traffic in New York Harbor, one that you have only at a few places in the country. It means a stabilization of the market.

Q. You would like, then, would you not, to discourage the use of pier stations?

A. I would like to see the perishables delivered in Jersey City, Mr. La Roe.

Q. You would like to see the handling of perishables at the pier stations in New York discontinued entirely if you had your choice, would you not?

A. That would be my view, yes, sir, for the benefit of the trade and for the benefit of the railroad and the public, as a whole.

Q. We will take care of the public if you will take care of the railroad.

A. I shall try to do that, sir.

Q. As a matter of fact, after this charge went into effect soon after the first of November, you noticed, did you not, an increase in the use of those yards over there in New Jersey?

A. Yes, we did.

Q. And that is just what you wanted, wasn't it?

A. That is exactly what I should like to see.

Q. That made you happy, and it is, in part, for that reason, that you spent money for the rehabilitation of those team-track yards over there in New Jersey, isn't that right?

A. That is right.

Q. How many miles is that, generally speaking, from the produce market on Manhattan Island?

[fol. 1018] A. Well, I guess your guess is as good as mine. I would say a mile and a half.

Q. By truck?

A. Yes. That would be by truck.

Q. And toll charges are required to get the trucks through the tunnel?

A. That is right.

Q. Would you care to tell us how extensive was your reconditioning of those team-track yards; what did you do, and how much money did you spend?

A. Well, my recollection was a couple hundred thousand dollars, Mr. La Roe, to fit those yards up. (1410-1412)

The argument of the same respondents now submitted by way of brief on exceptions to the proposed report of

Examiner Walsh reflects a similar position on the part of the railroads. As was suggested by protestant at the earlier stage of the proceeding, railroads are, or are supposed to be, servants of the public. The Interstate Commerce Act contemplates adequate service. Here we have a remarkable and probably unprecedented situation in which public authorities are cooperating to improve the delivery of food to the people of this metropolitan area while the railroads, after half a century of cooperation, are deliberately trying to lessen their service by diverting traffic to terminals short of billed destination and inconveniently located, as to this traffic, on the west side of the harbor. We repeat that it is a reasonable inference that the unloading charges in issue are a part of the whole plan to give less service to the public at a financial saving to the railroads. The additional charge is a new handicap amounting to a penalty for use of the piers.

[fol. 1019] At p. 23 of the proposed report the Examiner states correctly that, to quote:

> The unloading of the freight by respondents at their New York pier stations was for the purpose of making simple delivery of the property to the consignees. Because of the fact that the consignees were denied access to the cars on the carfloats for the purpose of accepting delivery and of unloading the freight, delivery of the freight to the consignees at those pier stations could not be accomplished in any other manner. The unloading, which necessarily preceded the delivery of the freight to the consignee, was essential to that purpose, and therefore was included in the transportation of the property and the rate applicable thereto. The unloading of the freight by the carrier onto the pier platform is due to the physical inability of the carrier to make delivery of the freight to the consignee at billed destination, without performing such unloading. Such inability is clearly a carrier disability for which consignees should not be subjected to additional unloading charges. In the case of team-track delivery the car is placed on a team track and the consignee's truck is backed up to the car door. This cannot be done at pier stations be-

> cause, as respondents admit, it is necessary to refuse consignees access to the carfloats for delivery of their freight. It is admitted by respondents that because of this disability the freight is not actually delivered to the consignee until it is placed on the pier floor. Delivery under the line-haul rates is not completed until the freight is placed in a location accessible to the consignee.

The argument for respondents that "high cost" of the unloading service precludes its continuance without additional charges adds nothing of value to the several arguments made in their behalf. The present record, reviewed [fol. 1020] in some detail upon the brief of protestant on further hearing, shows conclusively that the pier stations afford the most economical method of delivery at New York and that only by their continued use can such economies be perpetuated. To the extent that increased costs have been incurred by the carriers, increased rates have been made effective under Commission findings and orders in the several increased rate cases, as we have already shown.

Evidence with respect to the third section issue is conclusive.

As was shown in the brief of protestant on further hearing, dated August 1, 1951, discrimination by respondents under present tariff structures is unconscionable and altogether indefensible. The railroads have for more than half a century included pier station delivery in their line-haul rates as to all commodities. (R. 942) The Examiner observes correctly at Sheet 6 of the proposed report that the piers at which the assailed unloading charges apply are open generally for the receipt and delivery of carload freight in packages; that all such freight is unloaded from or loaded into cars on car floats; that freight of all kinds may be shipped from and to these piers, except that the Pennsylvania produce terminal, Piers 27 and 28, is limited to the receipt and delivery of perishable freight; but that even these piers, in addition to the handling of fruits and vegetables, are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish,

oysters, flower bulbs and raw silk. As correctly observed further at Sheet 6 of the report, "all freight, other than fruits and vegetables, is unloaded by the rail carriers at [fol. 1021] their pier stations without charge therefor in addition to the line-haul rates."

It is both unfair and unlawful to single out fresh fruits and vegetables for a charge that does not apply to any other traffic. The *Barringer case*,* heretofore cited by protestant, is directly in point, not only because it shows that there should not be discrimination as between commodities, which discrimination is to be gauged by looking at the entire transportation rate, but also because it establishes the principle that discrimination can grow out of loading charges when they are an integral part of the entire rate for the through service. The Court considered the loading charge to be "a component part of the total line-haul cost to the shipper and inseparable from it." See in that connection p. 43 of protestant's brief on further hearing, dated August 1, 1951, and the quotation appearing at p. 62 of protestant's brief on rehearing dated December 1, 1949.

There is no error in the conclusion of the Examiner that—

> Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York * * * are not shown to be just and reasonable, and that they are also in violation of section 3(1) of the act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered canceled and the proceeding discontinued.

All the pertinent elements of a discrimination case are shown upon the present record and by evidence that is in major part uncontradicted and in no substantial part [fol. 1022] denied. Violation of the third section is conclusively shown.

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* *Barringer & Co.* v. *United States*, 319 U. S. 1, 87 L. ed. 1171.

The evidence on further hearing of June 4-5, 1951, shows clearly the substantial economy and saving of transportation expense incident to delivery at the pier stations.

The matter of costs is adequately discussed on the proposed report. (Sheets 8, 11, 12, 13, 21-22) In his general discussion beginning at Sheet 23 of the report, the Examiner observes correctly that since the through transportation is covered by single-unit rates, "it cannot be established that the portion of the through rate applicable to the terminal operations, which in the instant case includes unloading, was insufficient to cover the cost of such operation * * *." It is stated further and correctly, at the same point, that "in order to establish that the portion of the through rate which covers the cost of terminal operations, including unloading of the freight onto the pier or station platform, was insufficient to cover the unloading cost, it is necessary to know the measure of that portion of the through rate." As a part of the findings and conclusions of the proposed report, to which respondents specifically refer, it is said, among other things, that "it it not sufficient to consider only the cost of the unloading service." It may be helpful to notice here the eminently sound and correct observations in connection with which that conclusion is stated. We quote from Sheet 25 of the proposed report—

> The compensation for the unloading of the fruits and vegetables performed by the respondents for more than 50 years was included in the line-haul rates. The addition of a charge for this unloading service per- [fol. 1023] formed before delivery requires clear and convincing proof that the practice of unloading without an added charge is unfair to the respondents because of the inadequacy of the line-haul rates for the total services rendered. Following like expressions in prior proceedings referred to herein, it would appear that it is not sufficient to consider only the cost of the unloading service. The impracticability of unloading by the consignees and the adequacy of the revenues from the traffic as a whole are necessary con-

siderations. All of the respondents receive a line haul on this traffic and derive substantial revenues therefrom. Rate uniformity based in part upon a consideration of the average cost of accomplishing delivery is an appropriate and desirable method of ratemaking. In the circumstances presented, there is no sufficient reason for differences in transportation charges based upon the differences in the costs of making the respective deliveries.

The burden of proving that the addition to the line-haul rates of separate charges for the unloading services performed by the respondents is just and reasonable and not otherwise unlawful was and is upon the respondents, under the provisions of section 15(7) of the act. This burden has not been met.

To the full extent that cost factors may be entitled to weight in the present proceeding, the record and the proposed report are abundantly adequate. Those factors, developed in part by protestant and in part by respondents are discussed in detail beginning at p. 24 of protestant's brief on further hearing, dated August 1, 1951. Repetition will be avoided. It is sufficient to here observe that the cost factors necessarily incurred in the provision and operation of team-track facilities required to handle the [fol. 1024] traffic compared with pier station costs developed by respondents show conclusively the substantial economy of the pier station operations.

The Examiner observes correctly that the respondents have failed to respond in any substantial way to the terms of the Commission's notice of October 10, 1950.

At Sheet 11 of the proposed report there is a reference to and quotation from the Commission's notice of October 10, 1950. By that notice the respondents were advised clearly and specifically that, in addition to other evidence which they might deem appropriate, they would be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of car-

loads of fruits and vegetables at railroad team tracks on Manhattan Island, and that, among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded pier delivery and those accorded team-track delivery "and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities." As correctly stated by the Examiner, "They have not shown what investment would be required for the construction in Manhattan of team tracks necessary to accommodate delivery of the fruit and vegetable traffic. It is obvious that the Commission wanted to know what it would cost the respondents to handle this traffic on Manhattan Island team tracks if the pier stations were not available." As further stated, and correctly, "The evidence submitted by respondents is merely a comparison of the costs of trans- [fol. 1025] porting fruits and vegetables from points in New Jersey to the existing respective pier and team-track facilities, as to the Erie, Baltimore & Ohio, and Pennsylvania, and through yard facilities of the New York Central." (Sheet 11)

Protestant is in agreement with the assertion of respondents that "the language of the Commission's notice is clear and simple." That language says plainly, among other things, that the carriers will be expected to show "any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities." It is no answer to argue, as respondents do argue, that since certain language of the notice "is entirely in the present tense" and "contains no verbs in the subjunctive tense" and "makes no suggestion that any assumption should be made" it must therefore relate entirely to existing costs of handling existing business. (Exc. p. 55) The argument is wholly technical and very thin—contradictory of the plain meaning of the language employed by the Commission, and in sharp contrast with the practical application of evidence called for by the notice. The deficiency has been supplied by protestant through unimpeachable evidence of an outstanding expert through whom was presented the Ford, Bacon & Davis survey. (Witness Poor)

Respondents, having failed to respond in any substantial way to the terms of the Commission's notice of October 10, 1950, direct their attack by way of exceptions to that part of the record developed through witness Poor covering the survey and report of Ford, Bacon & Davis, Inc. (Exhibit No. 158). The position of respondents in that connection is wholly obstructive. As already shown, the Commission's notice of October 10, [fol. 1026] 1950, advised respondents very clearly and specifically that, among other things, they would be expected to present evidence to show "any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities." That is apparently the element of cost evidence to which the criticisms of respondents are directed. The procedure followed by protestant and by the experts employed for development of the survey referred to is fully responsive to the said notice of October 10, 1950, and the results of the survey serve fully to supply the deficiencies resulting from the failure of respondents to comply with that notice.

The argument for respondents (Exc. p. 47) that existing team tracks on Manhattan Island are now adequate to handle all of the fresh fruits and vegetables that the trade wants handled on team tracks and that there is no evidence to the contrary, is altogether erroneous. The record developed through the testimony and documentary evidence of witness Poor, reviewed on protestant's brief of August 1, 1951, is certainly conclusive on the proposition that existing team tracks on Manhattan Island are not, and never have been, adequate to handle the fresh fruit and vegetable traffic in issue. The conclusion or assumption of respondents that they are adequate to handle the fruit and vegetable traffic that the trade wants handled on the team tracks is devoid of substantial support on this record.

Respondents undertake to develop their arguments with reference to team-track capacity through the mathematical process of combining and totaling the capacity of the tracks operated individually by the several respondents; but even that mathematical process does not support the position of respondents. In other words, and referring

[fol. 1027] to the specific detail beginning at p. 48 of the exceptions, it appears clearly that the attempt is to show that taking the Pennsylvania, Erie, Baltimore & Ohio and New York Central together, the four railroads have an existing team-track capacity of 541 cars and that their combined "peak day" receipts amount to less than that capacity. While protestant does not question the mathematics, it does question seriously the validity of any assumption that railroad team tracks on Manhattan Island are or could be pooled to effect the results indicated. Without a definite plan from respondents providing for such pooling of team-track facilities—and none is here offered, composite cost tabulations such as those shown in Appendices A and C of the exceptions are meaningless.

Referring particularly to the Erie, respondents object to the Ford, Bacon & Davis survey on the ground that it includes engineering factors with which the respondents do not agree and which have tended to increase the costs shown through the testimony and formal documents of witness Poor. It is significant in that connection that respondents offer no other or better plan of providing the team-track facilities that would be essential to accomodate the fruit and vegetable traffic in issue. They seek refuge in the allegation that the survey is "wholly imaginary", an argument that is altogether fallacious although at the same time essential to meet the necessities of respondents for a basis upon which to pitch their untenable arguments.

Respondents object that there is included in the assessed valuation for New York City real estate taxes the value of buildings and fixtures and demolition cost thereof. The inference that this procedure resulted in an inflated tax estimate is incorrect. Necessarily the estimates in Ex- [fol. 1028] hibits 158 and 159 were preliminary in character and did not warrant the refinement in method upon which authority for construction would be based. It appears that in estimating the real estate tax base the engineers used the value in condemnation of each individual parcel as estimated by the City without adding an allowance for land acquired through negotiation, which would normally be higher, or for any upgrading in value

through assemblage in block parcels. It appears further that the engineers applied the 85 percent ratio for railroad improvements to the entire project cost, although actually it would not be applicable to land. The record is conclusive, as we contend, on the proposition that the estimates on the taxes are conservative, as are all other estimates entering into the engineering detail submitted for protestant.

With reference to the Pennsylvania, respondents argue that as to actual volume which might be expected to be unloaded at 37th Street if the pier stations were discontinued, the capacity for receipts of 120 cars per day meets fully the obligations of the carrier. The record developed for protestant shows that this capacity would have been exceeded eight times in the first two months of 1951 alone.

Respondents complain that the great bulk of cost for additional team tracks concerns the cost of structures required to avoid interference with existing streets and railroads in the lots chosen in the study for new team tracks. The truth of the matter is that these lots were selected to limit the necessary changes to existing streets and industrial installations. The record is thoroughly persuasive on the proposition that they afforded the most expedient and economical expansion for Manhattan [fol. 1029] team-track yards. Respondents fail to indicate where they might obtain property of less value or which could be developed at less cost. In that connection we quote from p. 22 of Exhibit No. 158 (witness Poor)—

> ". . . . it is apparent to the Engineers that an area to accommodate 465 cars in the proximity of the Washington Market district would involve the condemnation of valuable property and the closing of numerous streets in an already congested section of Manhattan. The expansion of existing facilities would involve the use of land on which the average assessment per square foot is less than half that of the property in lower Manhattan and would involve fewer changes to city streets. For these reasons, together with the fact that an expansion of existing facilities would not disturb the present location of team tracks of each railroad in relation to the market area and to each

other, it is the conclusion of the Engineers that the expansion of existing facilities of the respective railroads affords the most practical expedient for the development of team track produce yards in Manhattan."

The foregoing discussion, read in connection with the detail of protestant's brief of August 1, 1951, affords a clear and conclusive illustration of the thoroughly obstructive course of respondents and the indefensible failure of said respondents to conform to the letter and spirit of the Commission's notice of October 10, 1950.

The Commission will not be misled by the gratuitous and utterly unwarranted observations of respondents directed to what they are pleased to call a "strategy idea" of charging the railroads with non-compliance with the notice in an effort to lend some emphasis to "the imaginary [fol. 1030] survey" which they retained Ford, Bacon & Davis to make. (Exc. p. 59) Such gratuitous assertions call for no reply. It is sufficient to read the notice of October 10, 1950, calling for evidence that would show "any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities."

Evidence concerning specified items of the report blanketed by respondents under the term "miscellaneous exceptions", is obviously entitled to consideration and weight. No error is shown in that connection.

Respondents assert that the evidence for protestants with reference to diversion of traffic away from the piers and to the trucks because of the unloading charges is completely answered by certain exhibits to which they refer. (Exc. p. 59-60) The truth of the matter is that these exhibits do nothing of the sort. Number 137, witness Hodkinson, is a statement showing the number of carloads of fresh fruits and vegetables terminating in the United States and the eastern district, respectively, for the years 1947, 1948 and 1949. Number 138 shows, among other things, number of carloads of fresh fruits

and vegetables terminated at New York for the years 1947, 1948 and 1949 indicating an increase of 8.1 percent over 1947 during the year 1948 and a decrease in 1949 of 18.5 percent under 1947. The facts are correctly shown at Sheet 7 of the proposed report from which we have hereinbefore quoted the detail concluding with the well-supported statement that "the diversion of rail shipments from pier stations to other points intensified the problems of the New York produce market, resulting in greater [fol. 1031] congestion in terminal handling and in dissatisfaction among buyers, labor, and other elements at that facility."

Divisions: At Sheet 25 of the proposed report the Examiner observes correctly that in *Florida Railroad Commrs.* v. *Aberdeen & R. R. Co., supra,* a proceeding involving line-haul rates on fruits and vegetables from Florida to points in the United States, including New York, the destination carriers emphasized the magnitude of their terminal services and costs, including unloading by them of the traffic as an essential part of delivery at a point convenient to consignees. Cited also at that point is the decision in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.,* 194 I.C.C. 729, a proceeding involving the divisions of the rates on citrus fruits between the Southern and Official territory carriers. It is apparently from the comment at that point in the proposed report that the conclusions of respondents at p. 60 of their exception brief are expressed, more particularly the conclusion that the position of protestants is unsound "because divisional arrangements among carriers have little bearing on the reasonableness of rates charged and paid for services rendered." The argument for respondents evades the pertinent facts and the settled rule of pleading and evidence. While it is true that the public is not generally interested in the divisions of joint rates, there are important exceptions to the general rule and this is one of them. In other words, the respondents are here seeking continued imposition upon the public of a burden of freight charges amounting to some $3 million annually on the theory that they are entitled to do so because of increased cost of service rendered in the unloading of fruits and

vegetables at New York. Protestants contend that re-
[fol. 1032] spondents have been at all times compensated for the said unloading service, including the increased cost thereof, and that the additional charge now imposed for the simple delivery service of unloading is nothing more or less than an unjust or unwarranted surcharge.

As stated at Sheet 15 of the proposed report, on all traffic from the West to New York the delivering carriers, including respondents herein, receive specified amounts as an arbitrary allowance out of the line-haul rate before prorating the remainder of the through rate with connecting carriers. In *Erie R. Co.* v. *Alabama & V. Ry. Co., supra,* a proceeding dealing with divisions accruing to complainants therein out of joint transcontinental rates on fresh fruits and vegetables destined to New York and New Jersey, including Duane Street Station (Piers 19, 20 and 21) the Commission (Div. 4) found, among other things, that "for the future the just and reasonable divisions of those rates to Duane Street Station would be 3 cents per 100 pounds to the Erie (since increased under the Ex Parte cases, as admitted by respondents at p. 15 of their exception brief) and of the remainder of the revenue 27.5 percent to the lines east of Chicago. In the *Florida Railroad Commissioners case* already cited, the subject was again considered with reference to rates on fruits and vegetables from Florida to points in the United States; and again consideration was given to the alleged cost of unloading fruits and vegetables by the carriers at New York as a part of the delivery of the traffic in *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp., supra.*

The quotation of respondents from the decision in Ex Parte No. 168, *Increased Freight Rates, 1948,* 272 I.C.C. 695, 704-5, affords no substantial support for their position. [fol. 1033] As heretofore suggested, the authority of a decision in a prior proceeding is coextensive only with the facts upon which the said decision was made. Certainly there is no similarity or reasonable comparability of the recorded facts in the present proceeding with those considered by the Commission in the increased rate proceeding referred to.

Fair Treatment. There can be no successful denial

of the proposition that the Port of New York is entitled to fair treatment in the matter of common carrier rates, charges, and practices with respect to all forms of traffic moving from, to or via that metropolitan area. Respondents so admit. (Exc. p. 62) However, they undertake to segregate local traffic from export and import commerce on the theory, as protestant understands the argument for respondents, that since the fruit and vegetable traffic is not export or import business the matter of fair treatment is immaterial. In other words, respondents take the position that the treatment accorded this traffic could not possibly have an adverse effect on New York as a major port. The argument in that connection is specious. To accord fair treatment to the Port of New York and its people, economical and efficient service is requisite as is also freedom from unjust discrimination with reference to domestic commerce as well as the export and import commerce of the port.

Cost to New York Consumers. The argument of respondents concerning cost to consumers of the unloading charges complained of affords no support whatever for the position they take. To assert that "there is nothing special or unusual about the unloading charges in this respect" (Exc. p. 64) is less than half a truth. There is something unusual about charges of any character imposed by a public utility in excess of those that may [fol. 1034] be considered reasonable to the public as well as to the facility. Excessive charges such as those here in issue are in the nature of a penalty which common carriers have no right to assess.

Nor is it any answer to suggest, as respondents do suggest, that the unloading charges represent such a small part of the ultimate price that they are of little importance. Even though there were only a small amount of unreasonableness or discrimination, the unlawfulness must nevertheless be condemned; but the truth of the matter is that the degree of unlawfulness in the present case, if unlawfulness may be measured by degrees as respondents apparently do measure it, is so seriously injurious as to provoke the urgent protest and complaints of municipal

authorities, labor organizations, shippers and receivers of fruits and vegetables and consumers generally.

Of course, New York is dependent upon railroad transportation for a major part of its fruit and vegetable supplies, some of which are hauled for long distances, providing good business and liberal revenues for the interested carriers. It is equally true that New York has a vital interest in the maintenance of strong and financially sound railroads, for which it is paying today in greatly increased transportation costs. However, such considerations hardly warrant imposition upon any municipality or shipper or consumer of unreasonable and discriminatory charges such as those complained of in this proceeding.

Disability of Respondents. There is no error in the conclusion of the Examiner to the effect that the absence of team-track facilities adequate to accommodate the fruit and vegetable traffic consigned to New York is a carrier disability. Respondents now admit (Exc. p. 70) [fol. 1035] that the statement appearing at Sheet 23 of the proposed report "seems to be the most complete and accurate statement on this subject in the proposed report", the said statement reading as follows:

> The unloading of the freight by the carrier onto the pier platform is due to the physical inability of the carrier to make delivery of the freight to the consignee at billed destination, without performing such unloading. Such inability is clearly a carrier disability from which consignees should not be subjected to additional unloading charges.

As the Examiner points out in that connection, in the case of team-track traffic the car is placed on a team track and the truck is backed up to the car door, observing further that "this cannot be done at pier stations because, as respondents admit, it is necessary to refuse consignees access to the carfloats for delivery of their freight. It is admitted by respondents that because of this disability the freight is not actually delivered to the consignees until it is placed on the pier floor. Delivery under the line-haul rates is not completed until the freight is placed in a location accessible to the consignee." (Sheet 23)

It is perfectly clear that the unloading is performed by respondents at the pier stations to meet their legal obligation to make delivery of the freight to the consignee; that is to say, to place the freight in a location and position reasonably accessible to the consignee, the pier stations being provided for that purpose in view of carriers' disability in the matter of team tracks.

Respondents argue that carriers are free to provide additional services at their discretion "subject only to the requirement that they provide reasonable alternative [fol. 1036] facilities without additional charges and that the charges for the special service do not result in prejudice or preference." (Exc. p. 72) The argument is too broad and it evades the real issue. It assumes, contrary to fact, that pier station delivery amounts to a special service. The argument is too thin for serious consideration.

Burden of Proof. The argument of respondents with reference to burden of proof is altogether specious. Although admitting that the issue here relates to the reasonableness of the charges under consideration, respondents contend that it is immaterial whether the rates are or are not "unfair". The fine-spun argument for respondents would draw a line of demarcation between that which is "fair" and that which is reasonable under the provisions of the Interstate Commerce Act.

That the burden of proof is definitely upon respondents to show the reasonableness and otherwise lawfulness of the charges in issue is perfectly clear from the pertinent provisions of the statute administered by this Commission. That respondents have wholly failed to sustain that burden is equally clear from the evidence of record already reviewed.

The Cases Cited. The cases cited on the proposed report, to which respondents refer, afford conclusive support for the proposition that the burden is upon respondents to show the reasonableness and lawfulness otherwise of the charges in issue. Respondents admit that "there is language in both *Lighterage and Storage Regulations at New York, supra,* and *Fruits and Vegetables to Duane Street, supra,* which tends to indicate that where special services are performed, carriers must prove the reasonable-

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[fol. 1037] ness of the additional charges." (Exc. p. 75) But respondents err in their repeated reference to "special" service. The truth of the matter is that the cases cited are conclusive on the proposition that compensation for the delivery service in issue is included in the line-haul rates. In the case last cited, it is stated specifically that—

> "As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane Street under the line-haul rates."

The decision reported under the title first suggested was unanimous. As heretofore suggested, it was historically a momentous decision with numerous parties and handled for the full Commission by Commissioner Meyer. Its values lies in the fact that it goes fully into the terminal conditions at New York, distinguishing them from the terminal service at interior points, but particularly in the Commission's conclusion that the assessment of any extra charge for terminal handling would "have the effect of increasing" the line-haul rates and that "where terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration * * * the entire through service of which it forms a part and the compensation heretofore received for such through service." (p. 61) In the case cited the rail carriers entering New York filed tariffs proposing, among other things, to segregate the terminal services on lighterage freight and assign to them a separate charge, although these terminal services had long been included in the line-haul rates. The [fol. 1038] Commission unanimously said that while it favors the analysis of service and rates as to their measurement and comparison nevertheless it could not permit the segregation of services and the imposition of separate terminal charges without taking into account the entire through service and the adequacy of the charges therefor.

As correctly stated by the Examiner, the respondents have not only failed in the instant proceeding to prove that

the through charges are reasonable, but have (heretofore) taken the position that the reasonableness of the line-haul rates is irrelevant. (Sheet 15)

For convenient reference we reproduce the quotation from the *Duane Street case* shown at Sheet 15 of the proposed report—

> "The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruits and vegetables at Duane Street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic. * * *"

Respondents assert that the decision in *Allowances for Stacking*, 179 I.C.C. 780, was not concerned with the question as to whether additional charges for services other than stacking were lawful. As correctly stated by the Examiner, the question at issue in that proceeding was whether or not the Pennsylvania could pay the consignee to stack packages of fruits and vegetables in piles, sorting them according to kind, brand, size, and grade, so that they [fol. 1039] might be easily counted, inspected, and displayed for sale. It appeared in that case that the railroads had in the past performed certain terminal services that go beyond simple delivery, more particularly stacking of freight on the piers for convenient inspection and sale. The Commission (Div. 3) drew a careful distinction between such services as stacking, on the one hand, and simple delivery service, on the other hand. It very clearly recognized the duty of the railroads to make simple delivery. To quote:

> "* * * instead of requiring the consignees to unload the shipments from the cars, as ordinarily required on carload shipments, respondent undertakes to make delivery in spaces assigned to the consignees on the piers and the stevedores stack the packages in those spaces. It appears from this record that at that point

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respondent has fulfilled its legal obligation as to delivery. The subsequent restacking, in which the packages are sorted as to brand, size, etc., appears to be solely for consignees' benefit and is apart from the transportation in connection with which allowances for services are contemplated. * * *"

The decision in the case cited is of further value because it recognizes that the obligation to unload does not apply to the consignee where he has no access to the freight.

The Examiner also cites and quotes from *Unloading Lumber at New York Harbor, supra,* a proceeding in which respondents therein (rail carriers serving the Port of New York) proposed to establish charges for unloading eastbound lumber from cars onto lighters or barges at specified stations in New York Harbor. Previously, the unloading had been performed by the respondents free of [fol. 1040] charge. At Sheet 16 of the proposed report the Examiner quotes a significant paragraph of the report referred to in which the Commission (Div. 2) said—

"The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor. In *New York Harbor Facilities Applications,* 100 I.C.C. 383, the Commission found that lighterage and car floatage in New York Harbor are equivalent to necessary extensions of the rail lines of the various railroads. This conclusion was reached also in *Lighterage Cases,* 203 I.C.C. 481. *The nature and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul services.* It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York,* 35 I.C.C. 47, 61. As such a showing was not made respondents have not met the requirements of the statute in that respect, and accordingly, have not sustained their burden as to the reasonableness of the proposed charge. (Emphasis supplied)"

With reference to the decision in *Terminal Charges at Pacific Coast Ports, supra,* respondents argue that it "specifically exempts from the implications of the language * * * the unloading of carload freight and says specifically that 'a carrier cannot reasonably be compelled to absorb such charges.'" There is no such exemption from the principle of the decision upon which this protestant has heretofore relied and which is sufficiently indicated by the quotations of the Examiner appearing at Sheet 17 of the proposed report.

[fol. 1041] It is well settled, as stated in the case cited, that where the rates have been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of specified terminal services as a part of the through transportation, their proposal to establish an additional charge for a part of the through service is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone or that the increased total charges are reasonable for the aggregate services.

Long-Continued Maintenance. It is asserted for respondents that the length of time during which they have provided "free" service is of no substantial importance in considering the issues in this proceeding. (Exc. pp. 77-78) The theory is that, to quote from the exception brief, "However long the respondents may have absorbed the cost of these services, the issue as to the reasonableness of the charges assessed and the legality of the publication of separate charges remain unaffected." The position of respondents is untenable. It is hardly necessary to cite the numerous cases in which the Commission has held consistently to the principle that long-continued maintenance of transportation rates without complaint is a matter entitled to consideration and weight in determining the reasonableness of such rates. These respondents would doubtless be among the last to deny the soundness of that principle. It is among the elements in chief showing that the service rendered by respondents in the simple delivery of fruit and vegetable traffic at the pier stations is included within the line-haul rates and that therefore additional charges for such delivery service may not be

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assessed unless the carriers are able to show that the [fol. 1042] line-haul rates are not sufficiently high to include the compensation to which they may be entitled or that the total charges are fairly responsive to the requirements of the Interstate Commerce Act. They have wholly failed to sustain that burden in the present case.

It is no answer to suggest, as respondents do suggest, that where special services are provided a new or additional charge may be imposed therefor, citing in that connection service charges with reference to redemption of unused passenger tickets; for handling hand baggage and other items having no relevancy to the present issue. There can be no successful denial of the proposition that where, as in the present case, the proposal is to impose a substantial additional charge—not for new or added services or for special services of any character, but for services included for more than half a century in the line-haul rates, there must be special justification therefor. No such justification has been shown in this proceeding.

Respondents confuse the delivery service here in issue with special and other services which are wholly unrelated thereto.

Respondents cling tenaciously to the argument that the issue is concerned with "free" unloading and that the service of unloading is a "special service" for which "special charges" may be assessed. It should be sufficient to reply that—

1. Respondents are compensated fully by the line-haul rates and the special arbitrary deductions already described for the unloading service in issue. There is no "free" service.

[fol. 1043] 2. No "special service" of any character is involved. The claims of protestants and the recommended findings of the Examiner are directed exclusively to simple delivery which is an admitted obligation of the carriers.

In the absence of meritorious arguments, respondents persist in their refusal to recognize the fact that there is not even a remote relationship of unloading services at

the pier stations, required to effect delivery, and unloading at interior points after the transportation contract has been completed by delivery. Where, as in the case at bar, simple delivery service rendered at the pier station is necessary to place the property in a position where the consignee may have access to it, and where that service has been included for more than 50 years in the line-haul rates, it is perfectly apparent that the burden is on the carriers to render that service—otherwise the property is left in their possession subject to an action for conversion. At the interior freight stations or team tracks to which the principle of the car unloading cases cited at the outset have been applied, shipments are delivered in the cars to which the consignees have convenient access and delivery thus accomplished, wherefore unloading by the carrier is accomplished after delivery and not as a part of delivery. The operation at such interior points is wholly unrelated to that here in issue.

Respondents are also on tenuous ground in their reliance upon a certain "admonition" of the Commission in *Emergency Freight Charges*, 215 I.C.C. 439, 464, having reference to "coordination of services and facilities, through revision of the rate structure to meet changed conditions, and in such other ways as are open to them (the carriers)." There is at New York efficient coordination [fol. 1044] of services and facilities of which the pier station operations are an important part. There have been no "changed conditions" that would require a revision of those operations. The line-haul rate structures which embrace all said operations have been substantially elevated during the years and are now on the highest possible level.

Respondents quote an extract selected by them from the decision in *The New York Harbor Case*, 47 I.C.C. 643, 734, in which it appears that there was comment concerning the terminal service at New York. In the same case the defendants contended, according to the report that "in a case as comprehensive in character as this one the single item of terminal cost should not be permitted to play too important a part." (p. 735) It appears clearly that the discussion at the point indicated concerns the general problem of terminal operations and costs confronting the

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whole country and that the comment is by no means limited to the Port of New York. As was pointed out on the brief for protestant dated August 1, 1951, the Commission has held as to this very New York terminal situation that terminal cost is not controlling in the making of rates, especially where the traffic involved is long-haul traffic, as it is here, and that the rate treatment of the port as an integral whole is justified in view of the commercial unity of the district. *New York Harbor Case*, pp. 668 to 674, 739.

The *Freight Forwarder Investigation*, 229 I.C.C. 201, has no bearing upon the case at bar, as is perfectly apparent from the fact that operations and schedules incident to the freight forwarding business have no relevancy to the service required to make simple delivery of fresh fruits and vegetables at the New York pier stations provided and operated by the carriers in the absence of team tracks [fol. 1045] adequate to accommodate the traffic. As heretofore suggested, the authority of a decision in a prior case is coextensive only with the facts upon which that decision was made.

Respondents advance the further argument that "the trade" should assume the expense of unloading because, as we understand the argument, it receives worth-while benefits from pier station delivery. It receives no benefits other than those to which it is fairly entitled and for which it pays fully under the tariff schedules of respondents. Respondents might well argue further and with equal logic that the consignee receiving his fruit and vegetable traffic on the team tracks enjoys worthwhile benefits because of the fact that he has direct access to the car and the convenience of backing his truck up to the car door, wherefore he should pay a charge in addition to the line-haul rate. The position of respondents is patently untenable.

Finally, it is said for respondents that cost for unloading has increased substantially since the date of the Commission's decision. It should be sufficient to reply that the line-haul rates have been also substantially increased since the date of the said decision, wherefore currently effective line-haul rates continue to include full and fair compensation for the service of simple delivery claimed by protestants and recommended by the Examiner.

Conclusion

The fact suggested by respondents that the unloading charges have been in force since November 1, 1948, adds nothing of value to the arguments submitted in their behalf—quite the contrary. On the whole record nothing is now more firmly established than the proposition that [fol. 1046] continued maintenance of the said unloading charges would violate the letter and spirit of the Interstate Commerce Act and override the settled principles of rate construction applied from earliest times by Commission and Court. The declaration of respondents that their continuance is permitted by the stabilization program is self-serving merely and calls for no further reply. The fact, if it be a fact, that elimination of these unloading charges would take away from the eastern carriers revenue in excess of the amount of increases granted in the Ex Parte proceedings to which respondents refer affords no basis or reason for denying to protestants the right to rates and charges that are just and reasonable within the full contemplation of the Interstate Commerce Act. In every case where unreasonable rates are required to be reduced the carriers "lose" money in the sense that they are required to conform to the provisions of the governing statute; that is to say, they render services in the future for reasonable rates and the said reasonable rates are less than the unlawful rates theretofore maintained. That is the perfect parallel.

In conclusion, this protestant denies with all possible vigor the repeated and utterly fallacious assertion on the part of respondents that the unloading charges in issue are consistent with the general rule that carload freight should be unloaded by or at the expense of the consignees. Shippers and consignees are entitled to delivery under the line-haul rates and where unloading is essential to accomplish that part of the contract of transportation from origin to destination the burden is on the carriers and not on the shippers or consignees. A completely different set of circumstances and conditions is encountered at stations [fols. 1047-1092] such as those located at interior points where unloading is a service accomplished after completion of the transportation contract. Respondents have

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wholly failed to show error of any character in the proposed report of the Examiner.

Wherefore, protestant prays that the said report and the recommended findings and conclusions thereof shall be adopted by the Commission and the proceeding thus brought to a just and prompt conclusion.

Respectfully submitted, Leander I. Shelley, General Counsel, 111 Eighth Avenue, New York 11, N. Y.; Wilbur La Roe, Jr., Frederick E. Brown, Arthur L. Winn, Jr., Samuel H. Moerman, Investment Building, Washington 5, D.C., Attorneys.

Dated at Washington, D.C., October 18, 1951.

[fol. 1093] BEFORE THE INTERSTATE COMMERCE COMMISSION
I. & S. No. 5500

Unloading Charges on Fruits and Vegetables at New York and Philadelphia

REPLY OF THE SECRETARY OF AGRICULTURE TO THE EXCEPTIONS OF RESPONDENTS TO THE PROPOSED REPORT—filed October 18, 1951

Comes now the Secretary of Agriculture of the United States and, in reply to the exceptions filed by the respondents to the proposed report upon further hearing of Examiner Martin J. Walsh, served upon the parties September 11, 1951, in the above-captioned proceeding, states as follows:

Reply to Exception A—The Line Haul Rate Conclusion.

The respondents challenge (pp. 10-20)* the following conclusion set forth on sheet 25 of the proposed report:

> The compensation for the unloading of the fruits and vegetables performed by the respondents for more than 50 years was included in the line-haul rates. The addi-

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* Unless otherwise indicated page references are to respondents' exceptions.

> tion of a charge for this unloading service performed before delivery requires clear and convincing proof that the practice of unloading without an added charge is unfair to the respondents because of the inadequacy of the line-haul rates for the total services rendered.

[fol. 1094] Respondents claim that the theory of the Examiner that the reasonableness of the unloading charges herein must be determined in the light of the adequacy of the line-haul rates was expressly repudiated by the Commission in *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25, and they quote at length from the Commission's report in that case (pp. 11-14). However, that case dealt only with a proposal to increase charges for the loading and unloading of carload freight performed by the carriers as an accessorial service at the request of consignees at some 30 points in Official Territory. The issues therein are entirely different from those before the Commission in the present proceeding, for in the instant case the issue is whether the respondent carriers can lawfully impose a charge in addition to the line-haul rate for the unloading of carloads of fresh fruits and vegetables at the New York pier stations and Philadelphia produce terminals where such unloading must necessarily precede and be incidental to delivery of such freight to the consignees.

Precisely the same issue was decided by the Commission more than 27 years ago in *Fruits and Vegetables to Duane St., N. Y.*, 66 I.C.C. 135, in which the Commission said:

> As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane street under the line-haul rates. . . . The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane Street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic. . . . (139)

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[fol. 1095] And, as if in answer to respondents' next argument that the rates on fresh fruits and vegetables from important origin points are blanketed over substantial eastern areas around New York and Philadelphia where the consignees need not unload (p. 15), the Commission continued in the *Duane Street* report that no showing of inadequate compensation was made by:

> . . . merely pointing out that the rates on California fruit are blanketed to all territory east of the Colorado common points and that 15 years ago, when the traffic began to be handled in the manner above described, no corresponding increase was made in the through rates. This blanket has been voluntarily maintained by the carriers for many years and appears to have been satisfactory to all concerned. We find that the establishment of terminal charges higher than the present assorting charges has not been justified (159).

Such consideration of the adequacy of the compensation received by the carriers for the through service was contemplated by the Commission in *The Five Per Cent Case*, 31 I.C.C. 351, in which the Commission admonished the railroads in official territory to ascertain to what extent, if any, the unloading of cars by the carriers constituted an unjust burden upon them (408). It was after it had conducted its own investigation of the unloading and other services performed by the carriers at New York that the Commission rendered its decision in *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47. In that case the Commission found that the unloading of freight from lighters at the New York pier stations had long been covered by the freight rate (60) and concluded:

> [fol. 1096] . . . Where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate the service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it

forms a part and the compensation heretofore received for such through service (61).

That principle has been followed consistently by the Commission, *Unloading Lumber at New York Harbor*, 256 I.C.C. 463; *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673. In the present proceeding respondents have failed to sustain their burden of proving that the line-haul rates inadequately compensate them for performing the through service, including such unloading as is incident to delivery; or alternatively, that the line-haul rate plus the unloading charges herein are just and reasonable for the total transportation service.

Respondents further argue that the unloading charges are consistent with the government price-stabilization program, do not add to the inflationary pressure, are unobjectionable from the standpoint of competitive relationships, and relieve the existing "depression" in the line-haul rates. These arguments are without substantial merit and require no reply.

Reply to Exception B—The Conclusion as to Delivery.

The principal exception of the respondents (pp. 20-35) is directed at the conclusion "that the unloading at the New York piers is a part of and necessary to the delivery at those stations" (p. 3) "and therefore included within the carriers' obligation under the line-haul rate" (p. 21). Respondents' criticisms are separated into seven parts.

[fol. 1097] *Obligation to Unload.* Respondents point out that nowhere in official territory except in New York are carriers obliged to unload carload domestic freight (p. 21). However, many of the circumstances and conditions which affect the transportation service at New York have no counterpart elsewhere in the United States; therefore, comparisons with service at other cities are difficult. *Lighterage and Storage Regulations at New York, N. Y., supra*, 52. As to whether the New York carriers should be under such an obligation, the respondents say (p. 22) the considerations should be those offered by the Commission in *Railroad Commissioners of Florida* v. *F. E. C. Ry. Co.*, 42 I.C.C. 616, 626:

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> Whether or not a particular kind of delivery is in the nature of an additional service, or whether it is such a delivery as the carrier must perform without additional charge, is a question of fact to be determined by examin--g the history of the rates, the nature of the service, the physical condition of the land and tracks, the custom of the carrier, and other pertinent evidence.

Under these criteria the respondents should be obliged to unload the carloads of fresh fruits and vegetables at the New York pier stations.

Unloading as a Part of Delivery. Respondents contend that the unloading performed by them at the New York piers and Philadelphia produce terminals is an accessorial service like sorting and stacking by brands, sizes, or grades for which they receive an additional amount and not a transportation service that they must perform under their line-haul obligation (pp. 23-25). They overlook, however, one important distinction: the consignees are able to take de-[fol. 1098] livery without such sorting and stacking, but, as the respondents deny them access to the cars, the consignees cannot possibly take delivery until the cars have been unloaded. When the carriers elect, as they have done here to preclude the consignees from an opportunity to unload their own traffic, they make of that unloading a transportation service. *Berg Industrial Alcohol Co.* v. *Reading*, 142 I.C.C. 161, 163.

The Commission found in its prior report in this proceeding, "Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (272 I.C.C. 654-5). The freight is really in transit until so delivered to an accessible point. *St. Louis (Cupples Station) Terminal Regulations*, 40 I.C.C. 425, 432. As the unloading is essential in order to complete delivery, the carriers must perform it, and they are paid for that service when they collect their regular rates. *N.Y.C. & H.R.R. Co.* v. *G. E. Co.*, 219 N. Y. 227, 114 N. E. 115.

Unloading Covered by Line-Haul Rates. Respondents doubt that the line-haul rates were intended to compensate them for performing the unloading service, because the

Commission's decisions have not expressly stated that the unloading service has had any material bearing upon the Commission's determination of the level of the line-haul rates (pp. 26-27). Accordingly, the respondents feel they are entitled to an additional charge for performing the unloading service. However, the unloading service is merely incidental to pier-station delivery accorded consignees in lieu of the team-track or side-track delivery that they ordinarily would receive elsewhere. "In unloading the [fol. 1099] freight from the cars and lifting it on the trucks to an accessible point of receipt on the station platform the carriers are merely supplying the deficiency, and in effect, though not in form, making team-track or siding delivery." *St. Louis (Cupples Station) Terminal Regulations, supra,* 432.

In *The Los Angeles Switching Case,* 234 U. S. 294, 58 L. ed. 1319, the Supreme Court reviewed the Commission's decision that deliveries on industrial spur tracks within the switching limits were not an added service for which the carrier was entitled to any charge additional to the line-haul rate, and that such deliveries were substituted deliveries in lieu of team-track deliveries and were not accessorial services. The court, quoting in part from the Commission's decision, said:

> "An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a side track delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done. 18 I.C.C. 310, 318" (309).
>
> * * * * *
>
> . . . it cannot be maintained that the delivery and receipt of goods on industrial spur tracks within the switching limits of a city is necessarily an added

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service for which the carrier is entitled to make, or should make, a charge additional to the line-haul rate to or from that city, when the line-haul rate embraces a receiving and delivering service for which the spur-
[fol. 1100] track service is a substitute. It is said that carriers are bound to carry only to and from their terminal stations. But when industrial spur tracks have been established within the carrier's switching limits, within which, also, various team tracks are located, these spurs may in fact constitute an essential part of the carrier's terminal system (311).

Similarly, in the instant case, as pier-station delivery is merely a substitute for the more usual team-track or side-track delivery, a charge in addition to the line-haul rate cannot be imposed for the performance of the unloading that is incidental to such pier-station delivery.

Respondents again advance the arguments that the line-haul rates are blanketed over broad areas and that the unloading is not performed at other destinations within such areas (p. 26). Reply was made to these arguments on pages 2-3 hereof.

Physical Condition of Delivery Facilities. Respondents urge that the imposition of an additional charge for the unloading of carloads of fruits and vegetables at the pier stations is unobjectionable for the reason that adequate alternative facilities are available (p. 27). Of course, this contention is not supported by the facts. In its prior report herein the Commission said, "There are various team tracks and private sidings in New York at which consignees may receive cars for unloading. . . . These facilities are not sufficient to handle all of the great bulk of fruits and vegetables received at New York" (272 I.C.C. 654).
[fol. 1101] Respondents would include team tracks and private sidings on the other side of the Hudson River from Manhattan as being alternative facilities for New York delivery. However, they themselves recognize that shipments consigned for delivery in "New York, N. Y." cannot be delivered some place in New Jersey, and that the tariffs would have to be amended before traffic billed to "New York, N. Y." could be shunted onto New Jersey team tracks

for delivery (p. 30). In *Bahrenburg, Bro. & Co.* v. *A. C. L. R. Co.*, 24 I.C.C. 560, the Commission permitted the Pennsylvania Railroad to make team-track delivery in New Jersey of carloads of watermelons that previously had been unloaded by the railroad at one of its Manhattan pier stations; however, in that case the Commission found that the increased traffic in watermelons and the congestion at the Manhattan pier station made it impossible for the railroad to continue the service (569) and that at the time of the change the line-haul rate on watermelon was reduced accordingly (568). Similarly in *Onion Rates to New York, N. Y.*, 30 I.C.C. 528, the Commission required the acceptance of delivery at Jersey City instead of at the New York pier stations but only after the tariffs were altered to provide for an appropriate allowance for drayage and ferriage (529). In the present case there is no suggestion that the New York-bound traffic in fresh fruits and vegetables has increased greatly or that the pier stations are unduly congested and that accordingly this traffic can no longer be handled at those pier stations. Nor to our knowledge have the respondents offered to reduce the rates to [fol. 1102] New York City or to pay an allowance for drayage and ferriage in the event New Jersey delivery should be substituted for delivery in New York City.

In any event the adequacy of alternative facilities is of relatively lesser importance in the determination of the legality of the unloading charges than are other factors. In *The Los Angeles Switching Case, supra*, the Supreme Court reviewed an order of the Commission denying an additional charge for side-track delivery in lieu of team-track delivery and said:

> It is said that it was established by undisputed evidence that the team tracks and freight sheds provided by the carriers were fully adequate for all carload freight. Putting aside the denial by the Commission of this allegation, it is evident that the question was not simply as to such adequacy, but as to the actual use of the various tracks, the service thereon relatively considered, and whether there was really an extra service in the circumstances shown (312).

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These other, more important factors require that the unloading charges herein be declared unlawful.

Custom of Carriers. The respondents state that carriers have never unloaded carload freight except under unusual circumstances, and that they have gradually eliminated such free service everywhere but in New York (p. 33). However, New York represents an extraordinary situation. It always has been customary on Manhattan Island for delivery, including unloading, to be made under the line-haul rates. The conditions that led to the adoption of this practice more than 50 years ago exist no less today. See *Fruits and Vegetables to Duane St., N. Y., supra.*

[fol. 1103] A comparable situation existed some years ago at St. Louis. At the Cupples Station the tracks were below the station's platform and were inaccessible for team-track delivery. Freight was therefore unloaded from the cars onto trucks and lifted, while on the trucks, to the platform by elevators, the work being performed by railroad employees without any additional charge. The Commission in *St. Louis (Cupples Station) Terminal Regulations, supra,* found, "The team-track facilities are now inadequate for the city's needs. Inbound cars at Cupples Station are loaded outbound with an average of four hours after their arrival, and demurrage there is practically unknown. The testimony indicates that this expeditious handling of freight at this station in the volume stated, and the prompt release of equipment therein employed, is an important factor in the prevention and relief of congestion of the city's team tracks as a whole" (433). Under these circumstances shown to exist the Commission approved the carriers' practice of unloading the cars as a part of their line-haul service (432). Similar findings can be made by the Commission in the instant case, and the long-established practice of "free" unloading by the carriers where they deny consignees access to the cars should be continued. It was not until many years later that the Commission in *Freight-Handling Charges at St. Louis Station,* 201 I.C.C. 543, found among other things "The present record shows a changed condition with respect to team track facilities in [fol. 1104] St. Louis. There are now ample team tracks in the vicinity of the . . . stations . . . to handle all the car-

load freight now handled through the . . . stations." Consequently the Commission permitted the imposition of an additional charge for the unloading performed at the Cupples Station. In the instant case the Commission is unable to make such a finding of adequate team tracks on Manhattan Island to handle the traffic now unloaded at the piers, and therefore pier-station delivery with the unloading performed by the respondents at no additional cost as a part of their line-haul obligation should be resumed.

Unloading Costs. Respondents complain about the high costs of performing the unloading service (p. 34). There is nothing new in that. The Commission long has recognized that pier-station delivery has certain disadvantages from the carrier standpoint. "It casts one burden upon the carrier which it is not compelled to bear at the ordinary station, i.e., the unloading of carload freight." *Constructive and Off-Track Freight Stations*, 156 I.C.C. 205, 222. However, the respondents have failed to establish that their returns under the line-haul rates do not compensate them adequately for performing the transportation service, including the unloading (proposed report, sheet 25), and, therefore, the schedules naming the unloading charges should be ordered cancelled.

[fol. 1105] *Movement of Traffic.* Respondents insist that the imposition of the unloading charges has promoted the movement of traffic to the pier stations (p. 35). Yet exhibit 140 introduced by the respondents reveals that unloadings at the New York pier stations have declined almost 40 per cent since 1948, while the unloadings at New York team tracks and private sidings have declined only 5 per cent since then (Ex. 139). Furthermore, as was demonstrated on page 26 of our brief upon further hearing of August 1, 1951, rail unloadings of carloads of fresh fruits and vegetables at New York altogether declined 27 per cent since 1947 while truck unloadings increased 13 per cent and boat unloadings increased 400 per cent.

Reply to Exception C—The Issue Under Section 3 of the Act.

The respondents take exception (p. 35) to the Examiner's conclusion on sheet 25 of the proposed report that the Com-

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mission should find that the unloading charges are also in violation of section 3(1) of the act. Respondents contend that not enough evidence was introduced to enable the Examiner to find, "As there is keen competition between fresh fruits and fruit juices in household consumption, the assailed unloading charges are unduly prejudicial to fresh fruits and unduly preferential of fruit juices in violation of section 3(1) of the act" (sheet 24 of proposed report). This is not the place to review in detail the wealth of evidence that was introduced on this point. It should suffice to state that in our brief of September 30, 1947, we said:

> The record also discloses that many other commodities are unloaded by the respondents under substantially the same circumstances and conditions and that no charge is proposed therefor (Tr. 84-5, 87-91, 184-5, 329-330, 399, 473, 522, 604, 654, 710, Ex. 37). In view of [fol. 1106] this and of the measure of the charges proposed the Commission should find the suspended schedules unlawful under Section 3 (p. 25).

Additional evidence with respect to discrimination was presented at the rehearing in 1949 (Laux, Tr. 921, 929-942, 949; Hedden, Tr. 967-970; Pease, Tr. 977-980; Weill, Tr. 1030; Stedman, Tr. 1045-8; Exs. 97-99, 104) and at the further hearing in 1951 (Dugan, Tr. 1776-7; Jarvis, Tr. 1786, 1789; Clark, Tr. 1806; Talbot, Tr. 1847; Stedman, Tr. 1916-8). This evidence clearly meets the requirements of *Barrett Co.* v. *A. T. & S. F. Ry. Co.*, 172 I.C.C. 319, 333, cited by the respondents (p. 38), and is more than adequate to sustain the Examiner's finding of prejudice and preference.

Reply to Exception D—The Rehearing on June 4 and 5, 1951.

New Evidence. The respondents charge that the cost studies introduced at the further hearing in 1951 failed to show that the respondents are effecting a saving from the use of the pier stations as compared with the team tracks (p. 44). However, respondents' own cost studies show that it costs less to handle carloads of fruits and vegetables at pier stations than at team tracks. The Baltimore and Ohio

reported total terminal costs (not including unloading) at $51.37 at its pier stations as compared with $70.46 at its team tracks (Exs. 153, 154); the Erie's costs were $44.30 and $45.44 respectively (Ex. 146); and the Pennsylvania's costs were $71.38 and $73.57 respectively (Ex. 148).

Furthermore, protestants' studies show that the cost of terminating *and unloading* a carload of fresh fruits and veg- [fol. 1107] etables at the Manhattan pier stations is less on the Pennsylvania and approximately the same on the Erie compared with the estimated costs of expanding and operating their presently inadequate team tracks to enable them to absorb the traffic now handled at the pier stations (Ex. 158, p. 44).

With reference to the unloading of cars at the pier stations the Commission in its prior report said, "The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available" (272 I.C.C. 652). The figures of the Pennsylvania show that the average time from arrival of a carload of fresh fruits and vegetables at Harsimus Cove Yard until it is unloaded at Piers 27 and 28 is about 34 hours, while it takes 96½ hours until the car is unloaded at the 37th Street team tracks. As was explained on page 22 of our brief upon further hearing of August 1, 1951, this faster turn around results in a minimum economic saving of approximately $11 per car unloaded at the pier stations. Such an economic saving should be taken into account in passing upon the reasonableness of the unloading charges herein.

Charge of Non-Compliance. Respondents object (p. 54-59) to Examiner's statement in the proposed report that "respondents have failed to respond in any substantial way to the terms of" the Commission's notice of October 10, [fol. 1108] 1950 (sheet 11). The Commission's notice directed the respondent railroads to submit evidence at the further hearing that would show, among other things, "any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities." The railroads, however, failed entirely to present such evidence. It was clear from the wording of the notice that

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the Commission wanted to know how great an investment in team track facilities on Manhattan Island would be required if the piers were not available for the use of the fresh fruit and vegetable traffic and how the amount of such investment would compare with the railroads' fixed costs in the pier facilities currently employed in the handling of that traffic. The proposed report of Examiners Brown and Walsh of June 5, 1950, had said, "the waters of New York harbor are a substantial asset to the railroads, in that they make possible extensive terminal operations to and from the several piers and other waterfront locations without the investment which otherwise would be required in switch tracks, team tracks, and rail terminal facilities" (Sheet 15). The Commission wished to have that asset evaluated. The respondent railroads, however, interpreted the Commission's instructions as calling merely for a comparative study of present costs of handling cars at pier stations and at their admittedly inadequate present team tracks, and they made no attempt to determine what the difference in costs to themselves would be if the piers were not available for the perishibles traffic (Root, Tr. 1678-9; Heywood, Tr. 1692).

[fol. 1109] *Reply to Miscellaneous Exceptions.*

Alleged Diversion. Respondents seek to deny that the unloading charges assailed herein have caused the diversion of some traffic from the rails to trucks by showing that the decline in rail receipts of citrus from 1947 to 1949 was greater in the Eastern District as a whole than at New York and Philadelphia (pp. 59-60). The respondents' figures are inconclusive, and they fail to obscure the fact that the unloading charges together with the increases in freight rates have resulted in substantial diversion of this traffic from rail to boat and truck. At Philadelphia rail unloads of fresh fruits and vegetables have declined 15 per cent since 1947, while truck unloads have increased 16 per cent. At New York rail unloads of fresh fruits and vegetables declined 27 per cent in the same period of time, while truck unloads increased 13 per cent and boat unloads increased 400 per cent. (See page 26 of our brief upon further hearing of August 1, 1951.)

Divisions. Respondents deem unsound the proposal of some of the protestants that, in lieu of the unloading charges, the respondents should seek higher divisions of the joint revenues accruing to the railroads for the carriage of this traffic (pp. 60-62). Yet the very costs of terminating carloads of fresh fruits and vegetables at the pier stations and produce terminals, for which the respondents allegedly wish to be reimbursed by the unloading charges herein, have heretofore been before the Commission in various division cases. In *Erie R. R. Co.* v. *Alabama & V. Ry. Co.*, 98 I.C.C. 268, one of the respondents herein was accorded a terminal allowance of 3 cents per 100 pounds on transcontinental traffic delivered at New York. The Commission therein said:

> [fol. 1110] Defendants point out that the manner of delivering fresh fruits and vegetables at Duane Street was initiated by the Erie to secure routing over its line and contend that the extra expense thereof should not come out of the division otherwise proper to the western lines. The rates provide for delivery, *Fruits and Vegetables to Duane St., N. Y., supra*, and in the division of those rates all services performed thereunder may be considered. While extra service performed by the Erie incident only to the marketing of fruit may not be charged to its connections, if that extra service is also necessary to secure maximum use of available transportation facilities, and indispensable to the handling of the traffic in order to avoid congestion and to prevent increased damage claims, then to that extent the extra service may and should be considered in the fixation of divisions between the carriers (280).

Similarly the peculiar circumstances incident to the termination of carloads of fresh fruits and vegetables at New York and Philadelphia were considered by the Commission in the following division cases: *Division of Rates, Official and Southern Territories*, 234 I.C.C. 175; *Southeastern Vegetable Case*, 200 I.C.C. 273; *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729; and *Florida R. Commrs.* v. *Aberdeen & R.R.R. Co.*, 144 I.C.C. 603.

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Fair Treatment for the Port of New York. Respondents fail to see how the unloading charges herein could possibly affect New York's export or import business as there is no connection whatsoever between the perishable traffic destined to New York and the export and import traffic through New York (p. 63). It is generally understood that, should the respondents be successful in their attempt to continue the unloading charges herein on carloads of fruits and vegetables, they will impose like charges on all freight similarly terminated by the respondents at the New York pier stations. In his proposed report the Examiner [fol. 1111] mentioned that "consideration is being given to the establishment of unloading charges on traffic other than fresh fruits and vegetables, but . . . as yet no definite conclusion in respect of such action has been reached" (sheet 3). Should such further unloading charges be established, the physical peculiarities that have made New York the world's greatest port will be turned into prohibitive barriers against the free flow of goods through that port. Delivery at the waterfront stations will be penalized, and the advantages of the unrestricted movement of car floats permitted by the waters surrounding Manhattan Island will be destroyed. The team-track facilities in Manhattan have been inadequate, and pier station delivery, including unloading, has been customary. To permit the carriers to collect a charge for such delivery in addition to the line-haul rates is to channel the stream of export items to those ports where team-track or spur-track facilities are adequate and delivery can be had without extra cost to the consignee.

Cost to New York Consumer. Respondents regret that the consumer ultimately must pay the unloading charges herein just as he ultimately must pay for all costs of the goods he buys (p. 63). That the consumer pays the final price in no way diminishes the fact that the unloading charges herein widen the gap between what the farmer receives for his produce and what the consumer must pay. As we stated on pages 27-31 of our brief upon further hearing of August 1, 1951, the Congress has expressed its intent that the price spread between the producer of agricultural commodities and the consumer be narrowed, and the Com- [fol. 1112] mission should give effect to that intent by find-

ing the unloading charges to be unjust and unreasonable and ordering them to be cancelled.

Plans for Washington Market. Respondents consider that there is too little information on record concerning the plans for the rehabilitation of Washington Market to permit discussion (p. 65). These plans were described by Witness Hedden (Tr. 964-971) and were analyzed in the brief in behalf of the Port of New York Authority of December 1, 1949 (pp. 13-22). It is noteworthy that these plans contemplated the continuation of the basic system of delivery of cars on floats alongside a waterfront station and the removal of the lading to the station platform as part of the transportation function of the carrier. The costs to the carriers for the use of the union terminal and for the performance of the unloading was estimated to be $2.00 a ton which would be substantially below their present costs. These plans were tabled, however, when the unloading charges herein were imposed upon the fresh fruits and vegetables traffic.

New Jersey Deliveries. Respondents again urge that delivery in New Jersey should satisfy their obligation to deliver in New York City (p. 65); this proposition was previously considered (*supra*, p. 8-10).

Local Traffic and Labor Problems. Respondents consider irrelevant the difficulties in traffic congestion and labor relations that would follow their proposal to have delivery at New Jersey team tracks satisfy their obligation to deliver in New York City (pp. 66-70). However, if as a result of labor action or of traffic conditions fresh fruits and vegetables cannot be trucked from New Jersey to Manhattan [fol. 1113] without great difficulty, then the local traffic and labor problems are of very real concern to the Commission in its consideration of the respondents' proposal. As a matter of fact the teamsters' union has taken certain action to prevent fruits and vegetables from cars unloaded in New Jersey from going into the Manhattan area (Papa, Tr. 1469-1471). The union's action renders delivery in New Jersey wholly impractical and makes clear the necessity for lifting the burden of the unloading charges from the fruits and vegetables traffic terminated at the North River stations.

The "Disability" of Respondents. Respondents deny that they are performing the unloading of carload freight at

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the New York pier stations as a result of their own disability (pp. 70-73). However, that fact has been expressly recognized by the Commission for more than 20 years. In *Constructive and Off-Track Freight Stations, supra,* the Commission said, ". . . the carriers serving Manhattan are now unloading carload freight at piers through their own disability" (225).

The Statement of the Burden of Proof. Respondents claim they have met the only burden which can properly be required of them in showing that the addition of these charges is reasonable in the light of the measure of the rates on these commodities at all other points in Official Territory (pp. 74-75). They have not met, however, their statutory burden of proving that the line-haul rates plus the unloading charges are just and reasonable for the entire transportation service performed by them, or, stated another way, they have not shown that the line-haul rates are inadequate to compensate them for performing the transportation service, including the unloading incident thereto. [fol. 1114] (See, *supra,* pp. 1-4.)

The Cases Cited. Respondents discuss certain cases cited in Examiner's proposed report (pp. 75-77). These have been referred to hereinbefore, *supra,* pp. 2-4.

The Long Continuance of the Free Unloading Service. Respondents allege that the length of time during which they have provided free service is of no substantial importance in considering the issues in this proceeding (p. 78). On the contrary, the time element is of great significance. The long continued practice and the special conditions have made the unloading at the pier stations and produce terminals a transportation service to be performed by the carriers. *Atchison Ry.* v. *U. S.*, 295 U. S. 193, 200, 79 L. ed. 1382, 1389; *Adams* v. *Mills*, 286 U. S. 397, 410, 76 L. ed. 1184, 1193. Being a transportation service, the unloading performed by the respondents must be performed under the line-haul rates; and a charge cannot be added therefor without considering the adequacy of the line-haul rate as compensation for the entire transportation service. It is wholly dissimilar from an accessorial service such as the redemption of passenger tickets or the switching at industrial plants, cited by the respondents (p. 78), for which a

new charge may be assessed without a change in the service, and in that distinction lies the crux of this case.

Wherefore, it is requested that the Commission reject the exceptions of the respondents and adopt the proposed report of Examiner Martin J. Walsh. The schedules naming the charges for the unloading of fresh fruits and vegetables at New York and Philadelphia should be ordered cancelled, and the proceeding discontinued.

[fols. 1115-1130] Respectfully submitted, by direction of the Secretary of Agriculture of the United States.

Chas. B. Bowling, Chief, J. L. Pease, Assistant Chief, Traffic Management Division, Transportation and Warehousing Branch, Production and Marketing Administration; Charles W. Bucy, Associate Solicitor; Walter D. Watson, Fritz R. Kahn, Attorneys, United States Department of Agriculture, Washington 25, D. C.

[fols. 1-5-9] PROCEEDINGS OF JULY 29, 1947

Exam. Brown: The Interstate Commerce Commission has set for hearing at this time and place investigation and suspension docket No. 5500, unloading charges, fruits and vegetables, New York and Philadelphia.

[fol. 10] By a schedule filed to become effective June 1, 1947, the respondents propose certain charges for unloading carload shipments of fresh fruits and vegetables at New York, N. Y., and Philadelphia, Pennsylvania. Upon protests of various shippers and others, the operation of the schedule was suspended until December 31, 1947.

Is that a correct statement?

Mr. Smith: Yes, sir.

[fol. 11] Exam. Brown: Are there any remarks which any of the parties wish to make at this time before we proceed with the evidence?

Mr. Smith: As a matter of information, Mr. Examiner, the respondents' first witness will be Mr. E. A. Hodkinson, who will deal with this subject generally from the standpoint of all of the respondents. Mr. Hodkinson will then be fol-

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lowed by witnesses dealing with the situation on the individual railroads involved.

Exam. Brown: Let the record show that certain exhibits for Mr. Hodkinson have been numbered from 1 to 21 inclusive off the record, and distributed.

E. A. Hodkinson, was sworn and testified as follows:

Direct Examination.

By Mr. Smith:

Q. Kindly state your name and business address.

A. E. A. Hodkinson, 143 Liberty Street, New York.

Q. What is your connection with the railroad business, Mr. Hodkinson?

A. I am a member of the auxiliary committee of the Trunk Lines Association, specifically assigned to handle commerce cases.

Q. How long have you been connected with the railroad business?

[fol. 12] A. I have had over 30 years experience along traffic and accounting lines. I have been connected with the Trunk Lines Association since January, 1928, and since that time my activities have been principally centered upon commerce cases before the Interstate Commerce Commission and the various state commissions.

Q. Are you familiar with the carriers under suspension in this proceeding?

A. I am.

Q. Generally speaking, Mr. Hodkinson, what do those carriers propose?

A. The carriers propose unloading charges on fresh fruits and vegetables at various stations in New York and Philadelphia. The charges range from $1.50 a ton on citrus fruits to $2 a ton on what is known as wet wash, that is, vegetables moving under refrigeration.

Q. At the request of the respondents in this case, have you prepared exhibits and testimony to present to the Interstate Commerce Commission?

A. I have.

Q. Kindly proceed, Mr. Hodkinson.

A. As I have just stated, the carriers under suspension in this proceeding name unloading charges for fresh fruits and vegetables at stations in New York and Philadelphia. Those are the only points in Official Territory where the railroads unload these commodities without any charge. At [fol. 13] all other points in Official Territory the unloading is performed by the consignee, or at his expense.

It is the usual rule, insofar as carload freight is concerned, that the shippers shall load and the consignees shall unload.

In this connection, I wish to introduce Exhibit No. 1. This exhibit reproduces Rule 27 of the Consolidated Freight Classification, and it provides, as I have just stated, for the unloading by the consignee of all carload freight, and that is the rule generally, with but very few exceptions. At various points, where the carriers hold themselves out to perform either a loading or an unloading service, the carriers are published which carry a charge for the service. Specific charges are published at Baltimore, Pittsburgh, and Chicago for the unloading of fresh fruits and vegetables.

Exhibit No. 2 is a statement taken from the I. C. C. Bureau of Transport economics and statistics statement No. 479. This statement shows the total carloads of fresh fruits and vegetables terminated in the eastern district for the year 1946. The eastern district is just about equivalent to Official Territory. These figures are exclusive of the terminations for the Pocahontas region that includes the Chesapeake and Ohio Railroad, the Virginian Railway, and the Norfolk and Western Railway.

[fol. 14] Exhibit No. 3 shows the railroad and consignee unloadings for the calendar year 1946. The total rail receipts of 118,497 cars is taken from the Department of Agriculture statement which shows the unloads of fresh fruits and vegetables at New York City, and, as I have indicated at the top of this exhibit, the New York City figures include all stations in New York City, Brooklyn, Jersey City, Hoboken, Kearny, and some nearby points on Long Island. The only points in New York City at which the unloading is performed by the railroads is at Piers 17, 19, 20, 21, 22, 27, 28, and 29. The unloadings by the rail carriers at those

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piers for the year 1946 aggregated 72,753 cars. The balance of the total receipts was therefore unloaded by the consignees, and that figure is 45,744 cars.

The annual report of the Department of Agriculture for New York City also shows the receipts at Newark, and the Newark receipts for the year 1946 were 11,399 cars, all of which were unloaded by the consignees, or at their expense.

Adding the Newark receipts to the New York receipts, we have a total of 129,896 cars, and adding the Newark unloads to the New York City unloads, we have a total of 57,143 cars, all of which were unloaded by the consignees or at their expense. So that, in the New York metropolitan area, 44 per cent of the total receipts of fresh fruits and vegetables are unloaded by the consignees, or at their expense.

[fol. 15] At Philadelphia, the unloads by the railroads aggregated 13,530 cars, and by the consignees 27,055 cars.

Exam. Brown: Is that Philadelphia proper, or does it include the suburbs?

The Witness: That is Philadelphia proper, as covered by the rail lines of the B & O, the Pennsylvania, and the Reading, and these are the figures reported by the railroads to me after they made a study of the entire situation.

Exam. Brown: How about the New York City points? Are all of those included within the tariff provisions?

The Witness: Yes, sir.

Exam. Brown: You refer to some nearby points on Long Island. Those are included also?

The Witness: They are included also. They are in the Department of Agriculture unload reports. I am coming to the rate situation a little later on, Mr. Examiner.

Exam. Brown: You are going to explain to what extent the tariff affects New York and Philadelphia?

The Witness: Yes, sir. I am going to show that to New York City, for example, when a shipment is consigned to anyone of these piers, or to team-track delivery right adjacent to those piers, the rate is precisely the same although in the one case the consignee bears the expense of the unloading and in the other the railroads are performing it gratuitously.

Mr. Bongartz: I think what the Examiner has in mind is [fol. 16] whether the nearby points are affected by the suspended tarriffs. Is that right?

Exam. Brown: That is correct. What I want to find out is whether you are going to draw a line.

The Witness: The suspended tariffs only carry at points where the railroads perform the unloading.

Exam. Brown: You are going to tell us where the points are?

The Witness: Yes. I might tell you now. I just furnished that information. You will see you have a map of the City of New York there, and the locations in New York are at piers 17—that is the New York Central pier known as the Barclay Street Pier—Piers 19, 20, and 21—those are the Erie Railroad piers, generally designated as Duane Street —Pier 22 is the B & O pier——

Exam. Brown: What is Pier 17?

The Witness: The New York Central, Barclay Street. And Piers 27, 28, and 29 are the Pennsylvania piers.

Exam. Brown: Are there any other piers involved?

The Witness: Not in New York City.

Exam. Brown: Or within the area?

The Witness: Or within the area.

Now, at Philadelphia, the operating witness will give you a map showing the location of the various points at Philadelphia where this charge will come into play.

[fol. 17] Exam. Brown: And you testified that that is all within Philadelphia proper?

The Witness: Yes, sir.

Exam. Brown: All right, go ahead.

A. The unloads at Philadelphia by the consignees aggregate 66 per cent of the total.

Now, the various protestants in the petitions for suspension of the tariff provisions here involved have taken the position that the line haul rates include the unloading. In this connection it should be borne in mind that the rates to New York for team-track delivery are precisely the same as they are for the pier delivery, on the same commodities, from the same points of origin. However, for team-track delivery the unloading is performed by the consignee, or at his expense, whereas the pier delivery at Piers 17, 19, 20,

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21, 22, 27, 28, and 29, the railroads now perform the unloading at their expense.

The same situation prevails at Philadelphia. The rate from the same point of origin to Philadelphia is precisely the same for the team-track deliveries as it is for the deliveries at the points where the railroads assume the expense of unloading the shipments.

I prepared a series of exhibits to illustrate the rate situation.

Exhibit No. 4 shows the blanket, the rate blanket in con- [fol. 18] nection with rates from Trans-Continental territory. All points east of the line shown on this exhibit take precisely the same rate.

Exam. Brown: What line?

The Witness: East of the line shown on the map.

Exam. Brown: Are you talking about this black line on the map?

The Witness: This heavy black line on the map, about the center of the map. For the purpose of this case I have started it just north of Toronto.

Exam. Brown: It includes points north of the black line and south, at the bottom of the map, is that right?

The Witness: Yes, sir. I am addressing myself primarily to points such as Rochester, Syracuse, and various points in New England. On a shipment of any fruit or vegetables from Trans-Continental territory to New York City or to Philadelphia the rate is precisely the same as it is from Rochester, New York or Syracuse, New York or Utica, New York, or Boston, Massachusetts, or Portland, Maine.

Exam. Brown: From what origin?

The Witness: From points of origin in Trans-Continental territory. That would be all points in California, Oregon, Washington, and, as I previously stated, at all of these interior points the consignees assume the expense of unloading. As I showed in Exhibit No. 2, there is a tremendous [fol.19] number of cars that are destined to points in Official Territory where the unloading is performed by the consignee.

Exam. Brown: Exhibit No. 2 has no breakdown, of course, as to the points of destination.

The Witness: No, but it is all points in Official Territory.

Exam. Brown: That includes those points, or rather, these carloads include those destined to New York and to Philadelphia, do they not?

The Witness: Oh, yes. Yes, indeed.

Exam. Brown: Would it be necessary to subtract those from the total in order to determine——

The Witness: That was the purpose of showing the New York and Philadelphia situations separately. On Exhibit No. 2 there are well over a million cars of fresh fruits and vegetables destined to Official Territory. Now, out of that number, all that was unloaded by the railroads was 72,000 cars at New York, and 13,000 at Philadelphia—say 96,000 cars all together, and 96,000 cars from 1,104,872 leaves over a million cars where the consignees assumed the expense of unloading.

Now, at some of these points in Group A, where the rate is precisely the same as it is in New York, and where the consignees unload, they receive unreasonable quantities of fresh fruits and vegetables, although the Department of [fol. 20] Agriculture has cut down on the statistics somewhat in later years, and the only year in which I have any figures for certain points is the year 1939. In 1939, Albany, New York, received 4,143 cars; Hartford, Connecticut, 3,700 cars; New Haven, 2,031 cars; Portland, Maine, 1,338 cars; Providence, Rhode Island, 4,497; Richmond, Virginia, 1,402; Rochester, New York, 2,321; Springfield, Massachusetts, 2,176; Syracuse, New York, 2,121; Worcester, Massachusetts, 901.

I have some 1946 figures for unloads. At Washington, D. C. we had 9,129 cars; at Baltimore, Maryland, 16,511 cars; at Boston, Massachusetts, 39,702 cars.

I want to repeat before leaving Exhibit No. 4 that all points east of this heavy black line shown on the map pay precisely the same rate as is paid by consignees in New York and Philadelphia, except that the consignees in those places have to either unload or assume the cost of unloading, whereas at New York and Philadelphia for these specific deliveries the carriers presently are performing the service gratuitously.

Exam. Brown: The cars unloaded, as just stated by you, at Albany, Hartford, and so forth, come from what origin?

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The Witness: They come from all origin territory within the United States, but a very large proportion originates at points in Trans-Continental territory.

Exam. Brown: It includes Florida?

The Witness: It includes Florida, Kansas, North Carolina, Georgia—it includes all origin states in the country, [fol. 21] but I can tell you that a very large percentage of the total receipts in those towns have their origin either in Texas, and particularly California, Washington and Oregon.

Exam. Brown: Those figures include citrus fruits and vegetables?

The Witness: It includes all the vegetables included in this particular case.

Exam. Brown: And citrus?

The Witness: Citrus fruits, vegetables.

Exam. Brown: Do those statistics include any shipments from Canada?

The Witness: Some Canadian shipments, yes, sir. But the traffic is not so heavy relatively from Canada.

Exam. Brown: You stated it covered only the United States, but you mean to include within that Canada?

The Witness: Oh, yes. We get some vegetables and fruits from Canada, but it is only a small proportion of the total.

Exam. Brown: Those statistics include shipments moving in intra-state commerce also, do they not?

The Witness: Oh, yes, but we don't get so much of those on the rails. We appreciate that for short haul traffic fruits and vegetables move very largely by truck.

Exam. Brown: For example, from western New York to New York City and you would get considerable shipments?

The Witness: Yes, and to the extent that we did have [fol. 22] rail shipments, they are included in the figures.

Exam. Brown: And from a point in Michigan to Detroit, which would be intra-state, those figures would also be included?

The Witness: Those would be included if they moved by rail. As I said before, we don't have very much fruit and vegetables traffic moving in short hauls. The statistics of the Department of Agriculture show that the nearby traffic moves practically altogether by truck.

Exam. Brown: The sole purpose of asking these questions is to determine what those statistics included.

The Witness: The include all rail receipts at these points.

Exam. Brown: Very well.

The Witness: But as I say, you should bear in mind that there is very little short haul traffic included. It is mostly long haul.

By Mr. Smith:

Q. Mr. Hodkinson, just to make it clear, the statistics for unloads at individual points that you have just given include only fresh fruits and vegetables, is that correct?

A. Absolutely.

Now, Exhibit No. 5 is a map which shows the Philadelphia group and the New York group in connection with the rates on fresh citrus fruits and fresh vegetables from Texas [fol. 23] origin. All points within this New York group take the New York rate, and all within the Philadelphia group take the Philadelphia rate.

Now, in the Philadelphia group we have points like Tonawanda, which is 223 miles from Philadelphia. Tonawanda takes the same rate as Philadelphia on Texas origins, and assumes the cost of unloading. Sidney, New York, and Scranton, Pennsylvania are two other points in the Philadelphia group, and so is Wilmington, Delaware.

In the New York rate group we have points as far north as Castleton-on-the-Hudson, which is just below Albany, Newburgh, New York, Poughkeepsie, and, of course, Newark and Jersey City take the same rate as New York City, but the consignee at Newark and Jersey City perform the unloading, or bears the expense of the unloading.

I think with those explanations that we can pass over the rest of these maps rather quickly, except for identification.

Map No. 6, which is Exhibit No. 6, covers the grouping in connection with western Trunk Line Territory—potatoes and vegetables from the west Official Territory.

Exam. Brown: I know it is difficult with all the noise, but if you can speak louder they will be able to hear you better in the back of the room.

A. Exhibit No. 7 is a map which shows the New York and Philadelphia groups on potatoes and rutabagas from [fol. 24] Iowa, Michigan, North Dakota, South Dakota, and Wisconsin origins. I wish to call attention to the fact that

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New York and Philadelphia take the same rate from this territory, and all points within these respective groups would take the same rates, the only difference being, as I said before, that the consignees at destinations other than New York City and Philadelphia have to perform the unloading or bear the expense of such unloading.

Exhibit No. 8 is the grouping in connection with fruits and vegetables from C.S.A. territory. All points within the Philadelphia groups take the same rate as Philadelphia, and all points within the New York group take the same rate as New York.

Exhibit No. 9 shows the Philadelphia group and the New York group in connection with the normal rates on fruits and vegetables from the south in Official Territory.

Exam. Brown: What do you mean by normal rates?

The Witness: Those are the rates that rose out of the Commission's prescription in the southeastern vegetable cases, Mr. Examiner, but subsequently the carriers put in some lower rates which were earmarked to meet truck competition.

Exam. Brown: They put that in on all these——

The Witness: On all these fruits and vegetables, and at the present time we are seeking to restore the rates which reflect the basis prescribed by the Commission, and to cancel out the depressed truck rates.

[fol. 25] Exam. Brown: The rates prescribed in the southeastern vegetable case were with respect to vegetables only?

The Witness: Yes.

Exam. Brown: Is the same thing true of citrus fruits?

The Witness: We have some lower rates on citrus fruits, but they are not under review at this time.

Exam. Brown: How much under the normal basis did you go in establishing rates on vegetables?

The Witness: We went appreciably below the normal basis. Of course, I can't give you the exact percentage at this time.

Exam. Brown: Take potatoes, for example. The Commission prescribed Column 30.

The Witness: I think the Commission prescribed 32½ on potatoes, and we—down in many cases to as low as 26 per

cent. Now, on vegetables, where the Commission prescribed 50 per cent, we are down to something below 40 percent.

Exam. Brown: You mean on lettuce and vegetables of that type?

The Witness: Yes, vegetables of that kind. We are considerably below the basis prescribed by the Commission.

Exam. Brown: What I want to be sure of is whether that is true of all the vegetables prescribed in the southeastern vegetable case?

The Witness: Yes, you can take it that that is true of all of the vegetables considered in that case.

[fol. 26] Exam. Brown: There was a companion case in Virginia with respect to vegetables. Did you cut those rates?

The Witness: Yes, I think we have.

Exam. Brown: You don't know?

The Witness: I am pretty sure we have put some truck rates in there, too.

Exam. Brown: When you speak of normal rates, you are talking about the rates prescribed in the southeastern vegetable case?

The Witness: That is correct.

Exam. Brown: You consider those normal rates?

The Witness: Well, they are not in excess of reasonable maximum rates.

By Mr. Smith:

Q. Will you continue describing the exhibits?

A. Exhibit No. 9—I think I finished with that.

Exhibit No. 10 is a map showing the grouping in connection with the truck competitive or subnormal rates. This is a smaller group than in connection with the normal rates, but the New York rate group includes such points as Trenton, New Jersey, Newark, New Jersey, Jersey City, and Brooklyn, and at all of those points the consignee assumes the expense of unloading the shipments, whereas the consignee at New York pays precisely the same rate, and at these various piers the railroad is performing this unloading service without charge.

Q. What origins does Exhibit No. 10 deal with?

[fol. 27] A. With origins in Florida. And in connection

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with that I say, "Note: See map Exhibit No. so-and-so for grouping in connection with normal rates." That should be map Exhibit No. 9, if you will please insert that there.

Exam. Brown: When you refer to the fact that these other points, that is, other than New York and Philadelphia, have paid and do pay unloading charges, has that been uniformly true in the past with respect to all these points?

The Witness: Yes, sir.

Exam. Brown: Insofar as New York and Philadelphia are concerned, that has been in effect for how many years?

The Witness: Well, I suppose over 50.

Exam. Brown: Are any of your witnesses prepared to answer that question?

The Witness: I think the earliest record that we have on it is something around 1854, where we had a competitive situation with the boat lines. But the competitive situation is altogether different today than it was at the time this expense was assumed by the carriers. We have continued the practice for a good many years. That doesn't mean we have to continue it forever.

Exam. Brown: What I would like to find out here, as I think the record shows, is that this unloading adjustment, as we will call it, has been in effect for a great many years, both as to the paying of unloading charges and the non-paying of them, is that right?

[fol. 28] The Witness: Well, if you mean by that a good many years at points other than New York, the consignee has had to assume the expense of unloading, or unload the cars himself, that has been in effect from time immemorial, just the same as at New York at these particular piers we have been performing the unloading.

Exam. Brown: And that latter statement of yours applies back as far as 50 years, is that right?

The Witness: Yes.

By Mr. Smith:

Q. Will you continue with your exhibits?

A. Exhibit No. 11 shows the Philadelphia groups and the New York group in connection with fruits and vegetables from the south to Official Territory.

At the bottom right-hand corner of this exhibit will you please insert, "See map, Exhibit No. 9 for grouping in connection with normal rates."

Here again I wish to call attention to the fact that the New York rate group includes Newark, Jersey City, Brooklyn, and Trenton, New Jersey, and that the Philadelphia rate group includes such points as Stemmers Run, Maryland, which is 108 miles from Philadelphia, and Wilmington, which is 32 miles from Philadelphia.

Exhibit No. 12 is the same as the preceding exhibit practically as to the grouping of the Philadelphia rate points and the New York rate points. This exhibit covers vege- [fol. 29] tables, pineapples, and strawberries from Florida to Official Territory. Here again the Philadelphia group includes Stemmers Run, Maryland, Wilmington, Delaware, and the New York group includes Trenton, New Jersey, Newark, Brooklyn, and Jersey City. As I said before, the consignees at these points other than New York and Philadelphia have to take care of the unloading themselves.

At the bottom right-hand corner of the exhibit will you please insert, "See map Exhibit No. 9 for grouping in connection with normal rates."

Exhibit No. 13 is a graphic reproduction of pages one and two of the annual report of the United States Department of Agriculture covering unloads of fresh fruits and vegetables at New York City for the year 1946. This exhibit is introduced to show the varying number of packages that there are in connection with the various fruits and vegetables involved in this proceeding.

Exhibit No. 14 consists of 34 pages. In compiling this exhibit it was our endeavor to select the peak movement month of the various commodities included and covered by the statement. This statement shows the fluctuations in prices for the same day, for the same week, for the same month, from day to day and from week to week and month to month. In showing the prices we were very particular to stick to the same variety in the same box.

[fol. 30] Page 2 of the exhibit, the right-hand portion shows Western Apples average. That is an average of the prices shown on page 3 of the exhibit.

I want to make one or two changes on page 3. In the

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third column it now reads, "Oer grade", as well as I can make it out. That should be the delicious apple, C grade.

Further over on the exhibit, about the middle of the page, there is a column headed, "Fancy." That is Delicious Fancy.

On page 3 of the exhibit I have dealt with the Washington apples, except for the last three columns. Those three columns cover British Columbia Red, Delicious Red Oregon, and Pippins Oregon.

The figures underlined are the high and low figures respectively. For example, under Delicious C grade, the low price per box was $2.85, on February 14, 1947, and the highest price was $3.88 on February 28, 1947.

We followed this same procedure all the way through the exhibit.

Exam. Brown: And on page 3 of the exhibit, what type of apple is that in the fourth column from the right-hand side?

The Witness: Winesap. Will you please strike the "i", please.

By Mr. Smith:

Q. Mr. Hodkinson, to what city do the prices shown on Exhibit 14 relate?

A. These are all New York City prices, and the authority is the New York Daily Fruit Reporter, for fruits, and the [fol. 31] Producers Price-Current, for vegetables. Those are the authoritative sources, and are used in the settlement of claims when we do pay claims.

Q. Are the prices shown in Exhibit 14 wholesale prices?

A. Those are wholesale prices, yes, sir.

Turning now to page 7 of the exhibit, that deals with grapes, and the average high and low price per load is shown on page 8 of the exhibit. The low price is $1.56, which prevailed on October 3, 1946, and the high price was $6.28, which was obtained on October 23, 1946.

In connection with these grape prices it should be noted that there was a wide variation between the low and the high on the same day. For example, on October 23rd the low price was $2.94, and the high price was $6.28.

On page 13 of the exhibit I have shown the average high and low prices for pears. The details supporting those figures are shown on pages 14 and 15 of the exhibit. Here again you have a wide fluctuation in the price of pears, during the same month. You have a low of $1.08 per box, and a high of $8.35 a box.

Exam. Brown: What is the purpose of this exhibit?

The Witness: It should be considered in connection with the measure of the charge which we wish to assess, Mr. Examiner. The unloading charge changes from $1.50 on citrus fruits, which is three-quarters of a mill per pound, [fol. 32] to $2 for top iced vegetables, which is exactly 1 mill per pound. So that, for a box of oranges, say, that weighs 100 pounds, you would only have 7½ additional. On pears, even if pears weighed 100 pounds, that is $1.75 for a ton, and for 100 pounds it would be less than 10 cents. Here you have a fluctuation in value of several dollars. Our point is that this change will not affect the selling price materially. In any event, it is going to be passed on to the consumer. It is very evident to anyone that goes into the grocery store with a dollar and sees what he can get in the way of fruits and vegetables.

On page 18 of this exhibit, Exhibit 14, I have shown the average prices for plums. The details of that will be found on pages 16, 17, and 18. Here we have a fluctuation from 96 cents per crate to $4.98 per crate.

By Mr. Miller:

Q. Mr. Hodkinson, in connection with page 18, can you tell me what you mean by this word "average" in that last column? Aren't these actual prices?

A. That "average," I think, can be eliminated.

Exam. Brown: Should it be eliminated, or do you know?

The Witness: No. We have a high and a low, Mr. Examiner, so that the word "average" can be eliminated as to these.

Exam. Brown: You wish to eliminate "average" from the exhibit?

[fol. 33] The Witness: Yes, I wish to eliminate "average" from the exhibit.

Exam. Brown: It will be eliminated.

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By Mr. Smith:

Q. Are there any other pages in Exhibit 14 where you wish to eliminate the word "average"? I call your attention to page 8, for example.

A. That can be eliminated from page 8, if you will, please.

Q. Will you hurriedly check through and see if there are any other places where you want to eliminate the word "average"?

Exam. Brown: But I understood this was taken from the Daily Fruit Reporter, which presumably had these figures and the word "average" in there. I don't know, but is that a fact?

The Witness: No. That word "average" was added by the men that I had prepare this statement. You see, this "Western Apples", on page 2, for example, runs to all these prices on page 3, and they thought it was an average. It is not really an average. It is the low price for any grade of apple, and the high price for any grade of apple. It is not an average in any sense of the word. So it would be perfectly O.K. to eliminate it from page 2, page 8, page 13, page 18, page 21.

Exam. Brown: What should it be?

The Witness: It should read "Price in dollars."

Exam. Brown: Off the record.

[fol. 34] (Discussion off the record.)

Exam. Brown: Up at the top of that exhibit eliminate "average" from the heading.

The Witness: The same on page 33. Up at the top of the exhibit "watermelons," it should read "Price in dollars per car."

The same for pages 24 to 34. Strike out the word "average" on each of those sheets.

Exam. Brown: The remainder of this exhibit seems to be along about the same lines as the first part of it. I wonder if we could let the exhibit speak for itself, subject to such comments as you wish to make.

A. I have already explained page 18. The only other page I have to call attention to is page 23, and the detail of those

high and low prices per car is outlined on pages 24 to 34 of the exhibit.

Exhibit No. 15 shows the fruit and vegetable auction prices at Philadelphia for the period June 11th to June 17th, 1947. The source is the Philadelphia Produce Market report, which is an authoritative trade publication.

Here again I have underlined the low figure and the high figure.

Exhibit No. 16 deals with retail prices in the City of New York. We obtained these figures from the City of New York, Department of Markets Division of Consumers' Service and Research.

[fol. 35] I have shown the prices in the units shown for the second weekly release of each month for the years 1934 to 1946 inclusive, and up to the release for the month of May, 1947.

This exhibit shows the fluctuation in the same week, and from month to month, in the period covered.

Exhibit No. 17 is similar to Exhibit No. 16 except that it deals with fruits. Here again the source is the City of New York, Department of Markets Division.

Exhibit No. 18 is taken from the United States Department of Labor, Bureau of Labor Statistics reports, and this shows the price which prevailed for the season before the war, January 17, 1939, and the price prevailing January 15, 1947. It shows that as to apples the percentage increase is 140.4 per cent; as to oranges 52.4 per cent. No figures were available for grapefruit.

Exhibit No. 19 is also taken from the United States Department of Labor, Bureau of Labor Statistics. Here we show the entry January 15, 1947 over January 17, 1939, and the increases there range from 65.9 per cent on lettuce, per head, to 166.7 per cent on sweet potatoes per pound.

Exhibit No. 20 is a statement showing the rate of return on property investment for the carriers involved in this proceeding. The terminating lines are the Baltimore & Ohio, at New York and Philadelphia; the Erie in New York; the New York Central at New York; the Pennsylvania Railroad at New York and Philadelphia; and the Reading Railroad [fol. 36] at Philadelphia.

These figures show that on gross investment the rate of return ranges from 1.13 per cent for the New York Central,

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to a high of 4.10 per cent for the Baltimore & Ohio. On the net investment the low is 1.48 per cent for the New York Central, and the high is 5 per cent for the B & O.

The Pennsylvania and the Erie, who handle the preponderance of this traffic, would have greater returns on the net investment for the months ended May 31, 1947—1.72 for the Pennsylvania, and 3.60 per cent for the Erie.

Exam. Brown: Where did you get these figures?

The Witness: These are based on the Carriers' Reports to the Interstate Commerce Commission, and we have used the gross investment figures as of the end of the year 1945.

Exam. Brown: Are you sure you have your testimony straight on that? You refer to the Baltimore & Ohio at Philadelphia, and the Reading at Philadelphia. Aren't these figures the total system figures?

The Witness: The total system. These are the roads interested in this particular carrier situation.

Exam. Brown: But the way your testimony reads would lead the casual reader to believe that you are talking about gross investment at Philadelphia and New York.

The Witness: Well, these are the system figures. This [fol. 37] exhibit shows that for the system the rate of return is low. These expensive operations at New York and Philadelphia contribute to that.

Exam. Brown: You have no intention of showing by this exhibit any investment figures at New York and Philadelphia?

The Witness: No, sir. The system.

Exhibit No. 21 is for the system, and shows the net income or deficit after fixed charges for the five railroads involved in this proceeding for the years 1929, to 1946. I call particular attention to the red ink figures for the New York Central and the Pennsylvania Railroads.

Exam. Brown: These include passenger charges as well as freight?

The Witness: Yes, sir.

Exam. Brown: How about Exhibit No. 20?

The Witness: That covers all operations.

By Mr. Smith:

Q. Mr. Hodkinson, were Exhibits 1 to 21 inclusive prepared by you or under your direction?

A. They were.

Q. To the best of your knowledge, do they correctly and accurately show what they purport to show?

A. Yes, sir.

Mr. Smith: I offer them in evidence.

Exam. Brown: Is there any objection?

Hearing none, they are received.

[fol. 38] (Respondent's Exhibits 1 to 21 inclusive received in evidence.)

Exam. Brown: We will have a short recess.

(A short recess was taken.)

Exam. Brown: Have you completed your direct examination?

The Witness: Yes.

Exam. Brown: Off the record.

(Discussion off the record.)

Exam. Brown: Mr. Karl Loos will begin the cross and he will be followed by Mr. Wells and Mr. Augello.

Cross-examination.

By Mr. Loos:

Q. Mr. Hodkinson, will you refer to your Exhibit No. 15, please. Those, I believe, are auction prices, are they not?

A. Yes, sir.

Q. How are those prices determined? Do you know?

A. No. We have just taken them from the Produce Market reports.

Q. Have you ever attended fruit auctions?

A. Not recently.

Q. Do you know that those prices are determined by bids?

A. I assume they would be. That is the purpose of an auction, isn't it?

Q. Yes, sir. Now, take, for example, the first price you

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show on the exhibit, under Washington Apples, $3.05. That was a priced determined by bids, was it not?

[fol. 39] A. I assume it was.

Q. Was it the highest bid for that particular line of produce?

A. No. The lowest.

Q. Wasn't that the highest bid for that particular line?

A. No. We have taken Washington Apples high $5.45, and a low of $3.05, on Wednesday, June 11th. That is what the paper said.

Q. But do you think that on that particular box that was sold at $3.05 that was the lowest bid or the highest bid on that particular box?

A. I suppose it was the highest bid on that particular box.

Q. If that be true, do you think that the bidder for that particular box would have bid any more if the freight rate had been higher?

A. I don't know what he would have bid, Mr. Loos. It depends on how much he wanted the apples.

Q. Do you think he would have bid any more if the railroads had been charging for the unloading service?

A. He may have done so.

Q. You think he might have?

A. Yes.

Q. Do you think the bidder has any knowledge as to what the freight charges and unloading charges, and so on, may be?

A. I suppose they should have some idea as to what the [fol. 40] prices of transportation are, but if he wants the apples he probably forgets all that.

Q. And you think that will be true, do you not, of all bids that might be made for all of the fruits and vegetables?

A. Yes. I suppose any man that is buying apples or lemons or oranges has a pretty good idea what he can get for them, and he is not going to pay any more than he is obliged to.

Q. Is it not true that the fruit is offered for sale by the receivers who receive the fruit at the Philadelphia auction, for example?

A. Mr. Loos, I haven't testified as to any of the factors prevailing in Philadelphia with regard to the sale. I simply put this in as a statement reproducing the prices that are

published in the Philadelphia Produce Market reports. We should have some operating witness who is familiar with the situation in Philadelphia, and they can undoubtedly answer this line of questions that you are putting to me.

Q. Well, I think this line of questions refers to the prices. Let me state it another way. Who pays the railroad for the freight charges?

A. The consignee, I assume.

Q. The consignee is the one who sells the fruit at the auction, is he not?

A. I assume that he is.

Q. He is the one who sells the fruit at the auction, is he not?

A. I assume that he is.

Q. He is the one who receives the price that the bidder [fol. 41] pays, is he not?

A. Yes, eventually.

Q. Now, if the consignee has paid an unloading charge, do you think he would have received anything more in the price that was bid at auction?

A. I think all these auction prices are a question of supply and demand.

Q. And the amount paid for freight charges or unloading charges wouldn't have anything to do with it?

A. I think they are all passed on to the ultimate consumer. I know that is my personal experience, especially lately.

Q. Does the ultimate consumer pay the railroad anything directly?

A. Not directly, no.

Q. If the consignee sells the fruit for the highest bid he can get, how then can he pass anything on to the consumer?

A. Between the consignee and the consumer someone is adding on these additional charges.

Q. But those who add on the additional charges do not pay the charges to the railroad, do they?

A. Not directly, but I figure that they are paid indirectly.

Q. Well, I think that is enough to develop that phase of the situation. We will have some evidence of our own on that subject. Now, you made some remark about the carriers performing the unloading service gratuitously at these [fol. 42] points in New York and Philadelphia that you mentioned. What do the carriers receive in the way of compen-

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sation for the services they perform from the beginning of the movement of the fruit to its final delivery?

A. Just the freight charges.

Q. And you refer to that as a line haul rate?

A. The line haul rate, yes.

Q. They do receive that line haul rate, do they not?

A. Yes.

Q. For that line haul rate they perform all the service of moving the fruit from the point of origin to the point of destination and making the delivery, do they not?

A. Yes.

Q. When the delivery is made on a team-track, what does the railroad do in the way of making that car available to the shipper?

A. Places the car on the track.

Q. When the fruit is delivered at these piers in New York and Philadelphia where the railroads unload, is the car placed on any track available to the shipper?

A. It is on a car float.

Q. Is the car on that car float available to the shipper for unloading?

A. I think later on we shall have something to say with regard to that phase of the question, Mr. Loos.

[fol. 43] Q. But can you say what the practice has been?

A. The practice has been, of course, with the railroads, to unload the car and transfer the contents of the car to locations on the piers.

Q. Until that unloading is completed, is the freight available to the shipper or the consignee for his acceptance?

A. Well, it hasn't been in the past.

Q. Now, will you refer to your Exhibit No. 3, in which you show the number of cars unloaded by rail carriers at certain piers in New York. Are all of those piers on what is known as Manhattan Island?

A. Yes.

Q. On Manhattan Island, what team-tracks are there at which cars might be placed available to the shipper for unloading?

Mr. Donadio: Mr. Examiner, I have been pretty patient with Mr. Loos' cross-examination of Mr. Hodkinson about matters that he has not testified about. That is operating

testimony, and we are going to have several operating witnesses, as Mr. Smith announced at the outset of this proceeding, and I think all such questions could be left until the operating witnesses testify and tell the complete story about pier unloading and team-track unloading.

Exam. Brown: We shall be glad to receive such operating testimony later, but at the present time I think Mr. Loos is entitled to know the basis underlying these exhibits. One [fol. 44] of the questions was whether or not all of these piers are located on Manhattan Island. I see nothing wrong with that particular question.

The witness: I have answered that.

Mr. Donadio: The question that is now pending relates to team-track delivery. I think that is certainly a question that Mr. Hodkinson hasn't dealt with on his direct examination.

Exam. Brown: Well, if the carriers are going to cover that point later, I presume Mr. Loos would defer questions along that line. How about that?

Mr. Loos: Yes, I am willing to defer questions as to what the team-tracks are, and where they are located, but I do want to know, if I may, what these figures represent. Let me put the question this way.

By Mr. Loos:

Q. Are there on Manhattan Island team-tracks at which some of the 118,000 cars shown in the first line of your exhibit were unloaded?

A. Yes.

Q. How many of that 118,497 cars were unloaded on team-tracks on Manhattan Island where they were unloaded by the consignee?

A. I don't know, because I didn't study the figures from that angle. We took the total rail receipts in New York, the known points at which the rail carriers performed the unloading, and then the balance of it obviously is the unloading by the consignees at these other locations which [fol. 45] are included in the New York City report of the Department of Agriculture.

Q. But that New York City area covered by these figures includes much more than Manhattan Island, does it not?

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A. That is true.

Q. Is there any way you have by which you can determine how many of the 118,000 cars were unloaded on team-tracks on Manhattan Island?

A. I suppose we could make a special study of that.

Q. Your figures as you set them up are not set up that way now?

A. No, we haven't asked the carriers for that information. We only asked them to give me the cars that they unloaded at the known points at which this unloading service is performed, and then, by the process of reduction, what is left is obviously the number of cars unloaded by the consignee.

Q. Are you able to give any estimate, or express any opinion as to what proportion of the 118,000 cars was unloaded on team-tracks on Manhattan Island—whether large or small?

A. You mean of the 45,000, don't you, Mr. Loos?

Q. 45,000, yes.

A. No, I can't give you any estimate at the moment. But as I said in my direct testimony, all of these 45,000 cars that were unloaded by the consignees paid precisely the same rate as the cars that were unloaded at the piers, if they consisted of the same commodities, and originated at [fol. 46] the same points of origin.

Q. But you are sure that some of the 45,744 cars were unloaded on team-tracks at Manhattan Island?

A. Yes, sir.

Q. Let me ask you this. Why were the 72,753 cars unloaded by the carriers rather than being unloaded by the consignees after they were placed on the pier float adjacent to the pier?

A. Well, they all arrived on car floats, and that is a continuation of the practice that has been prevailing for a number of years.

Q. If a shipper would have requested the opportunity to unload his car, would he have been allowed to do so?

A. Well, that goes into a question of operating practice which might be put to an operating witness, or it may be that our counsel will have some statement to make before the close of the hearing.

Exam. Brown: How about that question from the carriers' standpoint? Is there anything in the tariff that would prohibit it?

The Witness: No. The only thing that would prohibit it would be a lack of uniform practice, as I see it.

Exam. Brown: I am just talking about the carrier.

The Witness: There is nothing in the tariff to prohibit the unloading.

[fol. 47] By Mr. Loos:

Q. Isn't there an exception published to Rule 27 applicable to New York and to Philadelphia?

A. Yes. That provides that the carriers will unload.

Q. Under that exception, do you think the carrier permits the shippers to come up to the Erie pier 20, for example, and demand that they unload their cars there?

A. It certainly doesn't prohibit it.

Q. You think it does not?

A. No.

Mr. Loos: Of course, Mr. Examiner, that is a matter of tariff interpretation.

The Witness: I think it comes down to a matter of operating practices.

Exam. Brown: The exception to Rule 27 referred to by you, Mr. Loos, is that carriers serving produce terminals in New York City and Philadelphia will unload carload shipments of fresh fruits and vegetables in packages without extra charge in addition to the line haul rate.

The Witness: Yes.

Exam. Brown: That tells the public, that exception to Rule 27, that the carriers will perform certain functions without charge.

The Witness: Yes.

Exam. Brown: Whether from an operating standpoint the carriers would permit the shipper to go in there and unload is something else. I think that is a question of oper-

[fol. 48] ating practice.

Mr. Loos: Mr. Examiner, we will contend that the correct interpretation of the tariff, reading together Rule 27 and the exceptions, prohibit the shipper from unloading under the tariffs that have been in effect and under the tariffs that are now under suspension.

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Exam. Brown: That is going to be your position, that the tariff prohibits it?

Mr. Loos: That is my position. I don't know about anybody else. However, I think that is a matter of argument that can be developed from the language of the tariff rather than on cross-examination.

Exam. Brown: I presume you will also show that the shippers never have unloaded in recent years?

Mr. Loos: Yes.

The Witness: It should be borne in mind that the tariffs under suspension seek to eliminate this particular exception to the classification you just read.

Exam. Brown: That is understood.

Mr. Loos: If we are going to argue it now, I would like to add that the tariff under suspension still continues as an exception to Rule 27, so that Rule 27 of the official classification is not applicable to these cars that are unloaded by the carrier.

[fol. 49] Exam. Brown: Isn't it a fact that the exception will be eliminated by the proposed schedules?

The Witness: As far as the application of fruits and vegetables are concerned, yes, sir.

Exam. Brown: All right, Mr. Loos. Continue.

By Mr. Loos:

Q. Now, with respect to the 45,744 cars unloaded by consignees on team-tracks, as shown by your Exhibit No. 3, were any of those that were unloaded on team-tracks unloaded by the carrier rather than by the consignee?

A. All of the 45,744 cars were unloaded at the consignees' expense. The carriers did not assume the expense of unloading.

Q. Do you know whether the carriers actually did unload some of them or not?

A. My understanding is they did not.

Q. Your understanding is that the consignee unloaded all of those cars?

A. Or assumed the expense thereof.

Q. What do you mean by "assumed the expense"? Do you mean the carriers unloaded them?

A. I mean the consignee doesn't do the unloading himself. He hires an agency to do it for him.

Q. Do you know whether the agency was the carrier?

A. As far as my understanding is concerned, the carriers do not assume any expense in connection with the 45,744 cars.

[fol. 50] Q. It seems to me the question is simple. What I am trying to get at is whether the carriers did the actual unloading, regardless of who paid for it?

Exam. Brown: Do you know what the fact is?

The Witness: We have no provision for free unloading at team-tracks. This is the only point where we perform this unloading. Obviously, we couldn't without violating the law, declare any expense in connection with the unloading at team-tracks.

By Mr. Loos:

Q. Do the carriers do any unloading at team-tracks where they are paid for it?

A. At certain points. I don't think New York is one of them.

Q. Is Philadelphia one of them?

A. No, I think not. The only points where we have a provision for unloading fruits and vegetables with charge is at Baltimore, Marying, Pittsburgh, and Chicago. We have tariffs providing for unloading charges on general freight that are applicable at a number of stations in Trunk Line and C.F.S.A. Territory.

Q. Then it is your understanding that the 45,744 cars shown on your exhibit 3 as unloaded by consignees were, in fact, unloaded by consignees or consignees' agents other than the carriers?

A. Yes.

Q. Is that also your understanding with respect to the [fol. 51] 27,055 cars shown on your exhibit as unloaded by consignees at Philadelphia?

A. Yes, sir.

Exam. Brown: What do you mean by understanding? Is it a guess, or is it a fact?

Mr. Loos: I am asking if he knows.

Exam. Brown: I want to be sure that this understanding is a fact.

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The Witness: It is a fact that at Philadelphia these cars were reported by the railroads serving Philadelphia as having been unloaded by the consignees. That is an absolute fact.

By Mr. Loos:

Q. And that none of them were unloaded by the carriers?
A. Not if they were unloaded by the consignees. How could they be?
Q. When you said that the carriers performed the unloading service gratuitously, did you mean by that that they got nothing more than the line haul rate for all of the services which they performed?
A. That is correct.

Mr. Loos: That is all I have.

Cross-examination.

By Mr. Wells:

Q. Mr. Hodkinson, referring to your Exhibit No. 3, does that show only unloads of fruits and vegetables?
A. That is all.
Q. Were there any other unloads on Piers 17, 19, 20, 21, 22, 27, 28, and 29 in New York City by the carriers?
[fol. 52] A. I am not sure as to that, Mr. Wells. You will have to ask the agents who serve those stations.
Q. Then these figures are not intended to show all unloads by the rail carriers on those piers, on all commodities?
A. I am not sure any other commodities are handled on any of the piers. I know that 27, 28, and 29 are practically exclusively perishable piers. That is my understanding. But as I told you, the agents serving those stations are better qualified to answer that question than I. These are the unloads of fruits and vegetables.
Q. How about butter and eggs?
A. They are not fruits and vegetables.
Q. Are they unloaded on these piers by the carriers?
A. I think to some extent, but as I told you before, you have to go to the agents to find out precisely what is handled on the piers.

Q. Is any one of the 13,530 cars unloaded by the carriers in Philadelphia unloaded at the same place as any one of the 27,055 cars unloaded by consignees?

A. Well, in the same general vicinity. The Philadelphia operating men will point that out to you.

Q. You don't know whether the same circumstances and the same place of delivery obtain under the two conditions?

A. I don't know personally, no. The Philadelphia agents can tell you that.

[fol. 53] Mr. Donadio: It seems to me, Mr. Examiner, it is wasting time to question this man about operating problems that operating men will talk about.

Exam. Brown: I will make this suggestion as far as operating testimony is concerned, that you wait until the witnesses are on the stand, and then I will permit you to recall Mr. Hodkinson if you don't get it from the operating men. Is that all right, Mr. Smith?

Mr. Smith: Fine. It is a good suggestion.

Exam. Brown: You will be available throughout this hearing?

The Witness: Yes, sir.

By Mr. Wells:

Q. Will you turn to your Exhibit No. 9, please. Are citrus fruits included in your description "fruits" on that exhibit?

A. Yes, sir.

Q. Does the term "fruits" from the south, as used by you, include Florida as well?

A. Yes.

Q. Did you give any figure on your direct examination to be inserted in the note at the bottom of Exhibit 9?

A. No. I should have done that, Mr. Wells. That will be Exhibits 10, 11, and 12.

Q. On Exhibit 10, to what level of rates are you referring [fol. 54] when you use the term "normal rates"?

A. You mean on Exhibit 9?

Q. Well, you have used the term "normal rates," I believe, on Exhibit 10, in connection with your reference to Exhibit 9.

A. I meant the rates that reflected the basis prescribed

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by the Commission in the various cases.

Q. Can you specify which case you are referring to?

A. Primarily to the southeastern vegetable case.

Exam. Brown: That is I & S 3705.

By Mr. Wells:

Q. 200 I.C.C.?

A. That is about it.

Q. I am referring specifically to Exhibit 10, where you state, "Citrus fruits from Florida," and I ask to what level of rates you are referring when you use the term "normal rates"?

A. Those are the rates that reflect the Commission's prescribed basis, but I haven't got the citation at the moment. I can supply it for the record.

Q. Can you indicate how many years it has been since any one of those rates has moved any traffic?

A. Not exactly, but I think it is in the neighborhood of eight.

Q. Or more?

A. Or more.

Q. The same would be true as to your reference to normal rates on vegetables? None of those rates has moved any traffic in seven or more years, have they?

[fol. 55] A. That is correct. I showed that the grouping was greater in connection with what I term the normal rates than it was in connection with the so-called subnormal rates which reflect the truck competition. But even under the truck-compelled rates I have also pointed out the New York rate grouping includes points such as Cranford, Newark and Jersey City, large receivers of Florida fruits and vegetables, and the consignees there perform the unloading.

Q. Is there any other method of delivery provided by the carriers at those points?

A. Which points?

Q. The points that you have just mentioned where the consignees do the unloading?

A. They have team-track delivery and private sidings.

Mr. Wells: If I may, I will defer the other questions. They will probably be answered by operating witnesses.

Exam. Brown: It will be understood that Mr. Hodkinson will be recalled if you do not receive the information you wish.

Mr. Wells: That is all.

Cross-examination.

By Mr. Augello:

Q. Mr. Hodkinson, will you refer to your Exhibit No. 3. I believe that you gave us some unloading figures for Newark, New Jersey in connection with your Exhibit No. 3.
[fol. 56] A. Yes.

Q. How many cars were unloaded at Newark, New Jersey?

A. 11,399 in 1946.

Q. What is the purpose of injecting the Newark market unloads in this case?

A. Well, the purpose in this case is to show that the rates to Newark—I have shown the rates to Newark—are precisely the same as the rates to New York.

Q. In all cases?

A. Practically in all cases. All cases where you have any receipts of fruit that amount to anything. Any points over 100 miles distant from New York, the rates to New York and Newark are the same, with very few exceptions.

Exam. Brown: Off the record.

(Discussion off the record.)

By Mr. Augello:

Q. Would you say, Mr. Hodkinson, that the rates on citrus from the State of Texas to New York apply to Newark, New Jersey?

A. Yes.

Q. The basic rate of $1.16 is shown in southwestern lines tariff 62?

A. I haven't checked definitely with any rates with my map exhibits showing the blankets from Texas.

Mr. Smith: That is No. 5.
[fol. 57] A. It really shows Newark is in the New York rate group.

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Vol. II

TRANSCRIPT OF RECORD

(Pages [illegible] to [illegible])

Supreme Court of the United States

OCTOBER TERM, 1955

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 481

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, ET AL.,

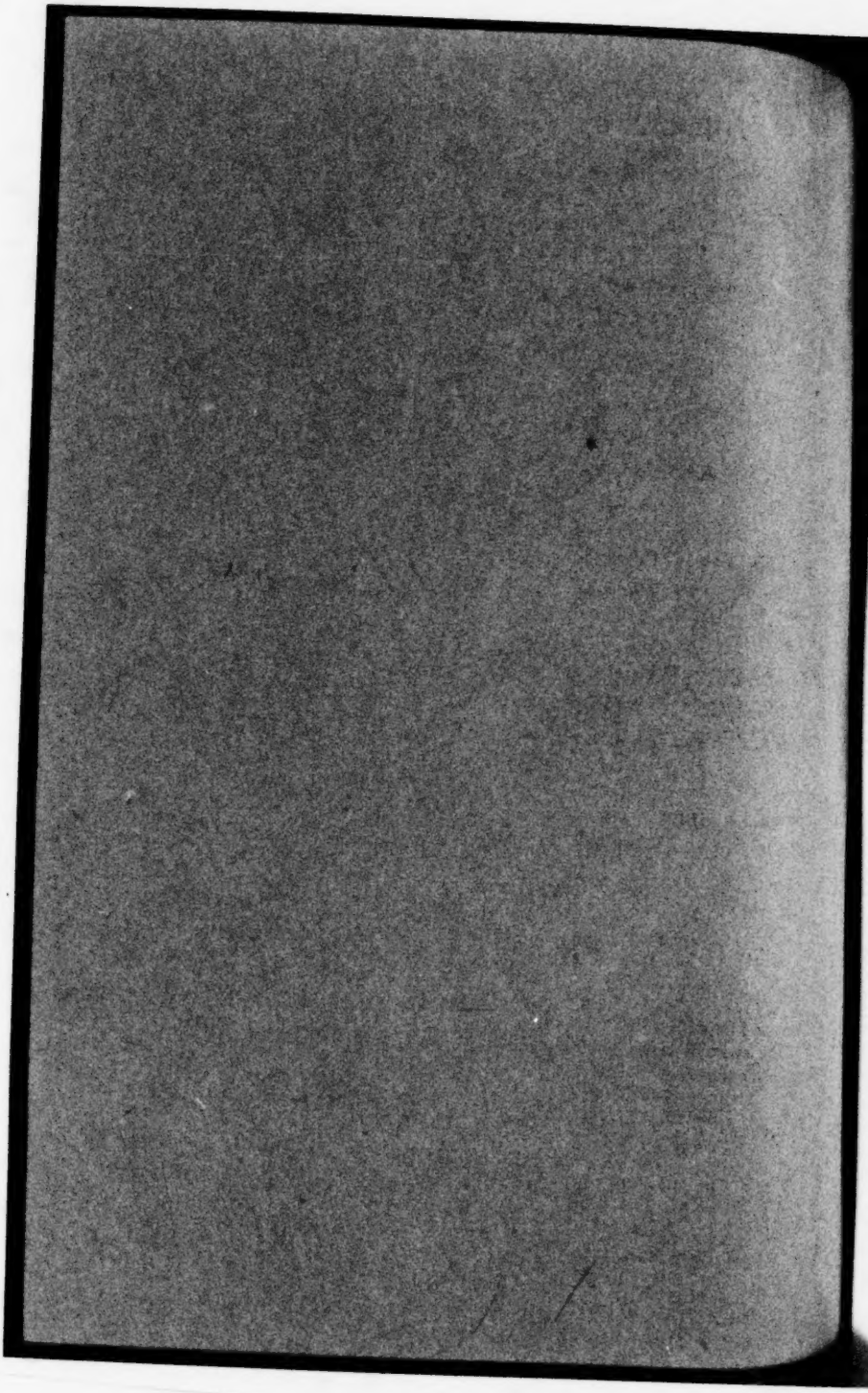
vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

[illegible]

Probable jurisdiction noted February 1, 1954



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By Mr. Augello:

Q. What exhibit is that?

A. No. 5.

Q. Do you have tariff 62 with you?

A. No, I haven't approached it as a rate proposition at all.

Q. You just made the statement that the reason you included the Newark figures in all cases, or practically all cases, is that the Newark rate would be the same as the New York rate?

A. That is right.

Q. But I am calling your attention to the fact that the rate on all citrus from the State of Texas, and you know the State of Texas produces some grapefruit and oranges, and I might say pink grapefruit that the housewife seems to enjoy, and the rate from Texas to New York, the base rate of $1.16 does not apply to Newark, and your tariff will so show that if you refer to that.

A. I don't know.

Q. Boat-compelled rates.

Exam. Brown: To what point?

Mr. Augello: New York City.

Exam. Brown: In other words, you claim the rate to New York City is lower than the rate to Newark?

Mr. Augello: That is right.

Exam. Brown: And you are referring to the all-rail rate from Texas?

[fol. 58] Mr. Augello: Yes, sir.

Exam. Brown: Do you know whether or not that is a fact?

The Witness: I don't. The tariff will speak for itself. I haven't put in specific rates.

Exam. Brown: But you did testify that the blanket rate was the same, so the question is appropriate under cross-examination.

The Witness: This seems to be a specific situation in connection with citrus that wouldn't apply as to vegetables.

Exam. Brown: The same order of competition would be present?

The Witness: I am not so sure.

Mr. Augello: Oh, yes. On some vegetables the water competition is the same as citrus.

Exam. Brown: The witness is not sure.

The Witness: You are now claiming the vegetable is different?

Mr. Augello: Yes.

The Witness: That is the only exception you know of, the citrus fruit rate?

Mr. Donadio: Your question to Mr. Hodkinson was that the rate to New York—was a lower rate applicable on citrus than that that was applicable to Newark. Is that it?

Mr. Augello: That is right, on citrus, and that is the reason I asked him the question as to why he included the [fol. 59] 11,399 cars unloaded at Newark and added them to the 118,497 cars shown on his Exhibit No. 3. I think the Newark situation has no place in this case.

By Mr. Augello:

Q. Mr. Hodkinson, you have no piers at Newark that you know of, have you?

A. No piers at Newark, no.

Q. All the unloads of fruits and vegetables at Newark are done on team-tracks?

A. Yes, at the consignees' expense.

Exam. Brown: Let's get the record straight on the rate to Newark. We don't know whether it is a normal rate or a so-called water competition rate.

Mr. Augello: I will specify it as a water-compelled rate. It is a boat-compelled rate, shown in the tariff as such.

Exam. Brown: You are not testifying. Unless you are willing to stipulate——

Mr. Smith: I suggest that Mr. Hodkinson during the noon recess check the tariff and then after lunch state what the tariff is.

Exam. Brown: You tell us after the recess. You can check it very easily.

By Mr. Augello:

Q. Your Exhibit No. 3 shows a total number of rail receipts, including express shipments, of 118,497 cars.

[fol. 60] A. Yes.

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Q. What percentage of that number were unloaded on the Jersey side?

A. I don't know. Mr. Loos asked me to break down this 45,744 cars between Manhattan Island unloads and Jersey unloads. I told him I couldn't do it, and I will have to tell you the same thing.

Q. There will be a witness that will testify?

A. I am not so sure that there will be.

Mr. Augello: Am I to understand you will have witnesses?

Mr. Miller: There will not be.

Mr. Augello: There will not be any witnesses to testify and break down these figures as to Jersey unloads, Long Island unloads, and Manhattan Island unloads?

Mr. Miller: That is correct.

By Mr. Augello:

Q. But you do have them for Newark?

A. Of course we have them for Newark, because Newark is one spot included in this 45,744 cars. You have Brooklyn, Jersey City, Hoboken, and Kearny unloads.

Q. Why did you include Jersey City?

A. Because the Department of Agriculture includes Jersey City in with its New York City reports.

Q. That is the only reason you used Jersey City figures?

A. We used the Department of Agriculture figures for New York City, and the publication itself shows that that [fol. 61] includes Jersey City receipts.

Q. Will you please refer to Exhibit No. 3 again? I believe it was your testimony that the 45,744 cars were unloaded by consignees on Manhattan Island.

A. No, it wasn't. That wasn't my testimony at all. I said the 45,744 cars were consignee unloads at points other than these particular piers on Manhattan Island. It includes team-tracks on Manhattan Island, it includes Jersey City, and it includes Hoboken and Kearny.

Q. How far east would you say on Long Island do they include?

A. Just the points that the Department of Agriculture

includes on Long Island.

Q. But you don't know how far east?

A. We started out on this premise, and it is very, very simple, that these piers are the only points at which the railroads perform the unloading service. That 118,497 cars came into this territory. Obviously the difference between the two figures are the cars that are unloaded by the consignees at Manhattan Island, Jersey City, Hoboken, and Kearny. I can't make it simpler than that.

Q. Which would also include any cars of fruits and vegetables placed at private sidings and warehouses of the consignees?

A. Yes, to the extent that they are included in the Department of Agriculture reports, private siding and team-track deliveries.

[fol. 62] Q. Will you please refer to your Exhibit No. 4, in which you show that the Trans-Continental group A rate applies to all points east of Buffalo and Pittsburgh and north of the Potomac River, and New England, is that correct?

A. Yes.

Q. This grouping, you say, applies on all fruits and vegetables?

A. In Trans-Continental territory.

Q. Is Grants, New Mexico in Trans-Continental territory?

A. I will have to look that up to make sure. I am talking particularly, as I did in my direct testimony—I especially mentioned California, Oregon, and Washington. I am not coming into the mountain territory, or points east of those states.

Exam. Brown: How about Arizona?

The Witness: I will have to check for Arizona, and I will have to check for New Mexico. But they are wide blankets from that territory.

Exam. Brown: Arizona is normally in Trans-Continental Territory, is it not?

The Witness: There are some points, I think, that take some rates slightly under it. I am somewhat hazy as to that. I know there has been some agitation, and how it was determined, I don't remember. The people in Arizona say

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they are so far east of California that they should have a [fol. 63] rate differential different from California. I haven't checked to see. But you have a general blanket in Trans-Continental territory, that is, California, Oregon, and Washington. These rates are the same. When you come to New Mexico the blanket may not be quite as big.

Exam. Brown: Is your territory confined to the northern section of Trans-Continental territory?

The Witness: And the southern.

Exam. Brown: You don't know if it includes New Mexico and Arizona?

The Witness: To the extent that they are included in the points included in this map.

Mr. Augello: Grants, New Mexico is in Trans-Continental territory which is quoted by Mr. Hodkinson in his Exhibit No. 4. Item 1406 in this Trans-Continental tariff 44—A specifically shows the rates on vegetables applying from several points in New Mexico, such as Bluewater, Grants, and Socorro, in which the Group A rates are circled by a note 6 and 7. Circle 6 applies to the Group A territory, Buffalo and Pittsburgh east up to New England-New York state line. Circle 7 applies at a higher rate of four cents than circle 6 to all of New England.

By Mr. Augello:

Q. So that, the information shown in Exhibit No. 4 of the Trans-Continental Group A territory is not entirely correct, is it?

[fol. 64] A. It is correct to say that the rate to Rochester, New York is precisely the same as the rate to New York City, isn't it?

Q. Yes, but do you agree with the information——

Mr. Donadio: Mr. Examiner, I don't object to Mr. Augello testifying at this point as to just what the situation is, but I think it ought to be reserved until he himself or somebody else takes the witness stand. I don't think it is proper cross-examination. It is pretty clear to everybody just what Mr. Hodkinson was talking about. I think it is not proper cross-examination.

Exam. Brown: Basically you are correct so far as the

statements of fact are concerned. But he was laying a basis for the question to Mr. Hodkinson as to what was included in Trans-Continental territory, and the Commission would like to know.

You have an exhibit that states that the rate from Trans-Continental territory to this broad group is the same. The Commission probably won't know what you are talking about when you say Trans-Continental territory. You are including the north Pacific Coast territory?

The Witness: Yes.

Exam. Brown: Are you including the southwest coast territory?

The Witness: Yes. California, Oregon, and Washington.

Exam. Brown: Those are the three big producing points [fol. 65] in the west, but there is considerable production in Arizona, and you don't know whether you included it or not?

The Witness: Not in this particularly. I am not trying to cover every specific rate situation in an exhibit of this size. Obviously, it is impossible. What I am trying to show here is that New York City pays precisely the same rate as Rochester from all points in Trans-Continental territory. Mr. Augello has pointed out that Boston may pay four cents higher than New York. I don't know that that is particularly material, because Boston unloads their freight anyhow.

Exam. Brown: You tell us exactly what this exhibit means.

The Witness: This exhibit means that to Trunk Line Territory, that is the point I am particularly interested in, the rates on fruits and vegetables from the states of California, Oregon, and Washington, are precisely the same to Rochester, Syracuse, Utica, and points just east of Buffalo, as they are to New York City.

Exam. Brown: Are you willing to let that exhibit stand as reflecting the rate adjustment only from those three states?

The Witness: Yes.

By Mr. Augello:

Q. And it does not involve any other territory outside of Trunk Line Territory, is that correct?

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A. That is all right. That is correct.

[fol. 66] Q. Mr. Hodkinson, in your direct testimony you stated that the New York carriers were giving free unloading of fruits and vegetables on the piers, is that correct?

A. That is correct.

Q. In other words, you do not agree that those charges are in the line haul rate?

A. Emphatically not.

Q. Emphatically not?

A. Yes.

Q. Have you read the I. C. C. decision in I. & S. docket 1420, decided January 20, 1922?

Exam. Brown: What is the citation?

Mr. Augello: 66 I. C. C., and the name is Fruits and Vegetables to Duane Street.

Exam. Brown: What is the first page number—66 I. C. C. what?

Mr. Augello: 135.

A. No. I leave those to our lawyers.

By Mr. Augello:

Q. You never read that case?

A. No.

Q. Have you had any occasion to look up the report?

A. No, sir.

Q. Would you be interested to know what the Commission said under the heading of "Terminal Charges"?

Mr. Donadio: I object.

[fol. 67] Mr. Bongartz: I object.

Mr. Smith: Counsel is trying to argue the case through the medium of this witness, and I think that should be reserved for briefs.

Exam. Brown: It is unnecessary for you to argue your objection. I will sustain it.

By Mr. Augello:

Q. I don't suppose you are familiar with the Commission's decision in I. & S. docket 3596, decided December 19, 1931?

A. I think those decisions will speak for themselves.

Exam. Brown: The question was——

By Mr. Augello:

Q. But you haven't read the Commission's decision?
A. That is correct.

Exam. Brown: You have not read them?
The Witness: No, I have not.

By Mr. Augello:

Q. Will you please refer to your Exhibit No. 14. I notice you have watermelons in this exhibit.
A. Yes.
Q. That is pages 20 to 34. Are watermelons unloaded on the New York piers by the carriers?
A. No, I think they are all unloaded on the Jersey side.

Exam. Brown: Do you know?
The Witness: I am pretty sure that they are.

By Mr. Augello:

[fol. 68] Q. Isn't there a tariff restriction in bringing watermelons over to the New York piers?
A. There may be. My information is that they are all unloaded at Jersey, on the Jersey side.
Q. And unloaded by the consignees?
A. Yes.

Exam. Brown: Do the protestants expect to bring out the facts a little more clearly?
Mr. Augello: Oh, yes. We will have witnesses testify as to the tariff restrictions as to watermelons, and so forth.
Exam. Brown: In the light of that fact, perhaps your cross-examination will be shortened.
Mr. Augello: That is what I am attempting to do, but I figure that Mr. Hodkinson, being a tariff witness, he would be familiar with that.
Exam. Brown: But you are going to bring out that fact?
Mr. Augello: Yes.

By Mr. Augello:

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Q. Mr. Hodkinson, you have your trunk line tariff No. I. C. C. A-856?

A. Yes, I have that.

Q. Will you please refer to item 335 in that tariff, and explain just what that covers.

A. Do you mean at stations of receipt and deliveries of fruit, Jersey City—or Duane Street, rather?

Q. Under "Terminal Deductions," will you read that into [fol. 69] the record, please?

A. "On shipments from and to connecting lines, deduct, except as shown in paragraph 2 below, 4.4 cents per 100 pounds——"

Mr. Bongartz: Mr. Examiner, I object to the reading of this on the ground it is entirely irrelevant. It is a divisional matter, has nothing to do with the case before the Commission.

Exam. Brown: I can't tell by the item itself. I don't know whether it has any relevancy or not.

Go ahead and finish the reading.

A. "—per 100 pounds minimum, $8.80 per car, before prorating, and add to the Erie Railroad Company, or New York Company, proportion for station facilities and services, and for floating or lighterage from and to Long Dock, Jersey City, New Jersey.

By Mr. Augello:

Q. What does that mean?

Exam. Brown: Before you ask him what it means, you had better tell us what particular benefit this is going to be to the record.

Mr. Augello: To show that the New York carriers that are making these pier deliveries on fruits and vegetables, and are doing the unloading, are being compensated for it by the line haul rates, in addition to their normal divisions. An additional deduction is made in the division before the [fol. 70] division is made.

The Witness: That is not the case at all. We get this terminal deduction on all freight. We get it at 28th Street where there is team-track delivery. We get it on all deliveries in New York Harbor. So do all the carriers.

Exam. Brown: All carriers?

The Witness: Yes.

Mr. Donadio: Mr. Examiner, I would like to interpose an objection at this point on going into any further questioning on divisions, or arrangements between carriers, because it has no pertinency to the issues involved in this proceeding, and I move that all questions and answers in connection therewith be stricken.

Exam. Brown: Let's clarify them. The question is, do you know what that means? I am trying to find out what relevancy that has in this case. It seems to me from the statement made by counsel, Mr. Augello, that it might have some bearing here. I think the question is proper. I think it would be better to bring that out on your side of the case.

Mr. Augello: You will recall, Mr. Examiner, Mr. Hodkinson specifically stated in his direct testimony that they were not being compensated in the line haul rates.

Exam. Brown: I said your question was proper and it would be all right to ask it.

[fol. 71] Mr. Augello: And this particular item 335 in the New York lighterage tariff specifically shows that they are being compensated for station facilities and services, and for floating and lighterage from and to Long Dock, Jersey City.

Mr. Donadio: That is an arrangement between the carriers. It has nothing to do with the shipper or the consignee. It relates strictly to the arrangements between the carriers as to how the line haul charge is to be divided.

Exam. Brown: If it is an arrangement between the carriers, why is it published in the tariff?

The Witness: For the information of the people that apply these divisions to the way books. This is the universal rule. It varies with the territory.

Exam. Brown: And it is your idea and conclusion that——

The Witness: That it is a convenient way of showing the terminal deductions that have to be deducted before prorating the revenue between the interstate carriers.

Exam. Brown: Is it your idea that this tariff provision has no reference to a shipper, that it relates solely to the arrangements between the carriers?

The Witness: Yes, sir.

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Exam. Brown: And it is published in the tariff?

The Witness: For convenient reference by divisional clerks.

Exam. Brown: Is that the usual way?

[fol. 72] The Witness: It has been done since time immemorial.

Exam. Brown: But it is not usually done with respect to divisional arrangements?

The Witness: No, only with respect to terminal arrangements. That is where we went for our information as to terminal deductions. It has been used for divisional purposes ever since I remember.

Exam. Brown: We will let this tariff item speak for itself. If the protestants wish to bring out anything further with respect to it, they may offer it.

By Mr. Augello:

Q. On a car to Newark, New Jersey from Transcontinental Territory, are there any deductions from the division that you know of?

A. Deductions from what division?

Q. Would the same deduction shown in item 335 be made on a car consigned to Newark, New Jersey?

Mr. Donadio: I object to that question for the same reason, that it relates to divisional arrangements between carriers, and has nothing to do with the issue involved in this case.

Mr. Augello: You will remember he brought in Newark, New Jersey.

Mr. Donadio: That was for a different purpose.

Exam. Brown: The witness testified on direct examination that the carriers were not being compensated. This [fol. 73] cross-examination is directed toward that statement, is it not?

Mr. Augello: Yes.

Exam. Brown: It is proper cross-examination if the direct was proper direct examination. I will permit the witness to answer.

Mr. Donadio: I would like an exception.

Exam. Brown: Under the rules and practice of the Commission, it is unnecessary for counsel to take an exception

to the Examiner's ruling. He is automatically allowed that.

You may answer, Mr. Hodkinson.

A. I wouldn't be prepared to answer the question yes or no. I haven't gone into the divisional arrangements, and divisional arrangements vary with different points. Some railroads have terminal allowances at Newark, others do not. The point as far as these allowances named in this tariff are concerned is that they apply not only to fruits and vegetables, but to all other freight, and that they apply for team-track delivery in metropolitan New York just as they do to pier delivery in New York. There is no distinction.

Exam. Brown: My suggestion in connection with this particular line of questioning is that the protestants put that in themselves rather than to ask this witness. I think we will save a lot of time in doing so.

Mr. Augello: I will be glad to save time.

Exam. Brown: I am not ruling in this connection that [fol. 74] your questions are improper. They might be improper if the direct examination had been otherwise. I suggest that you defer that line of questioning until your evidence is introduced for the protestants.

The Witness: I might say in this connection, Mr. Examiner, that this has somewhat opened the door to the divisional questions.

Exam. Brown: I didn't say I was going to let them ask. Understand this. I didn't rule definitely that that evidence would be admitted. I said it should be offered. Now, if proper objections are made, I will consider them when they are made, not now. Mr. Hodkinson will be available for further cross-examination.

Mr. Donadio: May I point out one more thing in connection with your statement, and that is that the tariff shows very plainly and definitely that there isn't a cent added to the shipper's charges for any of the terminal service which is referred to in the tariff item that was read.

Exam. Brown: I thought we were saving time by deferring this, but if you are going to reopen it, let's go ahead, and let Mr. Hodkinson exhaust the subject.

The Witness: These total deductions have nothing to do with the measure of line haul rate. As a matter of fact, the

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Commission in prescribing these divisions between southwestern territory, on the one hand, and the Official Territory [fol. 75] on the other, did not make any provisions for any of these terminal deductions in New York Harbor. This has nothing to do with the line haul rate at all, and, as I told you sometime ago, whether we make team-track delivery which the consignee unloads, or whether the delivery is made at the piers where the railroads unload, that 4.4 or 3.3, as the case may be, is deducted as a divisional arrangement, and the shipper or consignee has no interest whatever in it.

Exam. Brown: That is enough on that subject.

Off the record.

(Discussion off the record.)

Exam. Brown: We will adjourn at this time until 1:50.

(Whereupon, the hearing was adjourned until 1:50 p. m.)

[fol. 76] Afternoon Session

Exam. Brown: Please continue with your cross-examination.

E. A. Hodkinson resumed the stand and testified further as follows:

Cross-examination (cont'd.).

By Mr. Augello:

Q. Mr. Hodkinson, I asked you this morning in reference to the Texas citrus rate applying to Newark as compared with the rate applying to New York, New York.

A. The New York rate is specific to New York because of the water competition, and the rate to Newark is somewhat higher. Though the rates are not the same, they are higher to Newark than they are to New York.

Exam. Brown: And that is with reference to what?

The Witness: Texas citrus fruit.

Q. That is the Rio Grande Valley district?

A. Yes. That is the only exception I know of where Newark and New York rates are not the same.

Q. Is it not also true of the rate to Boston, that the points

intermediate to Boston are higher than the Boston rate?

A. That may be so. I haven't dealt with the Boston rate blanket.

Q. The Philadelphia situation is the same?

A. Yes. The port cities were water compelled rates.

Q. So that the intermediate points to Baltimore, Phila-
[fol. 77] delphia, New York, and Boston are all higher than the specific commodity rates, boat compelled commodity rates, to those cities?

A. That is right, on citrus fruits.

Q. That is right. The picture is different on vegetables?

A. That is right, on vegetables they are on a parity.

Q. I believe you stated that you started your employment for the Trunk Line Association in 1928; is that correct?

A. That is correct.

Q. Have you been handling commerce cases for the Trunk Line, or have you appeared as a witness for the Trunk Line in cases involving handling charges or carting charges on the New York piers since 1928?

A. Nothing to do with sorting or handling on the piers. I haven't had any connection with any case of that kind.

Q. Did you appear as a witness in I. & S. Docket 3596 in 1931?

A. What did that cover?

Q. Allowance for stacking fresh fruits and vegetables at New York.

A. No, sir.

Q. You did not?

A. No, sir.

Q. You have never read the Commission's report in that case, have you?

A. No.

[fol. 78] Q. Will you please refer to your Exhibit No. 20. I notice that you show on this exhibit the net railway operating income for the twelve months ending May 31, 1947. Have you the figures for the first five months of 1946 as compared with the first five months in 1947 for these five railroads?

A. I haven't them with me, no.

Q. Will you agree that it would show a different picture if you did have those figures?

A. No.

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Q. It wouldn't show a difference?

A. I won't agree that it would. I can't tell what it would do if I haven't the figures before me. I am not going to speculate as to just what they mean.

Q. Don't you know that the railroad earnings in the first five months of this year compared with the first five months of last year show tremendous increases?

Mr. Francis L. Brown: What raliroads are you talking about?

Mr. Augello: The five railroads shown on this Exhibit No. 20.

A. I wouldn't answer that yes or no until I looked up the figures.

By Mr. Augello:

Q. Can you get those figures for us?

A. If there is no objection from counsel, yes.

Mr. Bongartz: We will be glad to furnish it. What do [fol. 79] you want?

Mr. Augello: The first five months, or six months, of 1946 compared with the first six months of 1947.

Mr. Bongartz: The first five or six? I don't know whether six months are available. I think five months.

The Witness: Six months are not available.

You want the first five or six months of 1946 as compared to the first five or six months of 1947?

Mr. Augello: For the five railroads shown on this exhibit.

The Witness: Can I have ten days for that?

Exam. Brown: I hope you can have it before the hearing is closed.

Mr. Smith: We will try to. It may be that we can.

Exam. Brown: If you can't do it, please advise me, and I will give you appropriate time for filing it.

By Mr. Augello:

Q. Mr. Hodkinson, you mentioned about the Southern vegetable rates being reduced about seven or eight years ago; is that correct?

A. Yes. I was speaking from memory.

Q. Vegetable rates?

A. Yes. I said eight or more years.

Q. Well, that is about right. I think it was 1939. But you didn't mention at that time that at the same time that the vegetable rates were reduced that the carriers increased [fol. 80] the estimated weights; is that right?

A. Oh, I think that was an up and down proposition, Mr. Augello.

Q. No, it was definitely an increase in the estimated weights.

A. As to some commodities, the status quo as to others, and a decrease as to others.

Q. You don't agree that it was a general increase in the estimated weight at that time?

A. No, because with the various comodities you will find some were increased, a few were decreased, and some remained stationery. But that wasn't what I call an increase. It was just a recognition that the carriers should get paid for the weight they transport.

Q. That was involved in I. & S. 4577, was it not?

Exam. Brown: This witness testified he didn't know anything about I. & S. 4577.

Mr. Augello: I haven't asked him about I. & S. 4577.

A. I don't recognize it by the number, but there was a proceeding that involved the estimated weights on vegetables from the Southeast. I can't say as to the number.

Exam. Brown: That is the case you are talking about?

Mr. Augello: Yes.

A. (Continuing:) And there were some adjustments as to the estimated weights as to various vegetables. I know [fol. 81] that celery went up, but we had been transporting celery then, as I recall it, at 57 pounds a crate, when, as a matter of fact, it weighed 68. It wasn't an increase. It was simply a recognition of the carrier's right to get paid for the weight they transport. It is ridiculous to assess charges on 57 pounds when you know full well you are transporting 68.

By Mr. Augello:

Q. I think, Mr. Hodkinson, you are confused in the Com-

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mission's decision in I. & S. 4577. The Commission's decision didn't increase any estimated weights in I. & S. 4577. What I had reference to was the agreement made between the shippers in the South with the railroads in the South, to accept the increase in estimated weights for a reduction in the rate to take care of motor truck competition which they had at that particular time.

A. I think the decision will speak for itself. The point is that we did reduce rates, and concurrently with that reduction in the rates it was considered the appropriate time to take care of the weight situation to the end that we would be compensated for the tonnage we transported.

Mr. Donadio: Does your answer still stand that some of the estimated weights were reduced?

The Witness: Yes.

Mr. Donadio: And some stayed the same?

The Witness: Some stayed stationery.

Mr. Donadio: And others were increased?

[fol. 82] The Witness: That is right.

By Mr. Augello:

Q. Would you say the majority were increased?

A. In point of number of commodities, yes. I still don't like the use of the word "increase," except in the sense that it recognizes that is the weight we were transporting.

Q. Still there was an increase over the former estimated weights in the tariff?

A. There was an adjustment that gave the carriers revenue for the weight they transported.

Q. All right, you call it an adjustment; I will call it an increase.

Exam. Brown: From the tariff standpoint, the answer is yes?

The Witness: Yes, from the tariff standpoint.

Mr. Augello: That is all I have.

Cross-examination.

By Mr. Matson:

Q. Mr. Hodkinson, will you refer to your Exhibits 20 and

21, please. Is it the general purpose of those particular exhibits to show that the five carriers named are in need of additional revenue?

A. Yes, that is the general purpose.

Q. And you are proposing to get some of this revenue by putting in these unloading charges that have been suspended?

A. Yes, that would help.

[fol. 83] Q. Those charges will accrue, I presume, to these five carriers?

A. Oh, yes.

Q. It has——

A. Well, wait a minute. It won't exactly accrue to the carriers. It will be expenses that they are saved. The resultant revenue attached to it—we are performing the service and getting paid for it instead of paying out, as we do now.

Q. Well, the money that is paid to the carriers for the performance of this unloading service will go to these five particular carriers?

A. Yes; that is right.

Q. The adjustment has no connection, then, with the line haul rate from the origin to the destination?

A. That is true.

Q. Now, as a member of the auxiliary committee, do you know when this adjustment was proposed first? When was it decided to put this adjustment into effect?

A. No, I don't know precisely when they considered they should put it into effect. I think it has been in the minds of our executives for quite some time.

Q. Over a year?

A. Oh, yes, well over a year.

Q. When was the first notice that you got of it?

[fol. 84] A. Well, my first connection with it was just about the time the tariff was published. That is the first time I had any notice that the proposition was before the carriers.

Q. That was in March of 1947, was it?

A. Somewhere around there, yes.

Q. Now, the carriers have other ideas for getting revenue at this time. You know about those, too, I suppose?

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A. Well, we are studying every possible source of additional revenue that we sorely need.

Q. I have specific reference to the petition designated ex parte 166.

A. Yes.

Q. Can you tell me whether the decision to file that petition was made prior to March of 1947?

A. I don't know just when that decision was reached, either.

Q. What connection is there between the two decisions, if any?

Mr. Bongartz: That is objected to. The witness just said he doesn't know when these things were proposed, what meetings brought about the proposals, and I don't think this question, in the light of those answers, is proper.

Exam. Brown: I think Mr. Bongartz is right.

By Mr. Matson:

Q. Do the carriers propose to assess charges for the performance of similar services on other commodities?

[fol. 85] A. Well, we haven't, as far as I know, reached any definite conclusion as to that, yet. My own personal view is that the railroads should not continue to perform free unloading services on any commodity.

Q. Now, I understand that these figures on Exhibits 20 and 21 include passenger revenue, too; is that right?

A. Yes.

Q. Do the carriers propose to charge a bus fare for transporting passengers from Jersey over to New York?

A. I don't know anything about that.

Mr. Bongartz: Objection.

Exam. Brown: I don't get the purport of that question.

Mr. Matson: I think we have a parallel situation between the service performed, which is involved in this proceeding, and the service performed by the B. & O. in transporting passengers from Jersey to New York City.

Exam. Brown: Your specific question is what?

Mr. Matson: Whether the carriers propose to assess a charge for that service.

Mr. Bongartz: The only thing comparable would be if you carried the passengers off the bus.

The Witness: On a stretcher.

Exam. Brown: What is your answer? I will let you answer the question.

A. I don't know.

[fol. 86] By Mr. Matson:

Q. Now, you stated your belief or your position that the unloading charges involved here will be passed on to the consumer. Would you agree, then, that the amount of this charge will increase the spread between the price received by the producer and the price paid by the consumer?

A. To the extent that you are going to have a higher retail price, I suppose it will increase the spread. But I don't know the economics and the distribution of the returns from the fruit. I do know, as a consumer, that every possible increase is passed on to me, and I know that one-tenth of a percent a pound on carrots is not going to have any material effect on my purchase of carrots.

Q. You like carrots so well that you are willing to pay more?

A. I would, yes.

Q. Now, from the standpoint of the consignee, does the performance of this unloading service save him any cost as distinguished from the spotting of a car on a team track?

Mr. Miller: Objection. This man is a traffic witness. It seems to me the question necessarily entails a question of operations, as to how a delivery may be made under other circumstances to a consignee. I don't think the witness is in any way competent to answer it.

Exam. Brown: Can you answer the question?

A. Yes. If the consignee gets his traffic on a team track, [fol. 87] he is obviously under some expense in getting the car unloaded. Here he gets it for nothing. We are proposing to equalize that situation by making a charge.

By Mr. Matson:

Q. This service he gets, as you say, for nothing; does that put the commodities into his truck?

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A. Pardon me?

Q. Do the railroads put the fruits and vegetables into the consignee's truck?

A. No, but they make it available to the consignee's truck.

Q. If they spot the car on the siding, they also make the commodities available to the consignee to put them in a truck?

A. Yes.

Mr. Matson: That is all.

Cross-examination.

By Mr. Hoffman:

Q. Are there commodities other than fresh fruits and vegetables which are delivered and unloaded on these piers here in Manhattan by these delivering carriers?

A. Yes, there are some other commodities.

Q. Is there any charge for the unloading of those commodities under the existing tariffs?

A. Not at the moment, no.

Q. Are some of these commodities also perishable commodities?

A. Yes. Perhaps not so highly perishable as fresh vegetables.

[fol. 88] Q. Could you tell us the names of some of those other perishable commodities where the unloading is done by the carrier without any additional charge?

A. Dairy products.

Q. Now, in connection with other destinations in the same rate grouping as New York, do the carriers or do they not make a charge for the unloading of these other commodities?

Exam. Brown: Before you answer that, I wish you would make your question clear as to what territory you are covering. You say the same group as New York. That might mean Buffalo. Now, what do you mean?

By Mr. Hoffman:

Q. Well, for example, this group A or B.

A. On what commodities?

Q. On commodities other than fresh fruits and vegetables, being the commodities you just referred to, such as, for example, dairy products.

A. Well, if we unload dairy products any place other than New York, my understanding is that we assess a charge.

Q. Do you know of any proposal being entertained by the carriers to assess an unloading charge in connection with deliveries at Manhattan piers in connection with such other commodities, referring again, by way of example, to dairy products?

A. Well, I think that can be answered in this way. We have to make a start as to the assessing of an unloading [fol. 89] charge on various commodities where we are performing the service free. Fruits and vegetables are perhaps the larger volume of traffic, and we started there.

Q. Then your only reason in making a distinction between the fresh fruits and vegetables in connection with a tariff which is suspended, and these other commodities, is because you had to make a start in connection with these other fresh fruits?

A. Yes, we probably will reach the others later on. I told you my own personal opinion, which is that the carriers should not perfrom this unloading service gratis on any commodity.

Q. Then you have no other reason for making any distinction with respect to the treatment of these two different commodities?

A. Not at the moment. We haven't been able to study every commodity yet. We have been able to study the fruit and vegetable traffic.

Q. Are canned goods unloaded at these piers under existing tariffs without any charge for unloading?

A. If they are delivered at these piers they would be unloaded without charge.

Exam. Brown: What is the fact?

The Witness: I would prefer you to ask the operating witnesses as to whether or not canned goods are unloaded [fol. 90] at any of these piers. My information only goes so far as dairy freight. I am not so sure if any of this freight is delivered at the Pennsylvania piers, 27, 28 and 29, for example.

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Exam. Brown: You wouldn't include canned milk as dairy products, would you?

The Witness: Well, I suppose so.

Exam. Brown: When you say diary products, do you include canned milk?

The Witness: No, I had in mind butter, eggs, and cheese.

By Mr. Hoffman:

Q. Would your statement, your same statement be applicable to the delivery and unloading of dried fruits at Manhattan piers?

A. If they were delivered at any of the piers we would perform the unloading free.

Exam. Brown: What is the fact?

The Witness: Again, you will have to ask the operating witnesses whether dried fruits are delivered to any of the fruit and vegetable piers.

By Mr. Hoffman:

Q. Can you tell us whether, under the tariff, it is the duty of the carriers to deliver dried fruits, and unload without a charge, referring to the tariff?

A. Under the tariff, the carriers undertake to unload dried fruits and vegetables without charge.

Q. Do they do it?

[fol. 91] A. They do do it, yes but your question was with respect to these particular piers.

Q. Now referring to the tariffs under suspension, could you give us the names of the carriers who have joined in the filing of that tariff, in connection with the Manhattan tariff? I can't give you the number, but we can look it up. I am referring now to the tariff which is under suspension, applicable to Manhattan, and I am requesting the names of the carriers who have joined, or who have concurred in that tariff.

A. This is the service that is local to the particular carriers that make the delivery, so that in Manhattan the lines that would be affected are the B & O, the Erie, the New York Central, and the Pennsylvania.

Q. Now, have all of those carriers actually joined in that tariff?

A. Yes, sir. As a matter of fact, many of them issued their own individual tariffs. They are all involved in this proceeding. This suspension proceeding doesn't only run to Curlett's Tariff; it runs to tariffs issued by the B & O, the Pennsylvania, and the New York Central, if you will look at the notice dated the 28th.

Q. Referrring to the Trans-Continental Freight Bureau Tariff, ICC 150844-K, with which you are familiar, which is applicable to the movement of California fresh fruits, have [fol. 92] any of the carriers who are parties to that joint tariff in any way indicated any concurrence to this tariff under suspension as applied to New York?

A. There is no necessity to get their concurrence. They are not interested in this situation.

Q. I didn't ask you your conclusion. I wanted to know whether you knew whether or not they had.

A. We had no occasion to ask them. They are not affected.

Q. So you did not obtain the concurrence of any of the trans-continental carriers other than these delivering carriers here in Manhattan?

A. These carriers are not trans-continental carriers. Answering your question specifically, we did not find it necessary to go to the trans-continental carriers for any concurrence. They are not affected.

Q. Is the same statement applicable with respect to the tariffs concerning Philadelphia—the tariff under suspension?

A. Yes.

Q. Now, referring to Item 335, which was previously referred to by Mr. Augello, he having read to you Subdivision I, I now call your attention to Subdivision II of the same item reading as follows: "Deduct 3.3 cents per 100 pounds, minimum $6.60 per car on all traffic to, from, or via points shown in Note 7." What are the points covered by Note 7?

A. Note 7 is quite voluminous. It is on page 21.

[fol. 93] Q. Briefly, Mr. Hodkinson, they are Midwestern junction points, aren't they?

A. Briefly, they are Western trunk line carriers, and principally in the States of Illinois, Wisconsin, Iowa, Missouri, and so forth.

Q. Would you say, in taking a movement of California

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fruit under the Trans-Continental Tariff 44-K, with delivery at Manhattan piers, that there would be deducted from the line haul rate 3.3 cents per 100 pounds?

Mr. Smith: Mr. Examiner, I would like to object to going any further into the question of how the railroads divide up the revenue that is received from trans-continental transportation of these commodies. I don't think it is material to this case.

Mr. Hoffman: I don't want to argue the point, Mr. Examiner, but the testimony on this point is most vital. Here is an item which appears in the tariff, and there is a provision made that the delivering carrier shall deduct from the line haul rate, for that service, delivering, and for the terminal service, a given number of cents per 100 pounds in connection with the movement of our California fruit, which plainly indicates that these delivering carriers are being paid for this service out of the line haul rate, and that this present tariff which is under suspension is requesting an additional amount of money for the so-called termi-
[fol. 94] nal services. We believe it is very vital. We would like to have it go in the record, and we would like to have the questions answered subject to a motion to strike.

The Witness: This Note 7 has absolutely no application to trans-continental tariffs. You just referred me to Note 2, to Item 335, and then you referred me to Note 7 in connection with that note. I tell you that Note 7 has no application to trans-continental traffic.

By Mr. Hoffman:

Q. Note 7 has no application to trans-continental traffic? Now, I will read it again——

A. It says the deduction of the 3.3 cents will apply to and from the following stations, on the railroads listed below.

Q. But, Mr. Hodkinson, I call your attention to Subdivision II of Item 335, which appears in 116, which reads: "Deduct 3.3 cents per 100 pounds, minimum $6.60 per car on all traffic to, from, or via points shown in Note 7." Do you notice the word "via"?

A. But Note 7 is specific as to stations on this line, and,

as I said in answer to Mr. Augello, this 3.3 applies whether it is a pier delivery or whether it is a team track delivery on the Erie. You picked the Erie as your example. Now, 335 applies to the pier stations, and 385, or 345, applies to 28th Street, which is a team track. You still have the 3.3 at the team track.

Q. Mr. Hodkinson, you are not answering my question. I [fol. 95] was only asking you with respect to the application of Sub Item 2. Mr. Augello covered No. 1.

A. Sub Item 2 does not apply, as I see it, to trans-continental traffic. It is limited to the points shown in Note 7, and Note 7 does not cover any trans-continental points. And furthermore, in connection with these particular terminal charges in this tariff, we have under consideration, and have had under consideration for six months, the elimination of all this from the tariff, because it is purely a divisional proposition has nothing to do with the line haul rate or the measure of a line haul rate.

Q. Are you prepared to say now that in connection with the movement from California via Hammond, Indiana, with delivery by the Erie at Manhattan, that 3.3 cents per 100 would not be deducted from the line haul charges?

A. As to team track delivery, that is the fact. It wouldn't be deducted. The only deduction in connection with the trans-continental traffic is the specific 3 cent terminal charges awarded the Erie Railroad by the Commission in a former case, which was later extended to all carriers having like service.

Exam. Brown: What was the former case?

The Witness: I can't give it to you at the moment, but it was quite some time ago, and it wouldn't apply—we don't get anything out of the trans-continental lines for the 28th [fol. 96] Street deliveries, if you please. That is a subdivisional arrangement with the C.F.A. carriers. These items that are shown in this tariff, Mr. Examiner, have nothing to do with the line haul rates, nothing to do with the shipper or the consignee. It is purely a divisional arrangement between the affected carriers.

Exam. Brown: There seems to be a dispute as to the interpretation of this tariff. I would suggest that the protestants give us the benefit of such evidence as they wish in that respect.

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With respect to Mr. Smith's objection that we should not consider these divisional arrangements, so-called, although published in the tariff, I have this to say:

The exhibits of this witness, particularly Exhibit 20 and Exhibit 21, deal with the earnings of the five carriers involved at New York in this particular handling situation. It was the testimony of this witness that the carriers named in those exhibits would derive additional revenue from this proposed arrangement if it became effective. That being so, I see nothing wrong in bringing out the situation which might obtain under the tariffs if that revenue was divided in any particular respect west of New York City.

That is my ruling.

Mr. Smith: May I make a suggestion? There has been quite a bit of reference to the lighterage and terminal regu- [fol. 97] lation tariff. It is ICC No. A-856, and just so that the Commission and everybody will know exactly what is in this tariff, my suggestion, unless there is some objection, is that ICC A-856 be considered part of the record of this case by reference, with leave to all parties to refer to the provisions thereof.

Exam. Brown: Is there any objection?

(No response.)

Exam. Brown: It is understood, then, that the tariff may be referred to by any parties on brief. It will be considered a part of the record to the extent that the provisions there may be important. That doesn't mean the tariff will be physically incorporated in the record.

Mr. Augello: Or that we can't refer to the tariff at any time?

Exam. Brown: That is right.

By Mr. Hoffman:

Q. Mr. Hodkinson, in connection with the deliveries of fresh fruits and vegetables in the so-called Metropolitan area, do I understand you to say that in the course of your study and the compilation of those figures, you at no time compiled any totals with respect to the unloadings of fresh

fruits and vegetables in Manhattan by the carriers?

A. By the carriers, yes. The unloadings in Manhattan by the carriers are shown in my Exhibit No. 3.

Q. Did you make a showing in your Exhibit No. 3 with [fol. 98] respect to the unloadings on team tracks as compared with the unloadings at piers?

A. Only for the district as a whole.

Q. You didn't separate the two?

A. No, I haven't got the specific unloadings on team tracks at Manhattan island. I told Mr. Loos that, and Mr. Augello that.

Q. Could you obtain those figures for us?

A. I don't think it is really pertinent. The fact is that——

Exam. Brown: That is a question of counsel.

Mr. Wells: May I, in connection with that, and in connection with Exhibit No. 3, request that this witness, when recalled, be prepared to give the breakdown of the 45,744 cars, and particularly to show the number of cars of fruits and vegetables incorporated in that figure unloaded on Manhattan island, and by stations, and also to give, by commodities or commodity groups, the number of cars other than the 27,055 unloaded by the carriers on the piers, referring to the period covered by Exhibit No. 3.

The Witness: I don't follow that.

Exam. Brown: That is a request for counsel to answer, whether or not that information can be and will be made available.

Mr. Smith: We are willing to make that information available. The only question is whether we can do it before [fol. 99] the hearing is closed. We will have to let you know later about that. Possibly tomorrow we can tell when the information will be available. We will report back tomorrow what we can produce.

Exam. Brown: When Mr. Hodkinson is excused it will be subject to further cross-examination. If that can be developed at that time, it will be permitted, providing the carriers are willing to furnish the information.

Mr. Smith: There is no question about willingness. It is a question of whether we can have it available.

Mr. Augello: May I call counsel's attention to the fact

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that the freight agents at these piers are in the room and can give the information as to what the records show, and segregate the different commodities handled on the piers, whether they are fruits and vegetables or pig iron. They have those records.

Mr. Miller: I object to counsel's statement. The carriers have stated that such of these figures as are available will be supplied.

Mr. Augello: I object to telling us that you are going to let us know tomorrow. I think you could let us know right now whether we can get it or not, by interviewing the freight agents.

Mr. Miller: Sir, I assure you I cannot do so.

Exam. Brown: The situation seems to me to be that we [fol. 100] don't know whether or not this information will be made available at this hearing. We will defer our statements with respect to that until later.

By Mr. Hoffman:

Q. Mr. Hodkinson, you made the statement this morning that in your opinion any proposed unloading charge would be passed on to the consumer. Would you be of the same opinion if the unloading charge were 100 times that which was specified in the tariff?

Mr. Bongartz: I object to that.

Exam. Brown: What is the point of your objection?

Mr. Bongartz: It is just ridiculous on its face. It is speculation.

Exam. Brown: It may be ridiculous, but it is pertinent.

A. That is the tendency nowadays, to pass everything on to the consumer.

By Mr. Hoffman:

Q. Mr. Hodkinson, do you know that in past years there have been occasions when California deciduous fruits have sold in the New York market for less than the transportation and refrigeration charges?

A. That may be so, but I have never been able to buy them that cheaply in the retail stores.

Q. Would you be of the opinion in that case that any un-

loading charge would be passed on to the consumer?

A. Well, in that case there is a gap. I am talking about the ultimate consumer.

[fol. 101] Q. Referring again to Item 335 of Tariff 116, previously referred to, and Subdivision II, and your answers previously given, have you knowledge of the case entitled Erie Railroad v. Alabama & Vicksburg Railway Company, 98 ICC 268, wherein the Commission said, and I am only going to read a sentence: "Finds that the present division of the joint eastbound trans-continental rates on fresh fruits and vegetables to Duane Street Station have been unjust and inequitable, and that for the furture just and reasonable division will be 3 cents per 100 pounds to the Erie, and of the remainder of the revenue, 27.5 percent to the lines east of Chicago, and 72.5 percent to the lines west of Chicago."

Mr. Donadio: I object to that question for the reason stated. It is a divisional matter and has nothing to do with the issues in this case.

Exam. Brown: I think I made my ruling very clear on the question of division, and it stands. Now, what is your exact question, sir?

Mr. Hoffman: I am asking the witness if he has knowledge of that decision.

Mr. Bongartz: What difference does it make if the witness has knowledge of that case? I say the decision speaks for itself.

Mr. Hoffman: It has a great deal of materiality. This witness, as a tariff expert, made certain statements with [fol. 101a] respect to the interpretation of this tariff. I am now asking this witness whether his statement would remain the same, acting upon the knowledge of this decision. I am asking him now if he has a knowledge of that decision, and if he has such a knowledge, whether he desires to correct his answer.

Exam. Brown: I think we could save time by finding out if the witness has any knowledge of the decision.

The Witness: I know this case.

Exam. Brown: The question is, do you know about this decision?

The Witness: Yes, this is the case I referred to, Mr. Ex-

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aminer, a few minutes ago and told you I couldn't give the citation, where the Commission ordered the Erie Railroad three cents. But that isn't the three cents in this tariff.

Exam. Brown: All right. The witness has answered he knows about the case.

By Mr. Hoffman:

Q. In the light of your last answer, would you care to correct the previous statement made by you with respect to the interpretation of Item 325?

A. No; I just told you a minute ago that that tariff is not the authority for the deduction of the three cents that we get on trans-continental traffic.

Q. You are saying that Subdivision II of Item 325, while it has application to team track deliveries, has no applica-
[fol. 102] tion to pier deliveries?

A. No, I am not saying that. I am saying that 355 applies to team tracks and pier deliveries. The three cents you refer to there has only reference to pier deliveries, and this tariff is not the authority used for deducting that three cents.

Q. In the case just decided, is there a further deduction of 3.3 per 100 in connection with pier deliveries?

A. Not on trans-continental traffic.

Q. Can you give us the reason why you say that Note 7 does not apply to trans-continental traffic?

A. Trans-continental traffic has been treated separately and distinctly.

Q. Are you saying now that Subdivision II, referring to Note 7, is inapplicable because Note 7 does not refer to trans-continental traffic?

A. Note 7 does not refer to trans-continental traffic. We never use it in the division of trans-continental revenue. I told you that six times, Mr. Hoffman. I can't make it any more emphatic.

Q. And you are making that statement even though Subdivision II of Item 325 in addition to the words "to and from," uses the word "via"?

A. I am taking that position in view of the fact that Note 7 does not say "via." It limits it to those particular sta-
[fol. 103] tions and those particular lines. As a matter of

fact, as a matter of practical application, we don't even get it from those lines in any instances.

Mr. Donadio: I object to argument between the witness and counsel. We are not getting anywhere. The cross-examination has gotten to the point where it is nothing but argument as to what the witness' answers purport to mean.

Exam. Brown: I can dispose of that objection easily. We have had sufficient evidence on the question.

Mr. Hoffman: That is all.

Exam. Brown: Is there any further cross-examination of this witness?

Cross-examination.

By Mr. Logwood:

Q. Mr. Hodkinson, on your Exhibit No. 3, which has been pretty well worn out, you show unloaded by rail carriers at Piers 17, 19, 20, 21, 22, 27, 28, and 29, 72,753 cars for the calendar year 1946. I would like to ask you, sir, what you would have done with those cars if you hadn't unloaded them?

Exam. Brown: For the benefit of those in the back of the room who did not hear that question, I wish the reporter would read it.

(The pending question was read by the reporter.)

Mr. Bongartz: I object to the question.

Exam. Brown: On what ground?

[fol. 104] Mr. Bongartz: This witness has not been offered as an operating witness as to the various roads involved in the question, and the question goes beyond the scope of the direct testimony.

Mr. Logwood: There must be some underlying reason for the rail carrier unloading these cars.

Mr. Bongartz: You can ask that question of an operating witness.

Mr. Logwood: I don't care who answers it. I want it answered.

Exam. Brown: Do you know the answer to the question?

The Witness: I do not know the answer. I know the tariff requires the carrier to unload it.

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Exam. Brown: The answer is Mr. Hodkinson doesn't know what would be done with these cars. You can ask the same question of any operating witness that is put on the stand.

Is there any other cross-examination? Is there any redirect?

Mr. Smith: No redirect.

Exam. Brown: Does that go for all the carriers?

Mr. Smith: Yes, sir.

Exam. Brown: That is all, Mr. Hodkinson. You are excused, subject to recall, if necessary.

(Witness excused.)

Exam. Brown: We will take a short recess.

[fol. 105] (A short recess was taken.)

Exam. Brown: Call your next witness.

Mr. Smith: Will Mr. Hart take the stand, please.

R. E. Hart, was sworn and testified as follows:

Direct examination.

By Mr. Smith:

Q. Kindly state your full name and business address.

A. R. E. Hart, Duane Street Station, Erie Railroad Company, New York City.

Q. What is your position with Erie Railroad Company?

A. Agent, in charge of Piers 19, 20, 21 and 48 Hudson or North River, New York City.

Q. How long have you held such position?

A. Since 1929.

Q. How long have you been connected with Erie Railroad Company?

A. Since 1907.

Q. In your capacity as Agent are you familiar with the handling of fresh fruits and vegetables on Piers 19, 20 and 21?

A. Yes.

Q. Kindly describe such handling.

A. Carloads of fresh fruits and vegetables are road-hauled by the Erie from various points to the rail-head at Jersey City, New Jersey, where the cars are put on car [fol. 106] floats. The car—which have a capacity of 10 to 16 cars each, are then moved by Erie tugs across the Hudson River and tied up alongside either Pier 10, 20, or 21 for the purpose of unloading. Piers 19, 20, and 21, which are called the Duane Street Piers, are the only Erie piers at New York on which fresh fruits and vegetables are handled. There are 16 berth doors available which permit berthing a maximum of 22 car floats alongside the piers at one time.

Piers 19, 20, and 21 are leased by Erie Railroad Company from the City of New York. They are located adjacent to the Washington Market, which is the largest fruit and vegetable jobbing market in New York City and the primary market in the metropolitan area.

The unloading operation for fresh fruits and vegetables is carried on at night, starting at about 6 p. m. or 7 p. m., on Sundays and holidays and at about 8 p. m. on weekdays. The unloading operation is generally completed at about 5 a. m. or 6 a. m., depending on the volume of traffic.

The unloading operation consists of the following: (1) A so-called crew of "wreckers" place gangplanks in proper position so that the fruit and vegetables can be moved out of the cars onto the piers and adjust gangplanks to meet changed tide conditions during the conduct of the unloading operation. At times "wrecking crews" perform duties ordinarily handled by "wood gangs", referred to hereafter;

[fol. 107] (2) a so-called "wood-gang" breaks the seals of the cars, removes the wooden bracing from the cars and disposes of the bracing;

(3) the "unloading gang" unload the cars. Each unloading gang consists of seven men, one carman or checker who has charge of the gang makes a tally of the contents of the car and loads hand trucks in the car, a second carman who also loads hand trucks in the car, three truckers who handle the loaded trucks from the car to the dock and return the empty trucks from the dock to the car and two dockmen who unload the trucks on the dock and assort and stack the packages of freight on the pier floor. The "unloading

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gangs" also move commodities on the piers to make room for subsequent unloading operations;

(4) a crew of so-called "dock counters" checks to see that the unloading gangs have placed the packages in the proper locations on the piers and see that any improperly placed packages are moved to their proper positions.

All of the aforesaid four operations which I have just described are performed by Seaboard Terminal and Refrigeration Company with its own employees under contract with Erie Railroad Company. In addition to the employees who compose the workmen involved in the aforesaid four operations, Seaboard Terminal and Refrigeration Company employs six or more float foremen who supervise the work of [fol. 108] the unloading gangs. These float foremen devote all their time to such work. Also, Seaboard Terminal and Refrigeration Company employs "sweepers" who sweep and clean our piers and remove accumulated debris and rubbish to maintain the high standard of sanitation required in connection with the handling of food products.

On occasion, the "sweepers" are assisted by the unloading gangs. Also, Seaboard Terminal and Refrigeration Company employs a night general foreman and three or more assistants as required to supervise all of the operations which I have described, and a night timekeeper. Erie Railroad Company furnishes to Seaboard Terminal and Refrigeration Company the necessary office space at Pier 21 for handling the operations under the contract, and Seaboard Terminal and Refrigeration Company maintains an office force therein for handling the necessary clerical and accounting work.

In addition to performing the operations which I have described, Seaboard Terminal and Refrigeration Company under the contract also furnishes "A-Line" men whose function is to take the damaged packages that have been recoopered and place them in the regular stacks, setting aside the packages to which exceptions will be made awaiting delivery to the consignee or salvage agent, and a "seal and ice clerk" who takes record of seals on cars, position of ventilators and amount of ice in ice bunkers and seals cars when necessary.

[fol. 109] Seaboard Terminal Refrigeration Company under contract also handles freight for Erie Railroad Company at Pier 48, but fresh fruits and vegetables are not handled on that pier.

Fresh fruits and vegetables were unloaded on Piers 19, 20, and 21 in the following car volume:

	Calendar year 1946	January to June 1947
Citrus fruits	7176	3784
*Fresh fruits (other than citrus)	10804	3716
*Fresh or green Vegetables (top-iced)	3183	2442
*Fresh or green Vegetables (not top-iced)	1624	795
Cantaloupes and Melons	4222	447

(*Not cold pack nor frozen.)

About 80 per cent of these cars originated in transcontinental territory; about 10 per cent in southwestern territory; about 10 per cent in western trunk line territory or east.

All cars of fresh fruits and vegetables unloaded on Piers 19, 20, and 21 are unloaded, and for many years have been unloaded, by Seaboard Terminal and Refrigeration Company in the way I have described.

The time it takes to unload particular types of fruits and vegetables varies according to the size of the boxes, the weight per box and the manner and method of refrigeration and packing in the cars.

[fol. 110] We receive advice as to the various cars of fruits and vegetables—loaded on the various floats prior to the arrival of those floats at Piers 19, 20 and 21. This information shows the consist of the floats and consignees. Our piers are mapped out in such a way to give each consignee a specified location for the cars consigned to him. Many of these commodities, after unloaded, are displayed by the consignees at these locations on the piers so as to facilitate the examination and inspection thereof by prospective buyers.

Practically 100 per cent of the citrus fruits and fresh fruits (other than citrus) after unloaded on our piers, are sold at

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public auction in auction rooms on the second floor of Piers 20 and 21. Before bidding for these fruits at the auction, the buyers generally inspect them on display on our piers. Cantaloupes and melons generally are not sold through the auction but are sold direct to purchasers at private sales on the pier floors where the cantaloupes and melons are displayed after unloaded. Fresh or green vegetables (top-iced) generally are not sold through the auction or at private sale on our piers. The bulk of the fresh or green vegetables (not top-iced) are not sold through the auction or at private sale on our piers.

The Erie Railroad Company furnishes the equipment used by the contractor such as hand trucks, gangplanks, race pieces, truck racks, etc., in which the investment is substan-
[fol. 111] tial, and the Erie Railroad Company assumes the expense of maintenance of these trucks. The unloading operation for fruits and vegetables is performed at night, and the Erie assumes the cost of lighting. During the winter months the Erie Railroad assumes the cost of heating the piers. Pier facilities used in the unloading operations are leased from the City of New York by the Erie Railroad Company, which pays the entire rental and cost of maintenance and repairs. The Erie Railroad also has employees on its payroll who are in some instances involved to a substantial extent in the unloading operations. We have an Assistant Agent, directly responsible for all the night unloading operations. There are also delivery clerks, electricians, float checkers, watchmen, and janitors.

Q. Mr. Hart, at my request, did you bring with you to the hearing a series of six photographs, marked herein as Exhibit No. 22, which show conditions existing on Piers 19, 20, and 21?

A. I did.

Q. Does Sheet 1 of Exhibit No. 22 accurately portray the manner in which oranges are displayed on our piers after they are unloaded?

A. It does.

Q. Does Sheet 2 of Exhibit 22 show the same thing in connection with grapes?

[fol. 112] A. It does.

Q. Does Sheet 3 of Exhibit No. 22 show the same thing in connection with honeydew melons?

A. It does.

Q. What is portrayed by Sheet 4 of Exhibit No. 22?

A. Sheet 4 shows what is called the bumper end of a car float, in the center of which you will notice there is a platform and bridge, a transfer bridge placed there, extending from the platform of the float onto the pier floor. The men that you see there—the one on the right is a hand trucker taking an empty hand truck with a truck rack onto the car. The man in the center would bring a loaded hand truck with vegetables on it onto the pier floor. The man to the left is the float foreman in charge of that float. The picture shows the actual operation of taking fruits off of the car float onto the dock floor.

Q. What is portrayed by Sheet 5 of Exhibit 22?

A. Sheet 5 shows a trucker after he has arrived at the location on the dock where a car is to be displayed for sale, with a truckload of oranges.

Q. What is shown by Sheet 6 of Exhibit 22?

A. Sheet 6 shows—the one man to the left has a truckload of vegetables which have been top-iced, and he has arrived at the dock floor and is waiting to send his truck down for it to be unloaded. The other trucker to the right there [fol. 113] has a similar load. The man in the center is a so-called dock man who has taken a package off the handtruck and is putting it on the stack.

Q. Does Exhibit 22 thoroughly and accurately portray what it purports to show?

A. It does.

Mr. Smith: I offer it in evidence.

Exam. Brown: Is there any objection?

Hearing none, it is received as Respondent's Exhibit No. 22.

(Respondent's Exhibit No. 22, Witness Hart, received in evidence.)

Exam. Brown: Mr. Hart, during the process of your testimony, you said, "Fresh or green vegetables (top-iced) generally are not sold through auction or at private sale on our piers. The bulk of the fresh or green vegetables (not top-iced) are not sold through the auction or at private sale on our piers." Was there any purpose in separating those two? The sense of the process seems to be the same.

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The Witness: That is right, but it follows the sequence of the tabulation of the articles shown unloaded on our piers.

Exam. Brown: So as a matter of fact, there is no material [fol. 114] difference in handling vetgetables top-iced and those not top-iced?

The Witness: Yes, in the actual handling there is considerable difference.

Exam. Brown: You don't say so in your testimony; I mean so far as being sold through auction.

The Witness: Not so far as the sale of it is concerned, but in the handling there is.

Exam. Brown: That is what I am talking about—the auction. There is no distinction at all, or no material distinction at any event?

The Witness: Practically none.

By Mr. Smith:

Q. Mr. Hart, I note that the N. J. & N. Y. Railroad is a party to the tariff under suspension, along with the Erie Railroad. Will you explain why that is so?

A. The N. J. & N. Y. Railroad is a separately operated railroad, operating between Spring Valley, New York, and New York harbor. The N. J. & N. Y. is named in the unloading charge tariff to take care of the situation if the N. J. & N. Y. should handle in the future any fresh fruits or vegetables destined to New York City. As a practical matter, no fresh fruits or vegetables are delivered by the N. J. & N. Y. at New York City at the present time.

Exam. Brown: What is the status of that carrier, if you know? Is it owned by Trunk Line or is it an independent line?

[fol. 115] Mr. Smith: I can state that, Mr. Examiner. As counsel I can state that the N. J. & N. Y. Railroad Company is in reorganization under Section 77 of the Federal Bankruptcy Act, in proceedings pending in the United States District Court for the District of New Jersey. Mr. Peter Duryee is trustee of the property of the N. J. & N. Y. Railroad Company in the reorganization proceedings. It is a separately operated railroad.

Exam. Brown: The stock of the company as such is not owned by any trunk line carrier?

Mr. Smith: The Erie Railroad owns the heavy majority of the stock of the corporation, although the corporation is not in possession of the property now. The property is in the possession of, and is operated by, the Trustee in Bankruptcy.

Exam. Brown: In the past, and up to the present, excluding the reorganization proceedings, the N. J. & N. Y. was an Erie facility, was it not?

Mr. Smith: No. The N. J. & N. Y. always has been separately operated property.

Exam. Brown: True, but it was a subsidiary?

Mr. Smith: That is correct. It was a subsidiary.

By Mr. Smith:

Q. Mr. Hart, you probably heard this morning some reference to the subject of consignees doing their own unloading in connection with fresh fruits and vegetables to the Duane Street piers. What have you to say with respect [fol. 116] to the attitude of the Erie Railroad Company, the position of the Erie Railroad Company in that connection?

A. The Erie Railroad would be agreeable to consignees making their own arrangements to unload any cars of fresh fruits and vegetables consigned to them which they want to take delivery on *on* our Piers 19, 20 and 21, North River, provided such operation was carried on with the same supervision and control on our part as now being carried on the traffic unloaded with our contract labor.

Mr. Smith: I have no further direct examination, Mr. Examiner.

Cross-examination.

By Mr. Loos:

Q. Mr. Hart, is there anything in the tariff that you have in mind, that bears on this matter of the consignee unloading at your piers?

A. Not to my knowledge.

Q. Has such an announcement as that that you have just made been made in the past with respect to unloading at the Erie piers?

A. Not to my knowledge.

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Q. What is the occasion for the change in the position of the Erie Railroad in respect to permitting the consignees to unload at the piers?

A. I don't recall, Mr. Loos, the question ever having been raised with me as to whether or not they could unload their [fol. 117] own cars. In all my time at Duane Street that question has never been raised with me. There was no occasion to answer it before.

Q. In what time would you expect a consignee to unload a car that was placed at the Duane Street pier—48 hours?

A. Well, it must be unloaded the night they arrive, in time for the orders market, which would be before morning.

Q. But suppose the consignee didn't want to put his car in the auction. Would you permit him to receive the car on a car float at Duane Street pier and unload it in accordance with the rules and regulations that apply to unloading on a team track?

A. That could not be done, Mr. Loos, under the existing tariff. The tariff provides that the withholding of unloading of cars will not be permitted. They must be unloaded promptly on arrival at piers.

Q. To what tariff do you refer?

A. The terminal tariff, 116—I have forgotten the number.

Q. That tariff doesn't apply on team track, does it?

A. No, that item does not apply there. The item does not apply to team track.

Q. How would the consignee go about unloading a car that was on a car float if it were not the first car adjacent to the pier? Would he have to go through somebody else's car? Will you explain just how the car would be available to him?

[fol. 118] A. Well, the question has never been raised. It would be my impression that the most practical way would be to engage the services of the same contractor that handles our traffic.

Q. Suppose the consignee didn't want to do that. Would you let him do it himself with his own employees?

A. We would still ask that we have the same control and supervision over the operation as at the present time.

Q. What do you mean by that? What supervision is that?

A. As to what floats will be unloaded and made available for further use, first. What cars on the floats will be unloaded first.

Q. Then you expect the consignee to stand around and wait until his car is available in accordance with your idea of when he should unload it; is that right?

A. The sequence of markets and the availability of berths would make that necessary.

Q. Suppose he wasn't ready to unload it when you thought he should? What would you do then?

A. He would be expected to unload it before the market for which he ordered it.

Q. Suppose he didn't order it for a market. Suppose he just wants to unload the car there as he would on a team-track? What about—why can't he come down there any time within the 48 hours of free time that is allowed under the demurrage tariff and unload it?

[fol. 119] A. Because the floats must be used for other runs, and the floats must be used again for that night's orders.

Q. How many times do you use those berth spaces and floats during one 24-hour period?

A. We have used them as many as two times during one night's operation, and frequently three times.

Q. How many times during a 48-hour period? Would it be double that?

A. I have never made any check of that because they don't stand around that long. I would have no way of telling.

Q. Wouldn't it be reasonable to assume that it would be double the 24-hour period? If you use them three times in 24 hours, wouldn't you use them six times in 48 hours?

A. I really can't answer that question. I have had no experience along that line. It hasn't come into the picture.

Q. Well, what experience have you had with respect to the 24-hour period?

A. Let me say that all cars that are intended, or that are wanted particularly at pier stations are ordered for a specified delivery. They want them either for a certain sale or a specified time of delivery, such as a ten o'clock delivery. Those cars are brought over and unloaded in time for that delivery.

Q. Who orders them?

A. The consignees order the cars.

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[fol. 120] Q. And you refer to the number of times that a car float was used, and the number of times a berth space was used during a 24-hour period. Now, how many times was that?

A. My testimony stated that we started usually at 6 or 7 or 8 at night and ran through to 5 o'clock in the morning. So the usage of the berths for floats for perishable operations must take place within those two times, not 24-hours.

Q. I am sorry; I misunderstood you. So you use those floats and berth spaces some three or four times during the night's operation?

A. The berths are used three and four times. The floats a second, and sometimes a third time.

Q. Do you have a team track on Manhattan island at the Erie Railroad?

A. We have two team tracks on Manhattan.

Q. Where are they?

A. One at the 28th Street station, and one at Harlem station, Dexter and 149th Street.

Q. If a car were going over on a team track, how long does the consignee have to unload it?

A. There are no team tracks on Manhattan under my jurisdiction as Agent. Should I answer the question from my knowledge of the tariffs?

Mr. Smith: If you know the answer, give it, Mr. Hart.

[fol. 121] A. The general tariff covering unloading of cars to team track provides for 48 hours after the first 7 a.m. after the car arrives in place.

By Mr. Loos:

Q. Suppose a shipper unloading cars on team track wants to unload a car at Erie Pier 20, and he asks you to place that car at Pier 20 for his unloading. Why wouldn't you allow him the same 48 hours that you allow the team track?

A. Because that would constitute withholding of unloading, and that is not permitted under the tariff.

Q. In accordance with your announcement you are going to make this space available for consignees own unloading. Why don't you make it permissible for him to unload during any time in 48 hours?

A. Our announcement is qualified by the fact that we would exercise the same control and supervision over the operation as we do now, and could not permit a car to be held that long.

Q. You wouldn't permit him to have 48 hours in which to unload?

A. I would say not.

Q. Does that same supervision and control that you refer to mean that the shipper must employ the Seaboard Terminal and Refrigeration Company to do the unloading for him, the shipper?

[fol. 122] A. It was my thought that to do the job at the time and in the manner in which we would have to have it done, exercising control and supervision, it would be advisable for him to do that.

Q. Would it be necessary?

A. I would have to know just how he would propose to handle it before I could answer.

Q. You would require him to use the Seaboard Terminal and Refrigeration Company unless he submitted some plan of operation that would be satisfactory to you; is that right?

A. We would require that whatever plan he used would be satisfactory to us.

Q. Now, is there much difference between that and your doing the unloading?

A. It is a matter of personal opinion, I am afraid.

Exam. Brown: What is the answer?

The Witness: That is a matter of personal opinion.

By Mr. Loos:

Q. What is your opinion? Do you think the shipper has greater freedom under your proposal than he does now with respect to unloading at your pier?

A. Again, that seems to be a matter of personal opinion.

Q. What is your opinion?

A. He would have greater freedom in so far as the time and manner in which the car would be unloaded at the present time.

Q. Can he use his own handtrucks or would *be* have to use [fol. 123] the Erie handtrucks?

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A. That would depend upon the type of handtruck he proposes to use.

Q. Would you let him put in a conveyor system to unload his cars?

A. Provided it conformed to our requirements for getting the entire volume unloaded for the market. I would say there have been numerous studies of conveyor handling in connection with the persons handling our Piers 19, 20 and 21, none of which have proved themselves competent to handle the traffic.

Q. Would you permit a shipper to make sales from his car on the Erie pier while he was unloading the same as he does while unloading on team track?

A. That would be in violation of the general tariff.

Q. Would you permit him to make deliveries to his general customers in unloading a car on team track?

A. We would have to see what the situation is. I would express the opinion that we would not permit that. I don't think it would be practical.

Q. Now, when the shipper unloaded the car in the few minutes or few seconds that you allow him to do so, would he, at that time, have a truck brought up alongside the float and unload the car into the truck?

A. It would not be practical to any extent because it would interfere with the welfare of other firms who might [fol. 124] want to do the same thing and wouldn't be able to.

Exam. Brown: I am having difficulty hearing you, Mr. Witness. Talk a little louder.

By Mr. Loos:

Q. What would he do with the fruit then, when he unloaded the car?

A. Stack it on the dock floor, as is now being done, and make deliveries from the stacks.

Q. What good does that do the shipper if he wants to take it away immediately?

A. He would probably again be faced with certain regulations that the railroad does not promulgate, as to the time that they can take traffic off the piers.

Q. Why don't you make regulations? If you are going to make the cars available for unloading to shippers on the

pier, as you state, why don't you make regulations that will permit the shipper to unload and truck it away?

A. That question has never come up. I couldn't answer.

Q. Hasn't it come up right now?

A. That is a matter that will have to be considered, and whatever the proper procedure would be I would say would be arranged for.

Q. When would you permit the shipper to take the fruit off the dock after he had unloaded it from the car?

A. At the present time there are defined delivery hours that are observed. Now, what those delivery hours would [fol. 125] be with a changed operation such as you describe would have to be determined when the change is made.

Q. You haven't given consideration to those problems in preparing the announcement you have made that cars would be available to shippers to unload at the piers, have you?

A. No.

Q. You haven't very well digested the program, have you?

A. I have given no consideration to that item.

Q. Now, when a car is placed on the team track at 28th Street, how does it get there?

A. The car is loaded onto a car float here in the city, towed across the Hudson River and tied up to a float bridge at 28th Street close to our 28th Street station, taken off the car float by electric engine, handed over to our team track delivery yard which is across West Street from the flat bridge.

Exam. Brown: Take a car float that is a real car float, one that has 10 or 16 carloads on it. Just how do you handle that? What is the physical setup of the car float to begin with?

The Witness: There are two types of car floats. One is the so-called station float. It has a raised platform in the center of the float, and a track on either side of that platform, both extending toward the so-called brace or toggle end of the float. The empty car float is placed in what is called a float bridge on the Jersey shore. Our float bridges [fol. 126] are electrically operated. The bridge is then raised or lowered to meet the level of the float deck so that the two rails come together. It is then clamped by what we call toggles and held by cables to the float, tight against the

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float bridge. Then a switch engine shoves the cars onto the car float and the brakes and chains are applied, and when the float is completely loaded then it is taken away and towed across the river.

Exam. Brown: Tell us how the cars are arranged on the car float. Are they parallel?

The Witness: The two tracks are parallel with the platform.

Exam. Brown: Then on a ten-car float you would have five on one track and five on the other?

The Witness: Yes, sir.

Exam. Brown: How would you handle a 16-car float?

The Witness: Exactly the same, with the exception that it is a longer float and will take eight cars on each side of the platform.

The second float I spoke of is a three-track float. It has two connections, one on either side, a track with the land, one of which, through a switch arrangement, connects with an inner track between the two, and those floats have no platform.

Exam. Brown: If you had a 16-car float and the shipper [fol. 127] wishes to unload one of the cars in the middle, how would you go about doing that? Would you unload the other ones first and then take that one?

The Witness: That is not necessary. The gangplank is placed out to the platform of the float, either from inside or dockside. Then any car on that float can be unloaded by taking the carload onto the gangplank and onto the dock floor.

Exam. Brown: Is that true irrespective of the place of the car on the float?

The Witness: On the station floats, yes, sir.

Exam. Brown: Let us assume you move the car float up against the pier. Is that the idea?

The Witness: That is right.

Exam. Brown: Sidewise or endwise?

The Witness: Both, depending on the berth it comes into.

Exam. Brown: I am not sure that I understood exactly how the middle car could be unloaded. What I am driving at is whether or not a shipper in unloading the car—whether he could pick out his car and unload it, or whether he would

have to wait a half hour or an hour to have some other shipper unload his.

(Witness draws diagram.)

Exam. Brown: Try to explain that for the record, so that it will be clear.

The Witness: A car float has a platform.

[fol. 128] Mr. Smith: Just a minute. What you have on that sheet of paper will not get into the record, so explain it entirely verbally, if you can.

The Witness: The car float has a platform in the center of the float. The tracks on which the cars are placed are on either side of this platform and parallel to the platform. The platform is approximately not quite as high as the car floor. The car door is opened. A short gangway or race piece, as we call it, or gangplank, is set from the car floor down onto the platform of the float. In the meantime, large gangplanks have been placed from the platform leading onto the dock floor. So that after the car door is opened and the gangplanks in position, any car on that float can be unloaded by trucks taking the goods out of the car, down the platform of the float, and thence down the gangplanks to the dock floor, irrespective of any car on the float.

Exam. Brown: Can you unload two cars of different produce at one time?

The Witness: Yes. You can unload sixteen at one time.

Exam. Brown: You mean you can have the men take the produce off of one car, and another gang off another?

The Witness: We regularly do that. In fact, our operations require that we do that. In other words, we cover every car on the float simultaneously.

Exam. Brown: There would be no physical problem in [fol. 129] connection with the unloading?

The Witness: No, sir.

By Mr. Loos:

Q. If each one of those sixteen cars were consigned to a different consignee, do you think each one of those sixteen consignees could unload those sixteen cars simultaneously?

A. Yes.

Q. You do?

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A. Yes.

Q. Could any one of those sixteen consignees put a truck on that platform—a motor truck?

A. On the platform of the float?

Q. Yes.

A. That would be impractical.

Q. It couldn't be done?

A. No.

Q. So he would have to truck the load by handtruck from the car down to your platform?

A. I would say so.

Q. And he would have to do that when and how you permitted him to do it?

A. That is right.

Q. Then he would have to pick it up again when and how you permitted him to do it? Pick it up in his motor truck?

A. After he took delivery of it.

[fol. 130] Q. When would you say he was taking delivery; when he took it out of the car or when he took it off the platform?

A. When he takes it from the platform, from the dock floor.

Q. Now, if you used one of these three-track floats that operation couldn't be handled in that way, could it?

A. No.

Q. How would the cars on a three-track float be unloaded?

A. They could not be unloaded at pier stations.

Q. We started to talk about handling the float through the 28th Street station. Do you use a three-track float or a two-track float on that service?

A. Both.

Q. And to the piers; do you use both floats or only the two-track floats?

A. Just the two-track or the so-called station float.

Q. The so-called station float?

A. The station float.

Q. When the float gets to the pier, are the cars on that float moved in any manner?

A. Yes, if necessary to provide a space between cars to place the gangplanks.

Q. Would that be a movement of a matter of a few inches?

A. It might be ten feet.

Q. How is that accomplished?

A. By a gang of men who move the cars, with so-called car movers.

[fol. 131] Q. Do I imply from that that there is any movement in the way of switching to or from the float at the piers?

A. No.

Q. When the cars are unloaded, are they taken back to the Jersey side on the same float that brought them to the piers?

A. Yes.

Q. When the float goes to the 28th Street station, you stated, I believe, that a switch engine took them off the float. Are they then spotted at some particular point on that team track at 28th Street?

A. Either a team track or a freighthouse or a few private sidings in that station.

Q. Do you have team tracks at 28th Street?

A. Yes.

Q. How far are those team tracks from the float bridge?

A. Oh, I would say about a quarter of a mile.

Q. How many cars will the public team track accommodate?

A. I don't know. I am not in charge of the station.

Q. When the car has been unloaded after having been spotted on the public team track, what is the operation in bringing it back to Jersey City, or to your yards on the Jersey side?

A. They are sometimes reloaded. At other times they are brought back empty. And in either case they are brought back to the car float the same as they want.

Q. They are shifted back?

[fol. 132] A. Shifted back and towed across.

Q. They are loaded onto the car floats to return in the same manner as they are loaded on the car floats to come from Jersey?

A. That is right.

Q. Where is your 28th Street yard, or whatever you call the 28th Street track, with respect to the location of your Piers 19 and 20?

A. I am not certain of the distance.

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Q. Which way is it?

A. North. It is up between 28th and 29th Streets, and 11th Avenue is where our freight house is located.

Q. And where is it with reference to Pier 48, North or south?

A. It is north of Pier 48.

Q. Where is your Croxton Yard located? Is it northerly or directly across from your Piers 19 and 20?

A. I believe it is a little north and west—about four miles, I think, northwest.

Q. Where is your float bridge that you speak of on the Jersey side?

Mr. Loos: That is what I should have asked for, Mr. Examiner, instead of the Croxton Yard.

A. I was trying to think of the name of the street there, the only way I can describe it geographically. It is three blocks north of Pavonia Avenue.

[fol. 133] Q. Where is that in relation to Piers 19 and 20?

A. It is across the river and slightly north of Piers 20 and 21.

Q. Is there any difference in the floating service on cars that go to the piers and on cars that go to the 28th Street station, up to the time that they get to the float bridge on the New York side, or to the piers on the New York side.

A. I am afraid I don't quite understand your question.

Q. Well, are the same floats used for both operations?

A. Oh, yes.

Q. And the same tugs?

A. That's right.

Q. Is the time of floating approximately the same?

A. It would take a little longer to float to 28th Street than to Pier 20. The exact time I wouldn't know.

Q. Is the same true of the return movement?

A. That is right.

Q. Do you have any information, or can you give us any estimate of the number of cars of fruits and vegetables that are placed by the Erie Railroad on the 28th Street tracks?

A. No, I have no figures on that.

Q. What was the other team track you said you had?

A. Harlem Station at 149th Street and Dexter Avenue.

Q. Have you any information with respect to the number of cars placed on team tracks there?

[fol. 134] A. No, I haven't.

Q. How does that operation at 149th Street compare with the operation at the 28th Street yards?

A. It would be the same.

Q. Would it take a longer or a shorter time to go from your Jersey side to the 149th Street yard as compared to the 28th Street yard?

A. It would take longer.

Q. Have you any idea of how much longer?

A. No, I don't. I don't know what time it takes.

Q. Do you know how far the public team track at 149th Street is from the float bridge serving that area?

A. I would say about an eighth of a mile.

Q. Do you have the same kind of an operation in switching at 149th Street as you do at 28th Street?

A. That is right.

Q. In your capacity as agent, are you familiar with the handling of other commodities on Piers 19, 20 and 21?

A. Yes.

Q. What are these other commodities?

A. We handle dairy products there, butter, eggs, and occasionally a car of poultry. We handle carload shipments of general merchandise.

Q. Any packinghouse products or fresh meats?

A. No.

[fol. 135] Q. Are those carloads of dairy products, for example, road-hauled by the Erie from various points to the rail-head at Jersey City?

A. Yes.

Q. Are those cars of dairy products put on car floats?

A. Yes.

Q. Are those car floats handled in the same manner as you have described the handling of the car floats that transport fruits and vegetables?

A. Much the same, yes.

Q. Are those cars, when they arrive at the piers, unloaded by the Seaboard Terminal and Refrigeration Company?

A. Yes.

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Q. Are they unloaded by the same kind of gangs, or other groups that you have described in the unloading of fruits and vegetables?

A. With slight differences as to the makeup of the gangs, yes.

Q. Can you give us any information as to the quantity of dairy products, butter, eggs, poultry, and general merchandise that are handled over Piers 19, 20, and 21, compared with the number of cars of fruits and vegetables?

A. I have no figures with me at the present time.

Q. Do you have such figures where they could be obtained?

A. Yes.

[fol. 136] Mr. Loos: We would like to request, Mr. Examiner, that the witness furnish, for the same period of time as shown in his direct testimony, namely, the calendar year 1946 and January to June 1947, the number of cars of other products handled over Piers 19, 20, and 21; also the number handled over Pier 48, but keeping Pier 48 separate from Piers 19, 20, and 21.

I would also like to ask, if I may, Mr. Examiner, that the witness also furnish for the fruits and vegetables, as well as for these additional commodities, a breakdown of the year 1946 into the first six months and the second six months, so that we will have a comparison available of the quantity in 1947 to date, with a similar period for 1946, so as to more readily determine whether there is an increase or decrease in the present year as compared with the preceding year.

Mr. Smith: Just for my own information, Mr. Hart, to facilitate the production of this information, is that information available, and if so, about how long would it take to get it together?

The Witness: I could have it tomorrow.

Mr. Smith: We will have it tomorrow.

By Mr. Loos:

Q. I would also like to ask you, Mr. Hart, whether you have available anywhere in your records or the records of the railroad company, the number of cars of fruits and vegetables that were placed for unloading during the cor-

[fol. 137] responding period at your 28th Street and 149th Street tracks?

A. I don't know what shape we are in to get those figures. I assume they are available, but I don't know how long it would take.

Q. Will you look into that and see if you can ascertain what those figures are?

A. For the same period?

Q. Yes.

A. Yes.

Q. Mr. Hart, referring to your description of the work of the unloading gangs, isn't there a charge now assessed under the name of sorting charges of fruits and vegetables delivered at the Erie piers?

A. If they are sorted, yes.

Q. Is any of that sorting service performed by what you have described as the unloading gang?

A. It is all performed by the unloading gang. It is a continuous operation

Q. In your Exhibit 22, the first page, is that a picture of the stacks after the sorting service as well as the unloading service has been performed?

A. That is right.

Q. Is that true also of the next two pages of your exhibit?

A. Yes, that is right.

[fol. 138] Exam. Brown: The answer is yes to both questions?

The Witness: Yes.

Exam. Brown: I wish you would talk louder. I couldn't hear you.

By Mr. Loos:

Q. Can you tell us, Mr. Hart, where the sorting charge service begins and where the unloading service ends?

A. The car is sorted when necessary to stack the packages on different stacks, depending upon the marks, sizes, brands, type of goods, as indicated in chalkmarks on the car floor.

Q. Is it necessary to sort all cars that are sold at auction?

A. No.

Q. What is your practice with respect to sorting? Do

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you sort most of the cars that are delivered on Piers 20 and 21? What is the situation? Does it differ with respect to *this* different commodities?

A. It differs with respect to different commodities. Most of them are sorted.

Q. Most of the commodities are sorted?

A. Yes.

Q. Take oranges. Are all of the oranges that are delivered on those piers sorted, or are there some oranges that are not sorted?

A. I am quite sure I will be safe in saying all oranges are sorted.

[fol. 139] Is that true generally of other citrus fruits delivered on those piers?

A. On citrus fruits, yes.

Q. How about deciduous fruits?

A. Well, in the case of grapes, for example, you may have packages that are all identical, but for sales purposes they may catalog them in different lots. So long as it is not necessary for us to pick up by certain brands or marks, we don't consider that sorting, and we make no charge for it.

Q. On a carload of oranges which is sorted, can you describe the service of unloading, picking up from where you started in your testimony with the service of the unloading gang, and describe that service, and the sorting service, and tell us exactly where the unloading service ends and the sorting service begins.

A. Previous to the unloading of a car that is to be sorted, the dock floor will have been marked up with chalkmarks by consignees or their representatives showing how they want it sorted. The hand trucker who brings his load of fruit to the dock floor drops his truck. The dockman then takes the packages and being guided by the stencil marks on the boxes as to the size, the labels as to the brands, in some cases the shipper's name, sometimes by a zero number and sometimes by a symbol, all of which is indicated on the dock floor in chalkmarks,—he puts those packages on that part of the floor designated by the marks.

[fol. 140] Q. It is was a car of grapes being sorted, what would the dockman do?

A. The contents of the first truck would be unloaded on one stack until that stack is complete, then he would go to

the second stack, and the third, and so on, until he is finished.

Q. And who is the dockman to whom you refer? Is he one of the unloading gang?

A. That is right.

Exam. Brown: We will have a five-minute recess.

(A five-minute recess was taken.)

Exam. Brown: You may continue with your cross-examination, Mr. Loos.

By Mr. Loos:

Q. Mr. Hart, may we refer again to your Exhibit No. 22. I asked you about the sorting charge. Now, does the sorting charge and the sorting service performed by the railroad include the displaying of the fruit as shown on page 1 of your Exhibit 22, such as removing the covers and tilting the boxes?

A. No.

Q. Is there still an additional charge or cost for that service?

A. I don't know.

Q. Does the railroad perform that service?

A. No.

[fol. 141] Q. So that your picture on page 1 of Exhibit 22 shows the fruit after something more than the sorting and unloading have been done?

A. That is right.

Q. That is true also of pages 2 and 3?

A. That is right.

Q. Do you know who does do that additional service?

A. The consignees, or their representatives.

Q. What is the last page of your exhibit? Is that a picture of fruit or vegetables?

A. Vegetables.

Q. Are they being stacked on the pier floor?

A. Yes.

Q. We referred to other commodities like dairy products, butter, eggs, poultry, and general merchandise. Is there being proposed at this time a charge for unloading in addition to the line haul rate on those commodities?

A. Not to my knowledge.

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Q. Do you know why there has been no proposal of an unloading charge on those commodities, particularly dairy products, butter, eggs, and poultry?

A. No.

Q. Which are handled over the same piers, while proposing a charge for unloading of fruits and vegetables?

A. No.

[fol. 142] Exam. Brown: What does your "no" mean?

The Witness: I don't know why.

By Mr. Loos:

Q. Do you know whether there was a discussion of putting such a charge on dairy products, butter, eggs, and poultry?

A. I don't know.

Q. Did you participate at all in discussions with respect to putting a charge on fresh fruits and vegetables?

A. Not in the beginning.

Q. Or about your participation before or after the decision had been made?

A. I don't know whether a decision had been made at that time or not. It was in the latter part of the research that I was called into the matter.

Q. In your testimony you refer to ice clerk. Does he inspect the bunkers of the refrigerator cars while they are on the floats at the piers?

A. Yes.

Q. Do any of the workingmen described by you in describing the unloading operation, do any of those men other than the unloading gang perform any part of the sorting services?

A. The A-line men place the package, after being recoopered on the stacks as designated by the chalkmarks.

Q. Who makes those chalkmarks on the floor?

A. The consignee's representative.

[fol. 143] Exam. Brown: Are these consignee representatives also employees of the railroad?

The Witness: No, sir.

Exam. Brown: In no instance?

The Witness: No, sir.

By Mr. Loos:

Q. You referred to the wood-gang as breaking the seals of the cars and removing these wooden bracing. How many men are there in the wood-gang, if you have a regular number?

A. It will vary from four to perhaps sixteen, depending upon the volume.

Q. Depending upon the number of cars to be taken care of in the particular night?

A. Yes.

Q. I notice you call the first gang "wreckers," and the third gang the "unloading gang." Don't you think it might be well to transpose those names?

A. The term "wrecker" is a term that goes back, I would say, to pre-historic days. Although I don't know the origin of that term, I am told it goes back to the days when steamships unloaded practically all traffic in the harbor, and they had no railroads, and they had a crew of wreckers, and that term was just carried through on the payroll to the men doing that work.

Q. I recommend that under modern conditions you might [fol. 144] change that and give to the "unloading gang" the term "wreckers."

In the operation of the piers which you described, is it not a fact that the cars are released quite promptly by the rapid unloading which the carriers make?

A. Yes.

Q. Is not that release of those cars such more prompt than the release of cars ordinarily placed on team tracks for unloading by consignees?

A. Yes.

Q. Is not that more prompt release of cars an advantage to the railroad?

A. I would say so.

Q. Particularly in times of car shortages such as we have been experiencing in the past few years?

A. That is right.

Exam. Brown: What is the answer?

The Witness: That is right.

Q. I total the figures you give as to unloads at Piers 19,

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20, and 21, during the calendar year 1946 at 27,009. Now, if you had not unloaded those cars at the Erie piers, could the Erie Railroad have handled those cars on its team track in Manhattan island?

A. That would depend upon the release of the cars at the team track.

Q. Do you think it would have been possible under any [fol. 145] operation for all of those cars to have been placed on the Manhattan team track for the Erie Railroad?

A. I don't know.

Q. Is this offer that you have just made at the close of your direct testimony that the shippers may unload their cars at Erie Piers 19, 20, and 21, now effective?

A. Under the qualifications that were expressed, yes.

Exam. Brown: Those qualifications were that the railroad or your agents would continue to unload them?

The Witness: That we would have the same supervision and direction and control that we now have.

Exam. Brown: That is tantamount to my question, isn't it?

The Witness: I didn't quite get your question.

Exam. Brown: Read the question.

(The pending question was read by the reporter.)

The Witness: I am sorry; I don't get that.

Exam. Brown: As I understood your testimony, it was to the effect that you offer to permit the shippers to unload, but that the unloading must be performed by the railroad or by the agents of the railroad. That is my understanding of your testimony. If it isn't right, tell me.

The Witness: As I recall my testimony, at least I intended to say this: that we would require the same control and jurisdiction over the unloading that we now practice. I think I expressed a personal opinion to the effect that it [fol. 146] would probably be necessary to use the same crews of men that are now unloading.

Exam. Brown: As I recall it, you said so unequivocably. The record will show, however.

What is your present position?

The Witness: I feel, from my knowledge of the operations, that for us to have that control and jurisdiction, it

would likely be necessary that the same crew of men handle the unloading operations that now handle it.

By Mr. Loos:

Q. So that the only difference would be that the unloading would be performed by the same men, under the same supervision, but the consignee would pay the Seaboard Terminal and Refrigeration Company instead of you paying the Seaboard Terminal and Refrigeration Company?

A. That would be my opinion.

Mr. Loos: That is all.

Cross-examination.

By Mr. Wells:

Q. Mr. Hart, when was this so-called shipper permission to unload first discussed by you?

A. I don't recall.

Q. With whom did you discuss it?

A. My superior.

Q. Did the various delivery carriers on Manhattan piers discuss it together?

A. Not to my knowledge.

[fol. 147] Q. So that you are speaking solely for the Erie Railroad?

A. That is right.

Q. Without any knowledge as to what the other delivering carriers intend to do about it?

A. That is right.

Q. In your experience, which I understood you to say ran continuously since 1907 with the Erie Railroad, have you ever known of a carload of freight being unloaded at the Erie piers other than by the railroad or its agents?

A. No.

Exam. Brown: You have never heard of such a situation?

The Witness: No.

By Mr. Wells:

Q. Under your present practice, will you permit consignees to go to the piers and onto the car floats and unload a carload of freight?

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A. We have never had a request to do so. It has never been necessary for us to make any decision to do so.

Q. Would you permit the consignees to go to the dock during the time the float was there?

A. We do permit consignees representatives to go on the car float and inspect their cars, and have for some time.

Q. At all times?

A. Not at all times. When our operation is in progress.

Q. Are there any particular hours when they are not permitted?

A. Yes, before our operations start, which is 6 or 7 [fol. 148] o'clock on Sundays and holidays, and 8 o'clock on week nights.

Q. Is it your view that the operation which you have mentioned, the method of handling deliveries at your piers, is an efficient one?

A. Yes.

Q. In your judgment as a railroad man, is it the most efficient way in which the delivery of that freight can be made?

A. It is the most efficient way that we have been able to organize it up to the present time.

Q. Are you familiar with the fact that in other cases involving the handling of deliveries in New York that it has been the consistent position of the rail lines that shipper unloading is not feasible?

A. I don't know.

Q. You don't know about that?

A. No.

Q. Is this a 24-hour operation on the pier?

A. Not the unloading operation.

Q. Are any floats unloaded or any cars on the floats unloaded during the daytime?

A. Very, very few of fresh fruits and vegetables.

Q. Are any cars on the floats unloaded during the daytime?

A. There are isolated cases where a car might be unloaded during the daytime by special order.

[fol. 149] Q. Any commodities other than fruits and vegetables, are they unloaded in the daytime?

A. Yes, sir.

Exam. Brown: On what piers?

The Witness: On all our piers, 19, 20, and 21; also 48.

By Mr. Wells:

Q. Ordinarily, does any float brought over from Jersey carry fruits and vegetables until the 6 or 7 o'clock at night hour that you mentioned?

A. The floats are quite regularly brought over in advance of the start of the unloading operation, particularly over the weekend when they may be brought over the night before and held there until our unloading operation starts.

Q. Is it customary for a tug to return to Jersey for another couple of floats, or four floats, whatever it is they carry, without carrying empties back?

A. They do at times, yes.

Q. What is the customary practice at this time in regard to that?

A. They do quite regularly.

Q. Is the same operation the case for the pier delivery and the other two deliveries that you spoke of, in so far as the float operation is concerned?

A. If you are referring to 28th Street and 149th Street deliveries, I don't know, because I am not fully familiar with those operations. I have no jurisdiction over those [fol. 150] stations.

Q. How long does the float normally remain alongside the dock after the fruits and vegetables have been unloaded from all the cars?

A. Oh, I would say from 30 minutes to an hour.

Q. You just testified, I believe, that the same space alongside the dock is used several times by different floats?

A. Yes.

Q. And that the same float is used as many as two or three or possibly four times in one night?

A. The floats two or three times.

Q. Are those same floats used during the daytime for other freight?

A. Yes.

Q. What determines the frequency with which those floats may be used during the night?

A. The volume of fruit and vegetables to be handled, and the requirements for usage in other operations than our perishable operations.

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Q. So that you use as quick a turnaround as possible, both to utilize the floats to their fullest capacity and also to release the empty cars for return movements?

A. Yes.

Q. From Jersey?

A. That is right.

[fol. 151] Q. Can you give us the minimum number of carloads of fruits and vegetables that were handled on the piers on any one day in 1946?

A. Oh, I would say fifty, at least. Never less than fifty any one night.

Q. What was the maximum?

A. In 1946, I believe 296. I may be wrong on the exact figure. That is from memory.

Q. What is the largest number you have ever handled in one day?

A. 367.

Q. That is including all three piers?

A. That happened to be at Piers 20 and 21 only.

Exam. Brown: What were the commodities—fruits and vegetables only?

The Witness: Only fruits and vegetables in those figures, that is right.

By Mr. Wells:

Q. By the way, do you know how long the Erie has been using this method of delivery in New York?

A. From my personal knowledge, since 1929, and from being given that information by others, from 60 to 75 years.

Q. In your judgment, after the hand trucks have been loaded in the car and moved out onto the dock, when is delivery complete?

A. When the consignee calls, shows his ownership of the [fol. 152] car and accepts delivery of it.

Q. Well, at what point is the fruits and vegetables at that time?

A. On the dock floor, the pier floor.

Q. And until that time, in your judgment, there has not been a delivery?

A. That is right.

Q. When can he remove it from the dock?

A. After he has proved his ownership and accepted delivery of it.

Q. Is there any hour before which he cannot remove it?

A. There are hours that have been in effect for many, many years. The establishment of the hours I am not familiar with. Ten o'clock at night is the first hour at night that they usually take delivery of any commodity.

Q. In other words, before ten o'clock, under your local rules, he cannot take a delivery from the dock, that is, cannot remove it?

A. He never calls for it before ten o'clock.

Q. Well, is he allowed on there before then for the purpose of getting his commodities?

A. We don't prohibit him entering, but he doesn't come on.

Q. Mr. Hart, if I correctly understood your qualifications about this shipper unloading permission that you are giving now, it would require the continued control and supervision [fol. 153] by the railroad in the same manner as at present, and require the continued use of the same force that has been employed by this concern who is now your agent. Am I correct in that understanding?

A. It would require the same control and supervision that we have exercised in the past, and I expressed a personal opinion that that controlled supervision could not be exercised to the point necessary unless they used the same unloading gangs that are now being used.

Q. How long does your present contract with this concern run?

A. Since 1929.

Q. No. Does it run to sometime in the future?

A. There is no cancellation or expiration date.

Q. You mean it is from day to day?

A. Until terminated by notice.

Q. How much notice?

A. I don't recall.

Q. Now, in your direct testimony, you refer to the fact that there are certain factors controlling the time it takes to unload. Can you give us a little more information as to the weight attached to each of those cases?

A. Well, in the case of top-iced vegetables, when we open a car we find the entire load has been covered in many cases

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by a mountain of so-called snow ice, and they can't see the packages. You first have to take the snow out of the way [fol. 154] before you can get at the packages.

Then, particularly during the winter season, we find the packages themselves are frozen to each other and to the car floor. The slats are loosened on account of being wet from this so-called snow ice, so it is very hard to handle a package without it coming apart. The nails pull out very readily, and that means it delays and retards your unloading operation.

Q. In other words, if I correctly understand you, you can't assign any particular weight to each of the factors, as a matter of general practice?

A. Each commodity, if we were to go into detail, would have its particular characteristics, and would influence the time of handling that particular commodity.

Q. What is the normal time for unloading and making ready for delivery a car of citrus fruit?

A. Well, I haven't figures that I could give correct testimony on that, but I would say it is from 2 to 2½ or 3 hours, depending upon the condition of the car and the trucking distance, the number of feet they have to travel with the hand trucks to unload it.

Q. In other words, the particular location on the dock with reference to where the float has been placed would have something to do with it?

A. That is right, and the location of the car on the float [fol. 155] itself.

Mr. Smith: Mr. Examiner, I think it is only proper for me to say at this point that the next witness, Mr. Root, has made a cost study and a time study of the unloading operation, and his study will reveal and show fully the actual time consumed in unloading these various commodities.

Mr. Wells: I will defer that.

Exam. Brown: During the course of your testimony you referred to "shipper representatives." What do you mean by that term?

The Witness: The individuals I referred to as shipper representatives are men not on our payroll or our contractor's payroll, that come to the dock and mark up the floor to indicate how a car is to be sorted. In the case of

a car that is to be sold at auction, those same individuals will also open the lid and display the boxes for inspection on the part of the buyers and attach a tag indicating the lot number.

Exam. Brown: Do you include under that term prospective buyers of this merchandise?

The Witness: No.

Exam. Brown: So when you say shipper representatives will be permitted on the car floats, you did not refer to prospective buyers?

The Witness: No.

Exam. Brown: In other words, they could not go out and [fol. 156] inspect the merchandise?

The Witness: No, we have never permitted that in the past.

Exam. Brown: You have never permitted it?

The Witness: Not in the past.

Exam. Brown: Do you permit it now?

The Witness: Not under our present mode of operation. Now, if there is a change in the operation, that is something to be considered and decided, whether or not there is a necessity for it.

Exam. Brown: Up to the present date you have not permitted that type of inspection?

The Witness: No.

Exam. Brown: What is your arrangement with the Baltimore & Ohio? Do you handle their traffic?

The Witness: Yes. There is an operating agreement between the B. & O. and the Erie Railroad whereby the traffic which arrives via the B. & O. Railroad, via certain routes, in the event it has been reconsigned at arrival at original bill of destination, can be brought to Piers 20 and 21 at the B. & O.'s request, and handled for them on their account, handling it as their agent.

Exam. Brown: You don't handle their traffic at any other piers, just 20 and 21; is that right?

The Witness: 19, 20, and 21.

Exam. Brown: Three piers?

[fol. 157] The Witness: The only traffic we handle here is perishable traffic, and that is the only three piers where we handle it.

Exam. Brown: Not at 48?

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The Witness: We don't handle fruits and vegetables at Pier 48.

Exam. Brown: With respect to 19, 20, and 21, do you handle other types of commodities at those piers?

The Witness: Yes.

Exam. Brown: Are any of those piers devoted exclusively to the handling of fresh fruits and vegetables?

The Witness: They are not devoted exclusively to that traffic, no.

Exam. Brown: At any time during the day you might handle some other commodities?

The Witness: Yes.

Exam. Brown: How about at night? Then are those piers used exclusively for this traffic?

The Witness: Fruits and vegetables?

Exam. Brown: Yes.

The Witness: No.

Exam. Brown: You might unload other types of commodities?

The Witness: We might unload other types of commodities.

Exam. Brown: You might unload other commodities at those piers at night?

[fol. 158] The Witness: Yes.

Exam. Brown: Do you do that?

The Witness: Yes.

Exam. Brown: Frequently?

The Witness: Quite frequently.

Exam. Brown: Where is the unloading crew located, at the pier or carried on the car float?

The Witness: I did not understand.

(The pending question was read by the reporter.)

The Witness: At the piers:

Exam. Brown: Cross-examine.

Mr. Wells: May I ask one further question?

By Mr. Wells:

Q. Under your suggestion here, Mr. Hart, as to the shipper being given permission to unload his commodities

himself, subject to your limitations, what happened to the recoopering?

A. That would be a matter that would have to be determined if and when that type of operation would be made effective.

Q. That is another phase that hasn't been thought out yet; is that right?

A. That is right.

Cross-Examination.

By Mr. Augello:

Q. Mr. Hart, what is the capacity of your Piers 20 and 21?

A. It would depend upon the commodities themselves, [fol. 159] and the distribution of the commodities.

Q. How many feet do those two piers represent?

A. The two piers, 20 and 21, and the intervening bulkhead is approximately 250,000 square feet.

Q. If you put team tracks on those piers, how many cars could you accommodate?

A. I don't know.

Q. Well, haven't you got an idea?

A. I don't know how they would arrange the team tracks.

Q. Supposing they could arrange a team track?

A. That would be an engineering problem. I am afraid you would have to have a float bridge in order to get the cars on the float, and you would have to determine the runway you would need. I wouldn't know.

Q. As a matter of fact, the reason that the Erie unloads these cars on the pier is due to their inability to furnish team track delivery on Manhattan island; isn't that so?

A. I don't know.

Q. Did you read "Men of Erie"?

A. Yes.

Q. So you are familiar with what this book contains. Did you state previously that the same space on the pier is used two and three times within 24 hours?

A. No.

Q. How many times have you used the same space on [fol. 160] the pier within 24 hours?

A. We used to, at times, use the same space twice in 24 hours for fruits and vegetables, but not at the present time.

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Q. What are you doing at the present time? Just using that space once in 24 hours?

A. Yes, for fruits and vegetables.

Q. Are you using that same space for other than fruits and vegetables more than once?

A. At times, yes.

Q. How often?

A. I wouldn't know, without checking the records. We do at times use the same space for dairy products during the day-time, and cantaloupes or fruit delivered during night hours.

Q. So in many cases you are making two cars available every 24 hours at one space on the pier?

A. We do in some cases, yes.

Q. That is releasing refrigerator cars, isn't it?

A. Yes.

Q. Did you read in this book, "Men of Erie," where the Erie Railroad maintains a small navy to run their business?

A. Oh, I just don't recall the book in its entirety. I read the book, yes, but I don't recall.

Q. And also that the operation between Jersey City, the end of their line, and the New York piers is a must for the Erie, that that is the only way they could get the business [fol. 161] for Manhattan island? Do you remember reading that?

A. I remember something to that effect, yes.

Exam. Brown: Who wrote this book?

Mr. Augello: Mr. Hungerford.

By Mr. Augello:

Q. Who is Mr. Hungerford, do you know?

A. I don't know him personally, no.

Exam. Brown: Is he in the employ of the Erie Railroad?

The Witness: I am not sure of that.

Exam. Brown: Do you know whether he is a railroad man?

Mr. Donadio: He is a railroad man who has written about the B. & O. and other things.

Exam. Brown: Is he a railroad employee?

Mr. Smith: He is not an employee of the Erie.

Exam. Brown: This is interesting, but I don't see that it is particularly pertinent.

Mr. Augello: Well, I think the writer got all his information from the Erie Railroad.

Exam. Brown: But you don't know. You can ask the witness whether he knows.

By Mr. Augello:

Q. Do you know whether the information in that book is accurate, as far as you know, from your experience as an employee of the Erie Railroad for 35 years?

Exam. Brown: Before you answer that question, I am not going to receive that book in evidence.

Mr. Augello: I am not going to put it evidence.

[fol. 162] Exam. Brown: You are asking whether the contents of that book are accurate.

Mr. Augello: Well, he has read the book, and he knows the contents of the book, and it is a very interesting book.

Exam. Brown: Let's assume we stop right there and he says, "Yes." That is information that will be very valuable to the Commission.

Proceed with your cross-examination.

By Mr. Augello:

Q. You say that the Erie Railroad is now prepared to allow the Receiver, the consignee of a car, to unload his own car from the car float.

A. With the qualifications in my testimony, yes.

Q. When you consider the qualifications, the only difference there would be that we would -- paying for the work that you have been doing heretofore?

Exam. Brown: The witness has admitted that in response to questions by Mr. Loos.

Mr. Augello: Yes, I recall now.

Q. You don't think it is feasible to put team tracks on the piers?

A. Well, I don't know. That would be something for an engineer to make a study of and determine, and I am not an engineer.

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Q. How much time is consumed, Mr. Hart, in the recoopering of the broken packages caused in the unloading [fol. 163] of fruits and vegetables on your piers 20 and 21 by your labor?

A. I have never made any tabulation of that.

Q. You can't say whether it is one hour or two hours or three hours?

A. I couldn't say. The coopering operation is continuous with the unloading operation.

Q. The Seaboard people do the recoopering also?

A. No.

Q. Who does the recoopering?

A. A contractor known as the Etna Cooperage & Stevedoring Company.

Q. So you really have two contractors on the Erie piers during your unloading and recoopering?

A. Yes.

Q. Will you refer to your Exhibit 22, Sheet No. 1, and state whether or not the stacking of the boxes on the pier is approximately the same as these boxes were stacked in the car.

A. No.

Exam. Brown: What do you mean by no?

The Witness: They are not the same.

Q. Where is the difference?

A. In this particular exhibit you are referring to the fruit that has "Sunkist" on the box?

Q. Yes.

A. Those are California oranges. They are stacked on [fol. 164] the pier on the sides with the bulge out, and in the cars they are stacked on end. Sometimes a third layer is put on the side with the bulge up or sidewise.

Q. In other words, this car of "Sunkist" would be stacked three high in the car, and you stack it five high on the dock?

A. That is right.

Q. Does that apply to all other commodities?

Exam. Brown: That is a rather general question.

Mr. Augello: Fruits and vegetables I am referring to.

Mr. Miller: Mr. Examiner, it seems to me that the question ought to be defined as to whether he means that these

piles are piled higher than in the car, or whether they are piled to the same height.

Mr. Auguello: That is what I am getting at.

Mr. Miller: Will you clarify the question?

Mr. Augello: That is why I asked him if they were loaded in the car five high, and he said no, they would be loaded three high.

By Mr. Augello:

Q. The question is, are all the cars of oranges—we will say oranges for the *the* first question, stacked five high on the pier?

A. That is the general practice, stacking five high on the pier, that is right.

Q. And those same boxes when they are unloaded from the cars are stacked three high in the car?

[fols. 165-167a] A. They are stacked three high. They are stacked in the car three high on end, at times. Sometimes two high on end, and one on the flat. And in years past it was two high on end. In the case of three high on end the stack would be 78 inches high. With your five high on the floor on the flat you would be 60 inches high, or about those figures.

Q. Would you say that would be true of practically all other fruits and vegetables, that they are stacked higher on the dock than they are in the cars?

A. No, not all of them.

Q. What percentage of them?

A. I wouldn't know. I never made any tabulation on that.

Q. Are oranges a big tonnage commodity on the Erie Railroad?

A. In our operation, yes.

Q. How big are they? What percentage does oranges represent?

Mr. Smith: Mr. Examiner, the actual figures are given in the tabulation in Mr. Hart's testimony, and that has been read into the record.

Mr. Augello: Under "Citrus fruit." I have it.

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[fol. 168] PROCEEDINGS OF JULY 30, 1947

Exam. Brown: You may continue with your cross-examination, Mr. Augello.

R. E. HART, resumed the stand and testified further as follows:

Cross-examination (Cont'd.).

By Mr. Augello:

Q. Mr. Hart, will you give us briefly the difference between the service of the Erie Railroad, that the Erie Railroad performs on cars for team track delivery at the Harlem River station at 149th Street, as compared with the cars delivered on Piers 20 and 21.

A. As I previously testified, I do not have jurisdiction over the Harlem station, and therefore cannot speak from actual experience in the operation of that station. But I would say from my general experience with stations where team tracks are available, and that covers quite a large number of stations on our railroad, it is the practice on cars placed on team tracks for consignees to open the cars and remove the contents from the cars themselves or by their own arrangements, whereas on cars ordered to our Piers 19, 20, and 21, those cars aree ordered over by consignees to be unloaded for delivery to them on those piers, and the contents of the car are removed and placed on the pier floor by labor arranged for by the railroad and at the railroad's expense.

Q. Do you mean that the contents are taken from the pier [fol. 169] floor and placed on the consignees' trucks by railroad labor?

A. No.

Q. You mean unloaded from the cars onto the pier by railroad labor?

A. Yes.

Q. Now, as to the total haul, the floating haul from Jersey City to 149th Street, how much greater is that haul compared with the floating from Jersey City to Duane Street pier?

Mr. Smith: I object, Mr. Examiner. I don't think that

line of testimony has any relevancy in this case. That is the ground for my objection. It just clutters up the record.

Exam. Brown: Read the question.

(The pending question was read by the reporter.)

Exam. Brown: I don't believe the evidence is particularly useful, but I will permit the witness to answer.

By Mr. Augello:

Q. How much greater would you say it is, Mr. Hart?

A. The time in handling a car float from the Jersey City float bridge to Duane Street pier is from a minimum of twenty minutes to perhaps thirty or thirty-five minutes, depending upon conditions in the river. I have no personal knowledge of the time it would take to handle a car float from Jersey City float bridge to our Harlem station, but I have been told approximately one hour.

Q. As far as distance is concerned, what is the difference? [fol. 170] A. I don't know.

Q. Can you tell us how a float would have to go to get to 149th Street station—how it would travel?

A. It would travel southward around the Battery, and northward to the East River, to the Harlem River, and thence to 149th Street station, which is located on the Harlem River.

Exam. Brown: That is enough on that phase.

By Mr. Augello:

Q. When the float arrives at 149th Street, you have to switch the car off the float to the place on the team track; is that correct?

A. Yes.

Q. After the car is unloaded, say within 48 hours or longer, the car has to be switched from the team track back onto the float in order to take it back to Jersey City; is that correct?

A. Yes.

Q. On a car going to Pier 20 or 21, you do not have to do any switching, is that correct?

A. Not at the pier.

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Q. All you do is unload the freight out of the car and place it on the pier?

A. That is right, except the possible movement of the car a short distance on the float to provide for gangway space.

Q. Well, that is because of your pier disability in not having doors available at each spot; is that correct?

[fol. 171] A. I would not say disability. The normal pier handles cars necessitating making the so-called side gangway.

Q. Do you have doors along the pier, spaced, say, within 20 feet?

A. Well, it varies from 20 feet to perhaps 40 feet, or 50 feet.

Q. Isn't that the reason you have to do a little pushing of some of the cars on the floats to accommodate the unloading?

Exam. Brown: I don't think your question is particularly clear. It is not clear to me. What do you mean by pushing some of the cars?

Mr. Angello: He said yesterday something about moving some of the cars with one of the handjacks, maybe a few feet.

By Mr. Augello:

Q. Is that correct?

A. That is right.

Q. That is the extent of any switching they have to do of the cars on the car float on cars consigned to the piers?

A. That is right.

Q. But as to the team track, the car has got to be switched off the float onto the team track and placed; is that correct?

A. You are speaking of a team track at Harlem now?

Q. Yes.

A. That is right.

Q. After the car is unloaded you have to switch that car out from the team track back to the float?

[fol. 172] A. I believe I answered that is right previously.

Mr. Smith: At least six times.

Q. Can you see any difference between the two services

rendered by the railroad to the consignee, team track as against pier delivery?

A. I think your previous questions and my answers show there is a difference between the two deliveries.

Exam. Brown: Let the record speak for itself in that respect. There is evidence on both phases of those operations.

By Mr. Augello:

Q. On both deliveries the consignee has to pick up his merchandise and place it on his truck; is that correct?

A. I have answered that previously, but I will answer it again if you wish.

Q. Please do so.

A. On the pier deliveries the consignee arranges for these packages to be put on the truck at his expense, or at somebody's expense other than the railroad's. On team track deliveries the same thing is true.

Q. Mr. Hart, have you any breakdown of the figures on the cars unloaded by consignees shown in Exhibit No. 3?

A. No.

Q. You didn't bring any figures with you showing the number of cars loaded or unloaded at Piers 19, 20, and 21, of merchandise other than fruits and vegetables?

[fol. 173] Mr. Smith: If the Examiner please, Exhibit No. 3 is Mr. Hodkinson's exhibit, and he will supplement that exhibit to the extent that he has the breakdown.

Mr. Augello: I see. I thought Mr. Hart had the figures and that while he was on the stand he could give them to us and save time.

That is all.

Cross-examination.

By Mr. Hoffman:

Q. Mr. Hart, you stated on your direct examination that the carloads of fresh fruits and vegetables are road-hauled by the Erie from various points to the railhead at Jersey City, is that correct?

A. Yes.

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Q. You are referring to the items which are covered by this tariff which is under suspension?

A. That is right.

Q. To what points are they taken from Jersey City?

A. Piers 19, 20, and 21.

Q. Do the cars go through the Croxton Yards?

A. Yes, usually.

Q. Are they taken from Jersey City to the Croxton Yards?

A. The usual operating practice is for the trains bringing those cars into Jersey City to stop at Croxton, which is our hold yard serving New York facilities.

Exam. Brown: Where is it located?

[fol. 174] The Witness: About four miles west of the float bridge in Jersey City.

By Mr. Hoffman:

Q. When you say "hold yard," what do you mean?

A. That is the term used to indicate the yard where trains are brought in and the cars held or switched for forwarding to points where ordered or destined.

Q. So that the cars at Croxton are held awaiting orders by the consignee with respect to delivery?

A. Yes, under the provisions of S-12 in the Terminal Tariff.

Q. So the movement of cars from Croxton in Jersey takes place only after the Erie has received orders by consignees that the cars should be delivered to Duane Street?

A. That is right.

Q. Are there times and occasions when the accumulation and assembly of cars at Croxton are such that you cannot deliver them at Duane Street because of the inadequacy of your facilities at Duane Street?

A. We have had times when the cars being held at Croxton were in great volume, but I do not recall any time when we were not able to deliver ordered cars to Duane Street.

Q. As I understand you, then, at all times you have been able to comply with the request of the consignee to effect deliveries at Duane Street at the specified time?

A. No.

[fol. 175] Q. Will you amplify that.

A. There have been times when the order for cars has been in excess of the capacity of our piers, and in that case the order has been reduced, in accordance with the tariff provisions.

Q. So that there are times when your facilities at Duane Street are inadequate to meet the shippers' requests for delivery of these cars?

A. There have been those times.

Q. Do you then place what you call embargoes with respect to the delivery of cars?

A. I can recall one embargo having been placed anticipating, based on knowledge of cars in transit, that a situation of that kind would exist.

Q. Have you now an embargo in existence?

A. No.

Q. With respect to melons?

A. I know of no embargo.

Q. You have no knowledge of an existing embargo that your deliveries of melons are now limited to forty cars per day?

A. We have an understanding with the melon trade that we will not handle to exceed forty cars of melons a day, but it is not covered by an embargo.

Q. You say you have an understanding. Does anything appear in the tariff or in any writings which have been [fol. 176] issued by the Erie Railroad in which you indicate to shippers and consignees that you do not undertake to make deliveries at Duane Street in excess of your facilities?

Mr. Smith: I object to the question, Mr. Examiner. I don't see that it has any particular relevancy to this proceeding involving the matter of unloading charges on fresh fruits and vegetables.

Exam. Brown: It might have some indirect bearing on it. I am reluctant to sustain your objection because of that fact. I will permit counsel to proceed.

By Mr. Hoffman:

Q. You know of no ruling by the Erie Railroad, or you know of no usage or custom, in which you disclaim respon-

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sibility for holding these cars in transit by reason of your inability to make deliveries at Duane Street because of your limited facilities there?

A. I am at a loss to answer that question the way it is phrased. Perhaps I don't understand what you want.

Exam. Brown: Restate your question.

Q. Have you knowledge of any rule, written or otherwise, whereunder the Erie Railroad provides that it will take no responsibility with respect to the interruption in transit of the movement of fresh fruits and vegetables because of the inadequacy of the Duane Street facilities to make delivery of these cars as requested by the consignees?

A. There is a rule in the terminal tariff, which I believe [fol. 177] has been taken as part of the record here—I think the rule is S-12—that makes such a provision.

Q. Will you state that provision.

A. If I may look at the tariff. (Witness examines document.)

I am reading from Rule S-12, Item 8200, of W. S. Curlett's Tariff 116-C, ICC No. A-856. In part that rule reads:

> "In the event orders are tendered for cars in excess of capacity of premise, Agent, Duane Street, will reduce orders accordingly, the reduction to be by the deletion of the least preferred cars on each consignee's list of cars ordered. If consignee's orders do not delete which cars are preferred, and it becomes necessary to reduce orders, Agent, Duane Street, will make deletions to the extent necessary from such orders."

Exam. Brown: Are those cleared through the agent at Duane Street, Mr. Hart?

The Witness: Yes.

Exam. Brown: I mean the orders for the cars.

The Witness: Yes, in all cases.

Exam. Brown: And then they are transferred from him to other officials of the carrier in New Jersey?

The Witness: That is right.

Exam. Brown: And the traffic falls in line with those orders to Piers 19, 20, and 21?

The Witness: That is right.

[fol. 178] Exam. Brown: What do you do with the cars

you can't handle? In other words, those in excess of the capacity..

The Witness: The consignees are notified as promptly as possible the cars that will not be floated, and they are given the option of ordering those cars to such other deliveries as they may desire.

Exam. Brown: What other deliveries would those be?

The Witness: Usually team track deliveries in Jersey City.

Exam. Brown: How do they get them over to New York?

The Witness: The consignees?

Exam. Brown: Yes.

The Witness: By truck.

Exam. Brown: Do they take delivery at Jersey City and move the merchandise over by truck?

The Witness: That is right.

By Mr. Hoffman:

Q. Who pays the truckage?

A. I don't know.

Q. To the best of your recollection.

A. Not the railroad.

Q. So that in practice, where you are unable to deliver these cars at Duane Street, you do not make delivery of the same cars through any other facilities in Manhattan?

A. We would if so ordered and such facilities were available.

Q. What would that facility be?

A. We have other piers in New York, on Manhattan, and [fol. 179] we have, as previously testified, two team track facilities.

Exam. Brown: Who do you mean by "we", Mr. Witness?

The Witness: The Erie Railroad.

Exam. Brown: What are those other two facilities?

The Witness: The pier facilities.

Exam. Brown: The facilities you are testifying about?

The Witness: We have Pier 70 in the East River, Pier 67 in the North River, Pier 48 in the North River, at which fresh fruits and vegetables have not previously been handled to any extent. We have team tracks at our Harlem station and at our 28th Street station.

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By Mr. Hoffman:

Q. In practice, do any of these cars in the situation we last mentioned actually move, then, from Jersey City over to team tracks in Manhattan?

A. They have rarely been sorted.

Q. Are you prepared to tell us the extent of the team track facilities?

Mr. Miller: Mr. Examiner, I object. It seems to me we have gone as far as is in any way reasonable along this line of questioning. We have gotten completely far afield from the issues relating to an unloading charge, and these questions go to the operations of the Erie Railroad generally on Manhattan island. I think they have no relevancy to the issue here as to the way in which perishable produce is unloaded at Piers 19, 20, and 21 on Manhattan.

[fol. 180] Exam. Brown: The evidence is to the effect that when produce can not be unloaded at Piers 19, 20, and 21, that that merchandise is taken care of in another manner. It is sometimes delivered at Jersey City, sometimes at other facilities of this carrier in New York. It seems to me that type of evidence is pertinent, and I will permit further development of it.

By Mr. Hoffman:

Q. You refer to the Harlem station.

A. Harlem station team track.

Q. Is that in Manhattan?

A. No, that is in Bronx County, directly across the Harlem River from Manhattan.

Q. Mr. Hart, you stated yesterday it was the policy of the Erie Railroad to permit consignees of fresh fruits and vegetables to do their own unloading. Is that correct?

A. My recollection is this: that I was asked whether or not the Erie Railroad would have any objection to consignees doing their own unloading, and I said it would not have, providing the unloading was carried on with the same supervision and direction that we now have on our present unloading operation.

Q. But I recollect you used the words "policy of the Erie Railroad."

A. I am sorry.

Mr. Smith: Whether he did or not, the record will show.

Mr. Hoffman: I am asking whether he so stated yesterday.

[fol. 181] Exam. Brown: Furthermore, that has been handled previously on cross-examination. The record will show what he said. If you wish to ask any questions supplementary to that, very well. But let's leave the record as it is with respect to what the witness said.

By Mr. Hoffman:

Q. Did some officials of the Erie Railroad tell you that it was their policy to have consignees do their own unloading?

Mr. Smith: I object to the question, Mr. Examiner. It is immaterial. He stated what the position of the Erie Railroad was. It seems to me that is the only thing that matters.

Exam. Brown: The only question now is whether he said that was the policy.

Mr. Hoffman: That was brought out——

Exam. Brown: Just a minute. The only question involved, as I see it now, is whether or not this witness said "policy." The record will show what he said. He can state now whether that is the policy of the Erie Railroad or whether it is an offer.

Mr. Hoffman: There is a question he hasn't answered.

Exam. Brown: What is that question?

By Mr. Hoffman:

Q. Did any officials of the Erie Railroad, or persons connected with the Erie Railroad, tell you that that is the policy of the Erie Railroad?

[fol. 182] Mr. Miller: Objection, if you please.

Mr. Smith: I made an objection. May I have a ruling on it?

Exam. Brown: My ruling is that the evidence of this witness so far as the offer of the Erie Railroad, will stand as it is of yesterday. In other words, the evidence will speak for itself in that respect. I subsequently stated this morning that the question now seems to be the policy of the Erie

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Railroad. Now, Mr. Hoffman has asked whether any official of the Erie Railroad has told this witness whether it is their policy to do these things. The witness may answer that question, whether any official told him that that is a policy of the Erie Railroad.

Mr. Miller: Mr. Examiner, if you please, I have another objection. The only purpose of the of the question, as I see it, is to challenge the qualifications of this witness. I think they are amply established.

Exam. Brown: I don't believe there is any question of qualifications of the witness involved here. It is a question of whether any official of the carrier told him the Erie Railroad has a policy in this respect.

Mr. Smith: He used the word "position" yesterday. He stated the position of the Erie Railroad, and also stated he had discussed the matter with his superior.

Exam. Brown: Yes. Now, the question is: did any official [fol. 183] tell him it is the policy of the railroad.

You may answer that question.

The Witness: If I may speak to you a moment, my only reason in hesitating is that ordinarily an agent, and that is the capacity I serve the Erie Railroad in, does not express the policy of the railroad. He is an administrator.

Exam. Brown: And ordinarily the official of the railroad doesn't tell him the policy, either?

The Witness: That is right.

Mr. Hoffman: I withdraw the question.

By Mr. Hoffman:

Q. Did anyone connected with the Erie Railroad tell you it was the position of the Erie Railroad to permit consignees to do their own unloading of fresh fruits and vegetables at Duane Street?

Mr. Donadio: I enter an objection. It doesn't make any difference. The Erie Railroad is bound by the answer made by this witness to the question of his counsel, and it doesn't make any difference whether anybody else told him what to say or what the policy of the railroad is in that respect.

Exam. Brown: The witness may answer. The objection is overruled.

A. Yes.

Q. Did the attorneys for the Erie Railroad tell you that was the position of the Erie Railroad?

A. I don't recall having any discussion with the attorneys [fol. 184] of the Erie Railroad. I spoke to my superior in the Operating Department.

Q. Did you have any discussion with the attorneys for the Erie Railroad before coming here yesterday and testifying?

A. I had conferences with our attorney.

Q. You testified yesterday, as I understand it, that there were other commodities coming over from Jersey and being unloaded at these piers that you speak of where fresh fruit and vegetables are unloaded.

A. I so testified yesterday.

Q. Are canned goods handled over these piers?

A. Yes.

Q. Are dried fruits handled over these piers?

A. Yes.

Q. Is the movement of the canned goods and dried fruit similar to the movement of fresh fruits and vegetables as stated by you yesterday?

A. To what movement do you refer?

Q. I mean the transit of the canned and dried fruits from the Jersey side to the piers.

A. Yes, similar.

Q. Are they brought over on the same lighters?

A. They could be, in limited number. They are usually on separate floats.

Q. Are the floats practically the same?

[fol. 185] A. The same floats.

Q. And is the process of unloading the same?

A. The physical handling is the same.

Q. Is the unloading performed by the same crews who unload the fresh fruits and vegetables?

A. They are performed by the same contractor's crews. They may not be the same individuals, and again they might be in isolated instances.

Q. But the makeup of the crews is pretty much the same?

A. There is some slight difference in the makeup of the

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crews at different times of the day and according to the traffic we are handling.

Q. Have you ever been employed by the Seaboard Terminal & Refrigeration Company?

A. No.

Q. Is the Seaboard Terminal & Refrigeration Company controlled by the Erie Railroad?

A. I don't know. I understand not.

Q. Is there a close connection between the Seaboard Terminal & Refrigeration Company and the Erie Railroad?

A. I know of no close connection other than contractual connections whereby they handle freight for us under contract.

Q. Are your offices in the pier in the same place where the offices of the Seaboard Terminal & Refrigeration Company are located?

[fol. 186] A. Under the contract, as I stated in my testimony, we furnish them with a small office where they have a few clerks working there to take care of the work that must necessarily be handled, close to the operation itself, such as timekeeping and so on. The Seaboard Terminal & Refrigeration Company have no general office on our premises.

Q. Do you give orders to the Seaboard employees?

A. Not direct.

Q. Will you amplify that statement.

A. We make up what is called a fruit order to show what cars of fruits and vegetables are to be handled, and copies of that are given to the Seaboard supervision to show them the jobs that they are to do. The detail of that job is left to them.

Q. Have you any employees of the Erie Railroad under your direction at these piers?

A. Oh, yes.

Q. How many employees do you have?

A. Oh, I would say about one hundred.

Q. Are they all office employees?

A. No, some are watchmen—if I may look at my testimony—I previously mentioned delivery clerks, electricians, float checkers, watchmen, and janitors. I can add to that clerks. I believe that covers it.

Q. Who takes the record of the seals of the cars?
[fol. 187] Exam. Brown: What do you mean by that question—seals of the cars?

Mr. Hoffman: Well, that is what he testified.
Exam. Brown: I am asking you what you mean by your question.

By Mr. Hoffman:

Q. By that I mean, who goes and examines these cars as they arrive at Duane Street and ascertains whether these cars are sealed or the seals broken?
A. I testified that the Seaboard Terminal & Refrigeration Company under their contract furnished a so-called seal and ice clerk who takes records of seals on cars, position of ventilators and amount of ice in ice bunkers, and seals cars when necessary.
Q. Then the employees of the Seaboard really handle all matters pertaining to the physical movement of these cars in and out of the Duane Street pier?
A. No. They don't move cars in and out of the Duane Street pier.
Q. No, I ask you, the employees of the Seaboard handle all matters pertaining to the physical movement of the cars in and out of Duane Street?
A. Not the movement of the cars out of Duane Street, no.
Q. Have you made any changes or improvements in connection with the facilities at Duane Street in the past ten years?
A. We are constantly making changes in both our facil-
[fol. 188] ities and the mode of operation as we see things that we feel should be done.
Q. When did you make any changes last in the facilities?
A. Oh, I have no record of it at the present time.
Q. What changes do you refer to?
A. There have been times when we have provided facilities such as the pear conditioning room, air-conditioning for the benefit of the auction rooms, changes in the door arrangements when it appeared to be the proper thing to do, and—I don't recall just what they all are. There are things that help from time to time.

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Q. But you have made no changes with respect to the method and operation of unloading the cars?

A. We are constantly making changes in the method and operation of things as we see improvements that can be made.

Q. With respect to the unloading?

A. With respect to the unloading, yes.

Q. And what changes have you made?

A. There have been some changes made in the personnel, and in the duties handled by the personnel of the contractor by the contractor people. We have made some changes in the manner in which the goods are placed on the pier floor, as the situations present themselves, and as it appears we can improve our operation by so doing.

Q. Can you tell us the average period of time elapsing [fol. 189] between the arrival of these cars at Duane Street alongside the dock and the departure of the same cars on the float?

A. On the same calendar night. The extra time would depend upon the berth in which the cars are placed, the market time for which ordered, and the progress of the operation.

Q. I am trying to get a little more specific information from you. I am asking you now what is the period of time which elapses between the arrival of the float at Duane Street and the departure of the float with the empty cars?

A. I have tried to answer that the question—I have tried to answer that the best way I know how to answer it. It might be, in extreme cases, two hours and a half minimum. Again, as a maximum, over a weekend operation when cars are brought over on Saturday night, ordered for Sunday night unloading, it might be as high as eighteen hours.

Q. Would you have during some nights two and three movements of the same float?

A. Yes. I so testified yesterday.

Mr. Hoffman: That is all.

Cross-examination.

By Mr. Van Arnum:

Q. Mr. Hart, in the tabulation of the carloads handled by

the Erie, will you state more plainly whether any watermelons, gooseberries, or bananas were included in the cars unloaded at the piers.

A. If you refer to the statement given in my direct testi- [fol. 190] mony showing the number of cars handled during the calendar year of 1946, and from January to June 1947, at Piers 19, 20, and 21, according to the best of my recollection, no watermelons were handled during either of those periods, and very few cars of gooseberries. There were no bananas handled during those two periods.

Q. Were there any restrictions against the handling of those commodities, or the unloading of those commodities on the pier in your tariff?

A. There are no restrictions on either watermelsons or gooseberries at our Duane Street piers.

Q. Mr. Hart, is it within your province to advise your company as to the cost of performing the unloading service on your piers, as to whether it is increasing or not, whether in your opinion, to your company it is becoming excessive?

A. I don't quite understand the question.

Q. Have you been asked to advise your company, or furnish them with data to indicate the cost of performing the unloading service that is involved in this case?

A. We regularly keep our management advised by the medium of so-called operating reports as to the cost of our operations.

Q. Will you be able to tell us whether you have advised your company in the recent past six months or a year whether or not the cost of performing the unloading service has substantially or in any way increased?

[fol. 191] A. What periods?

Q. Six months to a year back.

A. Again I must ask, when you speak of an increase, what periods are you comparing?

Q. 1946 as compared to the first months of 1947, which enlarges my time, as compared to five years ago, or any time during the war period, the active war period.

A. I do not have in my mind just what those figures would show. I don't know if it would show a decrease or an increase. I don't carry figures of that kind in my mind.

Q. Do you either make or administer on the part of the

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Erie Railroad the contract with the Seaboard Terminal & Refrigeration Company?

A. I administrate it in so far as our operation is concerned.

Q. Has there been any change in the contractual rate for unloading on your piers on the part of the Seaboard Terminal & Refrigeration Company?

A. There have been numerous changes in the contractual rate. I do not negotiate those changes.

Q. You have no dealing, I take it, with the actual labor that performs the unloading under the employment of the Seaboard Terminal & Refrigeration Company?

A. No direct dealing.

Q. And do you have any knowledge of the labor contracts between the Seaboard Terminal & Refrigeration Company [fol. 192] and the labor union?

A. Pardon me. The contract between the Seaboard and the labor union?

Q. Yes.

A. No official knowledge.

Q. You couldn't testify firsthand, then; is that your answer?

A. No.

Q. You do not know, or are unable to say within the scope of your knowledge whether there have been any increases in those labor costs?

A. I could not testify based on official knowledge.

Q. May I ask, or perhaps I should ask your counsel, whether they will have a witness who can testify as to the actual labor costs, or can you answer that?

Mr. Smith: I will be glad to answer the question.

The next witness will put in a cross-study which will show the cost.

Mr. Van Arnum: Will he also be able to testify in an official capacity as to whether he has been consulted by the Erie as to the relative costs and as to the policy of the Erie in this case?

Mr. Smith: The next witness will be an Erie witness, an Erie representative.

Mr. Van Arnum: Will he be an official who can testify [fol. 193] as to the Erie policy, as to the determination of

taking the steps that have been taken in this proceeding?

Mr. Smith: I don't know what you mean by "policy." He will put in the cost study which will show the cost of operation.

Mr. Van Arnum: Mr. Hart has testified that he, as an agent, is not consulted or has no voice in making the policy of the Erie Railroad with particular respect to the proposal here. I want to know whether there will be a witness who can answer that question.

Mr. Smith: He stated what the position of the Erie Railroad is, and that binds the Erie Railroad.

Mr. Van Arnum: That will be all. I will wait for the next witness.

Exam. Brown: Is there any further cross-examination?

Cross-examination.

By Mr. Logwood:

Q. Mr. Hart, are you an operating man?

A. Yes.

Q. You didn't testify directly about this, but when I tried to get the answer from Mr. Hodkinson yesterday, they sidetracked him. Witness Hodkinson, Exhibit No. 3, shows that during the calendar year 1946, the railroads serving the New York area unloaded 72,753 cars at Piers 17, 19, 20, 21, 22, 27, 28 and 29. Now, I understand that 19, 20, and 21 are your piers; is that right?

[fol. 194] A. Yes.

Q. Now, if you hadn't unloaded those cars, what would you have done with them?

Exam. Brown: Mr. Hodkinson was unable to answer the question yesterday, and it was reserved for this witness.

A. That is a situation that we just have to meet, and we will determine it as the situation presents itself. Frankly, I couldn't tell you just for the moment what would be done with that number of cars if we were expected to do something with them all at one time.

Exam. Brown: Didn't you testify this morning as to what disposition you might make of some of the cars? Delivery might have been taken at Jersey City; is that right?

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The Witness: Yes.

Exam. Brown: Also it might have been spread out to other terminals at Manhattan?

The Witness: That is right.

Exam. Brown: Any other additional evidence that you have, what might that be?

The Witness: Cars that are intended for delivery at our Piers 19, 20, and 21, and are so billed, are, as I previously stated, held in Jersey City awaiting orders. In the event those cars are not ordered within a certain time, we have notified others that might be interested in those cars of the fact that they are being delayed and are not being brought [fol. 195] over on order. Sometimes they furnish disposition by reconsigning them to other deliveries; at other times, they are held there until they do want them over for these markets on our piers or until our situation is such that they can be handled.

By Mr. Logwood:

Q. Yes; but you haven't answered the question I have in mind. So far as these piers are concerned, you have got to unload the cars, for you have no tracks or anything else down there to set the cars on; is that right?

A. We have no tracks on the piers.

Q. You have got to unload the cars at these piers?

A. Well——

Mr. Logwood: That is all.

Exam. Brown: Is there an answer to that question?

Mr. Smith: He answered previously the same question.

Exam. Brown: Is that a statement of counsel or a question?

There is no answer to it. I don't know whether it was a statement or a question. Which was it?

Mr. Logwood: It is a question.

Exam. Brown: What do you say to that, Mr. Witness?

The Witness: I believe if we had no tracks, and I said we had none——

Mr. Logwood: No. My question was, he has to unload the cars there for he has no tracks or anything else to set the cars on after he gets them across the river.

[fol. 196] The Witness: If that is a question, I would

again say that we would have to meet that situation that presented itself and determine what would be the proper thing to do with those cars with the facilities available at that time to handle them, based on the consignees' desires. They, again, might want to reconsign them.

By Mr. Logwood:

Q. Isn't this whole unloading scheme at these piers brought about by the railroad's disability and inadequacy of facilities to handle cars on tracks in the customary manner?

A. I wouldn't say so. I know that carloads have been handled on these piers for upward of seventy-some odd years, and we are still handling them on it. I don't know why they started to handle them in the beginning.

Mr. Logwood: That is all.

Exam. Brown: Is there any further cross-examination? Is there any redirect?

Mr. Smith: I have just three or four questions, Mr. Examiner.

Redirect examination.

By Mr. Smith:

Q. After a car of fresh fruits and vegetables arrive at Croxton Yard, is the consignee given notice of that fact?

A. Yes.

Q. Then is the car held at either Croxton or Jersey City [fol. 197] until the consignee orders it to be delivered at Duane Street?

A. Yes.

Q. Under present tariff provisions, are the consignees entitled to 48-hours' free time at Croxton or Jersey City?

A. They are entitled to 48 hours' free time after the first 7 a.m., after arrival of the car and serving notice of arrival.

Q. By arrival you mean at Croxton?

A. At Croxton.

Q. How often does it happen, Mr. Hart, that the Erie Railroad is unable to deliver the cars at Duane Street at the time when a delivery is ordered by the consignee?

A. Based on my personal experience at Piers 19, 20, and

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21, which began in September 1929, there was no such failure until about three years ago when we were in the war situation. During the year of 1945, to the best of my recollection, there were three or four times when it became necessary to delete the order under the provisions of the tariff. During 1946 there were, perhaps, half a dozen times. In 1947, there have been rare instances, perhaps two or three times so far.

Q. Could you give a rough estimate of how many cars would be involved in these two or three times in 1947 that you refer *you*?

A. The maximum in 1947 of cars that had not arrived [fol. 198] in time for these markets would not be over three.

Exam. Brown: That was during 1947?

The Witness: Yes, sir.

By Mr. Smith:

Q. Do you know of any instance, Mr. Hart, when a carload of melons, honeydew melons, cantaloupes, was not delivered at Duane Street when ordered by the consignee?

A. In so far as cars that arrived on trains scheduled to meet the order market during the present year?

Q. During 1947, yes.

A. To the best of my recollection there haven't been more than three cars that were not brought over.

Q. Are the employees of the Seaboard, who now do the unloading work at Piers 19, 20, and 21, members of the Longshoremen's Union?

A. They are members of the International Longshoremen's Association.

Q. Is that affiliated with some national labor organization?

A. Affiliated with the American Federation of Labor.

Q. Suppose the consignees, Mr. Hart, attempted to do their own unloading work themselves, using men other than members of the Longshoremen's Union. Would that, in your judgment, create a situation which might lead to a labor disturbance?

A. Yes.

Q. How much free time do the consignees have at Duane Street, Mr. Hart, to remove the perishables after they are unloaded?

[fol. 199] A. They have 48 hours' free time after the first 7 a.m., after the contents of the cars have been unloaded and notice of arrival served upon the consignees.

Q. That is in addition to the 48 hours' free time at Croxton?

A. That is in addition to the 48 hours' free time at Croxton.

Mr. Smith: That is all on redirect.

Recross-examination.

By Mr. Hoffman:

Q. Mr. Hart, in connection with the delivery of cantaloupes from Jersey City to the Duane Street pier, and refering to the year 1947, has the Erie issued any directions to consignees of cantaloupes that the Erie would not place at Duane Street piers in excess of a specified number of cars?

A. Yes.

Q. When was that order issued?

A. I don't recall the exact time.

Exam. Brown: Was there an order issued?

The Witness: Yes; I answered yes.

Exam. Brown: I didn't hear the "yes." Testify so that you can be heard at the end of the room.

The Witness: I answered yes. The date, I am not certain, was in May—perhaps in April.

By Mr. Hoffman:

Q. Has that order been enforced ever since that time?

A. Yes.

[fol. 200] Q. So that from May until the present time, the Erie Railroad has had an existing order to consignees that the railroad would not accept for delivery at Duane Street in excess of a specified number of cars?

A. Yes.

Q. Would you call that an embargo on the deliveries of cantaloupes at Duane Street?

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A. I don't think I am competent to answer that question whether that would be called an embargo or not. I am not a technical man.

Q. When you referred on redirect examination that there were only a few instances where the Erie Railroad has — unable to effect deliveries of melons pursuant to requests, did you or did you not mean requests for deliveries at Duane Street of those melons within the limit of the quota given to each consignee?

A. I don't understand that question.

Exam. Brown: Restate the question. Make it simple.

Q. On redirect examination, according to my recollection, you testified that there were only a few instances where the Erie was unable to make deliveries at Duane Street of melons pursuant to the request of consignees.

A. Yes.

Q. In making that statement, I take it you refer to deliveries requested by consignees at Duane Street within the quota of the particular consignee.

[fol. 201] A. No.

Q. What did you mean?

A. I meant that we had only held back a very few cars during the current year of 1947, that had been ordered unloaded for delivery.

Q. But you have placed these consignees on a quota, haven't you?

Exam. Brown: When you say that do you mean this witness or the Erie Railroad?

Mr. Hoffman: The Erie Railroad.

A. I previously testified that we would handle a maximum of 40 cars of melons on any one delivery night.

Q. To be allocated among the various consignees?

A. That is right.

Q. In accordance with what priority?

Exam. Brown: Do you make these allocations personally?

The Witness: Not entirely.

Exam. Brown: Do you know enough about them that you are able to testify?

The Witness: Yes.

Exam. Brown: Very well.

The Witness: Mr. Examiner, I would have to go back into history on this to make myself clear. It has been the custom in the New York fruit market for many years, any time that an allocation is made, that it is based on the previous [fol. 202] experience of firms as to the volume they handle. So this allocation of those cars within this limit of 40 is based upon the previous experience of buyers compared as to the volume they handled.

Mr. Hoffman: That is all.

Exam. Brown: Are there any further questions of this witness?

Recross-examination.

By Mr. Wells:

Q. Mr. Hart, on redirect examination your testimony was that in your judgment the allowing of shippers to unload cars would then lead to a labor disturbance. Will you give for the record the facts on which you base that judgment?

Mr. Smith: You are incorrectly summarizing what he said. He said if labor other than present members of the union were used by the consignees that that would create a labor disturbance.

Mr. Wells: I think it amounts to the same thing.

Mr. Smith: I was stating for the record that you incorrectly summarized his testimony.

Exam. Brown: Ask your specific question to the witness.

By Mr. Wells:

Q. Will you state for the record the facts on which you based the judgment you expressed on redirect examination. [fol. 203] A. That is based on my experience at this station since 1929, my observation of what has happened at times in the past when individuals attempted to perform services ordinarily performed by union labor associated with unions with which those individuals are not connected.

Q. What services are you referring to?

A. At times when a firm who was having some difficulty with the union attempted to carry on activities with men not belonging to that union, our entire pier was tied up for three or four hours and no traffic moved at all on the pier.

Q. What service are you speaking of?

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A. That was delivery service by truck from the pier.
Q. You are not referring to any instances you have had of a shipper attempting to unload a car?
A. There have been no such experiences.

Recross-examination.

By Mr. Van Arnum:

Q. Mr. Hart, in reference to your answers concerning those cantaloupe quotas, is it a fact that that quota of 40 cars per night was established because of the limitations of space on your piers?
A. That is right.
Q. I understood you to infer at least that the 40 cars were based on the ability of the receivers to sell that number, but that is not what you wanted to say?
A. Oh, no.

[fol. 204] Mr. Van Arnum: That is all.
Exam. Brown: Off the record.

(Statement off the record.)

Exam. Brown: There being no further questions of this witness, he is excused, subject to recall, if necessary.

(Witness excused.)
Exam. Brown: We will have a short recess.

(A short recess was taken.)

Exam. Brown: All right, gentlemen.
Mr. Smith: I will call Mr. Root.

Eugene S. Root was sworn and testified as follows:

Direct examination.

By Mr. Smith:

Q. Kindly state your full name and business address?
A. Eugene S. Root, Midland Building, Cleveland, Ohio.
Q. What is your present occupation?
A. Chief of Research for the Erie Railroad Company.
Q. How long have you held that position?

A. Since May 1942.

Q. How long have you been connected with the Erie Railroad Company?

A. Since 1918.

Q. Will you briefly outline your present duties.

A. As Chief of Research I am in complete charge of our [fol. 205] Business Research Department. This department's activities are concerned primarily with analyses of business trends, traffic potentials, other sales analyses and cost studies. The Business Research Department makes special studies as assigned.

Q. Have you made studies with respect to the handling of fresh fruits and vegetables?

A. Yes, we have made many studies.

Q. Did you hear the testimony of Mr. Hart describing the unloading operation covering fresh fruits and vegetables at the Duane Street piers of the Erie?

A. Yes.

Q. Have you made a study of the cost of the unloading operation at the Duane Street piers as described by Mr. Hart?

A. Yes, we have made such a study of the contractor's operation which is summarized on three sheets.

Q. Is that study the exhibit which has been marked No. 23 for identification in this proceeding?

A. Yes, sir.

Q. Will you describe Exhibit No. 23.

A. Sheet 1 of Exhibit No. 23 shows separately for citrus fruits, fresh fruits other than citrus, fresh or green vegetables—top iced, fresh or green vegetables—not top iced, and cantaloupes and melons, the total number of cars and tons unloaded, and unloading gang minutes required for a *for a* [fol. 206] representative test period. These data were summarized from the contractor's unloading gangs' "Daily Time Report and Summary of Cars or Boats Worked."

Q. Have you with your representative samples of the originals of such "Daily Time Report and Summary of Cars or Boats Worked"?

A. Yes, I have five representative samples of such originals.

Q. Have those representative samples been marked as Exhibit No. 24 for identification in this proceeding?

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A. Yes.

Q. Kindly describe Exhibit No. 24.

A. Exhibit No. 24 consists of five samples. One of these reports is prepared daily for each gang working. For example, Sheet 1 of Exhibit No. 24 covers Gang No. 6 for the night of May 16-17, 1946. It shows the names of the employees included in the gang, their check numbers, occupation, time started and finished, and hours of service. It also shows the car number of each car unloaded by the gang, the commodity, the time started and finished. Because it is not usually shown on this report, we asked the contractor to insert for each car the weight unpacked in pounds for our use in making this study. This was generally shown, as in this instance, in the column headed, "Total Time Consumed."

Q. Continue with your description of Sheet 1 of Exhibit No. 23.

[fol. 207] A. One week in each season was selected for a test period because of the seasonal movements of the commodities and the effect of volume on the efficiency of unloading operations. To simplify the verification of the totals of time worked and tons unloaded, and the application of costs, the contractor's payroll weeks were used. Periods selected were the weeks ending May 22, 1946, August 28, 1946, November 26, 1946, and February 4, 1947. The first two of these weeks ended on Wednesday and the latter two on Tuesday, due to change in the payroll week between these periods. The tons unloaded and gang minutes shown on the "Daily Time Reports and Summary of Cars or Boats Worked" in these periods were summarized on worksheets by the commodity groups before mentioned. The totals and average unloading gang minutes per ton for the entire test period are shown on this Sheet 1 of Exhibit No. 23.

Q. Will you make clear what is meant by "unloading gang minutes."

A. Mr. Hart has stated and as shown by Exhibit No. 24, the unloading gang consists of seven men. An unloading gang minute, therefore, represents seven man minutes. We used gang minutes to avoid converting the time shown on the daily time reports to man minutes.

Q. As shown on Sheet 1 of Exhibit No. 23, what were the

average unloading gang minutes per ton required for unloading during the test weeks?

[fol. 208] A. The average unloading gang minutes per ton for the entire period for citrus fruits were 6.32; for other fresh fruits 8.88; for fresh and green vegetables—top iced, 10.75; for fresh and green vegetables—not top iced, 6.61; and for cantloupes and melons, 9.61.

Exam. Brown: When you use the expression "cantaloupes and melons," does that include watermelons?

The Witness: No, sir.

Exam. Brown: What does the expression "melons" include?

The Witness: Well, honeydew melons.

Exam. Brown: Casaba and Persian and everything but watermelons?

The Witness: Yes, what would be included in the ICC classification for melons.

Exam. Brown: Other than watermelons?

The Witness: That is right.

By Mr. Smith:

Q. Will you continue with Sheet 2 of Exhibit No. 23.

A. Sheet 2 of Exhibit No. 23 is an analysis of the contractor's costs for the same weeks covered by the time analysis on Sheet 1 of this exhibit. All of the items making up the subtotal of $57,134.84 represent wages and salaries paid the employees of the Seaboard Terminal & Refrigeration Company, described by Mr. Hart in his testimony. However, two classes of employees have been omitted, namely, [fol. 209] the A-line men and the Sealer-Ice Clerk. Some proportion of the wages paid these employees could be considered as being part of the unloading cost, but to be conservative in determining the cost, we omitted them from this exhibit.

Exam. Brown: I think it would be well at this time to tell us what you mean by these A-line men and the Sealer-Ice clerk.

The Witness: These A-line men were described by Mr. Hart. Their function is to take the damaged packages that have been recoopered and place them in the regular stacks, setting aside the packages to which exceptions will be made

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awaiting delivery to the consignee or salvage agent. The seal and ice clerk takes records of seals on cars, position of ventilators and the amount of ice in the ice bunkers, and seals cars when necessary.

Exam. Brown: In other words, the duties of these individuals are those described by Mr. Hart and you adopt that description; is that right?

The Witness: That is right; yes, sir.

Exam. Brown: All right, you may continue.

A. (continuing) Two wage increases were given the employees included in this exhibit during the year, one effective April 15, 1946, and a smaller one effective June 1, 1946.

The one effective April 15, 1946, was not agreed to until [fol. 210] after the week ending May 22, 1946, but was made retroactive to April 15th. Payroll for the week ending May 22, 1946, was restated for the purpose of this Exhibit No. 23 to include both increases as these are the wage rates presently in effect.

The money shown for wreckers, wood gang, float foreman, and dock counters represents total salaries or wages paid applicable to the four week test period.

The amount of $45,950.27 shown for unloading gangs is only part of the total wages paid such gangs, there being omitted certain items of expense not applicable to unloading operations and certain other items of expense such as sweeping and cleaning piers, transferring commodities, et cetera, that are separately treated as an overhead item.

Exam. Brown: Now, you refer to certain items of expense not applicable to unloading operations. You also refer to certain other items of expense. In the latter connection you describe what you mean, but you do not so far as "certain items of expense not applicable to unloading operations." What are those operations?

The Witness: Well, one of the principal items that I recall is assisting the A-line men. Since we omitted the A-line men from our cost, we omitted that portion of the unloading gangs' time that assist the A-line men. I think that was probably the principal item.

[fol. 211] Exam. Brown: Anything else?

The Witness: Not that I recall. I can tell from my work papers.

Exam. Brown: You made the study. You should know.

The Witness: I don't know whether there is any other particular item.

Yes, there was one other additional item. It is an unloading operation, but since it is a different unloading operation, and not in connection with the unloading of fruits and vegetables involved here, we omitted it, and that is the force account work which the contractor performed unloading some fruit, Argentine fruit, where the consignee made the arrangements with the contractor.

Exam. Brown: In other words, that was work not connected at all with this particular operation we are considering here now?

The Witness: That is right.

By Mr. Smith:

Q. Will you continue, Mr. Root, please.

A. The salaries paid general foremen, dock foreman, assistant foreman, and night timekeeper are applicable not only to the expense assigned the unloading operations, but to the expenses omitted, and were distributed between the unloading operation and other operations on the basis of the directly assigned expense.

Exam. Brown: What do you mean by that? Did you dis- [fol. 212] tribute according to certain types of expenses? Then you refer to "an- other operations on the basis of the directly assigned expense." What do you mean by "directly assigned expense"?

The Witness: Well, for example, you are unloading this Argentine fruit. The expense that we assign against that, this overhead, was apportioned on that directly assigned expense.

Exam. Brown: All right. How did you determine the directly assigned expense to the A-line operations?

The Witness: On the basis of the actual wages paid your unloading gangs, and for your A-line men the actual wages paid your A-line men.

Exam. Brown: Let us take this Argentine operation. How did you determine that?

The Witness: The number of minutes that were involved in this unloading operation was multiplied by the average

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cost *cost* per minute of the unloading gangs.

Exam. Brown: In other words, you knew the amount of time used by these two particular groups of workers?

The Witness: Yes, sir.

Exam. Brown: All right.

A. (Continuing) The amount of $1,183.54 represents the proportion of salaries paid these employees applicable to [fol. 213] the unloading operations.

By Mr. Smith:

Q. Whom do you mean by "these employees," Mr. Root?

A. The general foreman, dock foreman, assistant foreman, and the night timekeeper.

Q. Please continue.

A. The wages paid the sweepers and that portion of wages paid unloading gangs applicable to sweeping and cleaning piers, transferring commodities, et cetera, as well as similar expense of day unloading gangs is applicable to both night and day unloading operations at the Duane Street piers.

The total of such expense was assigned to the day and night operations on the basis of directly assigned expenses, and the amount of $1,617.20 represents the proportion applicable to the night unloading operations on this exhibit.

Salaries paid Assistant Office Manager, cashier and clerks are applicable not only to all operations at Duane Street, both night and day, but to the operations of the contractor at Pier 48, New York City. Such expense is assigned to these unloading operations on the basis of directly assigned expense. The amount of $588.12 represents the proportion applicable to the night unloading operation on this exhibit.

Q. In other words, the $588.12 does not include anything on account of operations at Pier 48?

A. That is right.

[fol. 214] Q. The reason for that is that fresh fruits and vegetables are not handled at Pier 48?

A. That is right.

Exam. Brown: Would that be subject to the qualifications expressed by the prior witness, that on some occasions the fruits and vegetables might be diverted to those

other piers in case of being unable to handle them at Piers 19, 20, and 21?

The Witness: It would be subject to that qualification.

By Mr. Smith:

Q. Were fruits and vegetables handled on Pier 48 during the test periods?

A. No, sir.

Q. Will you continue.

A. The contractor pays compensation and liability insurance and payroll taxes on his total labor cost. For the year 1946 such expense was 10.352884 per cent of the payroll, and that proportion of the amount of $57,134.84, or $5,915.10, has been added to the payroll cost. The payroll taxes included in this figure are Old Age and Social Security taxes computed on the basis of 4 percent on the earnings of each employee up to $250.00.

The Erie Railroad Company has been served with a proposed report of an examiner of the Railroad Retirement Board in Railroad Retirement Board Jurisdictional Docket No. 24, dated June 19, 1947, in which it was held that the employees of the Seaboard Terminal & Refrigeration Com-[fol. 215] pany are subject to the Railroad Retirement Act. Under these circumstances the taxes would be, at present rates, 8-¾ percent of each employee's earnings up to $300 per month. The additional taxes that the Seaboard Terminal & Refrigeration Company may have to pay under such a decision, would substantially increase the amount of $5,915.10 included in this exhibit.

There has also been included $5,713.48, representing 10 percent of the labor cost to cover other expenses assumed by the contractor and for contractor's profit.

The total expense thus determined for the night unloading operation during the test period amounted to $68,763.42. This was divided by total night unloading gang minutes of 319,126 applicable to all unloading operations performed by the night unloading gangs during the test period. The average expense per unloading gang unit minute in the test period as shown on this Sheet 2 of Exhibit No. 23 was 21.55 cents.

Q. Will you describe Sheet 3 of Exhibit No. 23.

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A. The cost of 21.55 cents per unloading gang minute determined on Sheet 2 of Exhibit No. 23 was applied to the unloading gang minutes per ton by commodity groups shown on Sheet 1 to determine the total unloading cost per ton. The unloading gang minutes per ton include the time of assorting fruits and vegetables. Under present tariff provisions the consignee is charged with $3.13 per car on [fol. 216] cantaloupes and melons and $3.24 per car for other fruits and vegetables for assorting. We divided this tariff carload rate by the average tons per car for the test weeks in each commodity group shown on Sheet 1 of this Exhibit No. 23, and deducted this amount from the total unloading cost per ton to determine the net cost.

Q. Are all fruits and vegetables assorted?

A. They are not.

Q. Does your method of computation on Sheet 3 of Exhibit No. 23 assume each car unloaded was assorted?

A. Yes.

Q. What effect does this have on the net cost?

A. It understates the net cost.

Q. What are the net costs per ton for unloading in each of the selected commodity groups on Sheet 3 of Exhibit 23?

A. The average net cost per ton for citrus fruits is $1.2206; for other fresh fruit, $1.7242; for fresh or green vegetables—top iced, $2.0538; for other fresh or green vegetables—not top iced, $1.2096; for cantaloupes and melons, $1.8202.

Q. According to Exhibit No. 23 is it correct that the net costs you have just given cover only the unloading operations performed and expenses of the Seaboard Terminal & Refrigeration Company?

A. *Yes.*

[fol. 217] Q. Are there other expenses that are part of the cost of unloading fruits and vegetables at the Duane Street piers?

A. Yes. As Mr. Hart has stated, the Erie Railroad furnishes the equipment used by the contractor such as hand trucks, gangplanks, race pieces, et cetera, in which the investment is substantial, and the Erie Railroad assumes the expense of maintenance of this equipment. The unloading operations for fruits and vegetables are performed at night, and the Erie assumes the cost of the lighting.

During the winter months the Erie Railroad assumes the cost of heating the piers. Pier facilities used in the unloading operations are leased from the City of New York by the Erie Railroad Company, who assumes the rental, cost of maintenance and repairs.

The Erie Railroad also has employees on its payroll who are in some instances involved to a substantial extent in the unloading operations. We have an Assistant Agent, directly responsible for all the night unloading operations.

Exam. Brown: What do you mean by Assistant Agent as compared with Agent?

The Witness: He is Mr. Hart's assistant. Mr. Hart's assistant agent at Duane Street.

Exam. Brown: Mr. Hart is Agent at Duane Street?

The Witness: That is correct.

Exam. Brown: And the expense you refer to here——

[fol. 218] The Witness: Is his assistant. His assistant is on the night operation only.

Exam. Brown: I understand, but have you included those costs?

The Witness: No, sir.

Exam. Brown: That is, with respect to the Assistant Agent?

The Witness: No, sir.

Exam. Brown: All right.

A. (Continuing) There are also delivery clerks, electricians, float checkers, watchmen and janitors. Although some portion of the cost of all these items of expense is properly char-eable to the unloading of fresh fruits and vegetables, we have not attempted to determine the amount. I might also add some—I might also add that none of the expense of recoopering packages has been included in Exhibit No. 23.

Exam. Brown: Why did you omit the recoopering expense? Because it was difficult to ascertain?

The Witness: No, but to be consistent we omitted the A-line men who handled the recoopered packages, so we omitted all the expenses that would be of similar nature.

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Q. In other words, Mr. Root, you included in Exhibit No. 23 only the cost to the contractor?

A. That is right.

Q. And omitted costs that directly are borne by the Erie, [fol. 219] is that right?

A. That is right.

Exam. Brown: Did you omit in that connection the cost attributable to the carrier's agent, Mr. Hart, for example?

The Witness: Yes, sir.

Exam. Brown: That was omitted?

The Witness: Yes, sir.

By Mr. Smith:

Q. Are the five sheets which make up Exhibit No. 24, photostats of the originals of the Daily Time Reports?

A. They are.

Q. Was Exhibit No. 23 prepared by you as the result of the studies which you have described?

A. It was.

Q. Does Exhibit No. 23 correctly and accurately show what it purports to show?

A. It does.

Mr. Smith: I offer Exhibits 23 and 24 in evidence.

Exam. Brown: Is there any objection?

Hearing none they are received.

(Respondent's Exhibits Nos. 23 and 24, Witness Root, received in evidence.)

By Mr. Smith:

Q. Mr. Root, are you familiar with the contract between the Erie and Seaboard Terminal & Refrigeration Company?

A. Not all phases. I am generally familiar with the contract.

[fol. 220] Q. Do you know enough about it to state how much the Erie Railroad Company is obligated to pay and does pay the Seaboard under the contract for unloading fresh fruits and vegetables?

Mr. Loos: I would like to interpose an objection. I think

By Mr. Smith:

the contract is the best evidence of that, and I suggest that the carriers offer the contract.

Exam. Brown: It seems to me this information has been requested several times, by the protestants, under cross-examination, and now you are objecting, I take it, to the very evidence you have asked for.

Mr. Loos: I am objecting to the manner in which it is offered. I think the contract is the best evidence.

Exam. Brown: You wished information, didn't you?

Mr. Loos: Surely.

By Mr. Smith:

Q. Will you answer the question?

A. Yes. $2.12 a ton.

Exam. Brown: You know that of your own knowledge?

The Witness: I do.

Exam. Brown: Irrespective of any specific contract?

The Witness: Yes.

Exam. Brown: I permit you to answer on that basis, that you know of your own knowledge.

The Witness: Yes, sir.

By Mr. Smith:

Q. Does that amount of $2.12 apply equally to all types of fresh fruits and vegetables?

[fol. 221] A. It does.

Q. There is no different charge made depending on the nature of the fruit or vegetables?

A. No, sir.

Mr. Smith: That is all on direct examination.

Exam. Brown: Before you cross-examine, I wish all the parties who intend to engage in cross-examination would listen carefully to the cross-examination conducted by other attorneys, to the end that we may not have any duplication.

Mr. Loos, you may cross-examine.

Cross-examination.

By Mr. Loos:

Q. Mr. Root, will you refer to your Exhibit No. 24. Does

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the page shown as the Daily Time Report and Summary of Cars or Boats Worked include only what Mr. Hart described as the unloading gang?

A. Yes, sir.

Q. Did you have in your study daily time reports such as these shown in Exhibit 24 for all the time worked by all the unloading gangs during those several specific weeks that you mentioned?

A. And all of the time reports; yes, sir.

Q. Including both the time reports for commodities other than fruits and vegetables and for fruits and vegetables?

A. Yes, sir.

Q. Am I correct in understanding that the total number [fol. 222] of unloading gang minutes shown by all of those time reports was the figure of 319,126 shown on Page 2 of your Exhibit 23?

A. That is right.

Q. And that of that 319,126 minutes, the number of unloading gang minutes worked on fruits and vegetables was 286,001 shown on Page 1 of your Exhibit No. 23?

A. That is correct.

Q. Do you know what commodities were covered by those unloading operations for the 33,125 unloading gang minutes representing the difference between the two figures we have just mentioned?

A. They are the commodities described by Mr. Hart. Generally dairy products, some merchandise.

Q. Do you know how many cars or tons of such products were unloaded during those weeks in those 33,125 gang minutes?

Exam. Brown: Do you mean dairy products? Or dairy products plus the miscellaneous merchandise?

By Mr. Loos:

Q. Any products other than fruits and vegetables.

A. I can give you the figure if I will be permitted to work it out.

Exam. Brown: How long will it take you?

The Witness: About two minutes.

Exam. Brown: All right.

A. (Continuing) For these night unloading gangs, 188 tons.

[fol. 223] By Mr. Loos:

Q. Are you sure of that, only 188 tons?

A. That is right.

Q. Referring to the first page of your Exhibit 24——

A. May I correct that figure? Pardon me. I am glad you asked me to verify it. It is 3,414.6 tons.

Q. That would represent how many unloading gang minutes per ton for these other commodities?

A. I can make an approximation from these figures which you have quoted in the record. 33,125 minutes and 3,414.6 tons would be a little less than ten minutes per ton.

Exam. Brown: In gang minutes?

The Witness: Gang minutes.

By Mr. Loos:

Q. So that it takes a little more time per ton on the commodities for which you are making no unloading charge than it does on those which you are proposing an unloading charge, is that correct?

A. I haven't checked that. Of course, it is less than top iced vegetables. It is more than the other commodities.

Q. Your average shown at the bottom of Page 1 is 7.99?

A. 7.99.

Q. What does the language at the bottom of Sheet 1 of your Exhibit 24 indicate?

A. That is assisting another gang in unloading the car. That is, this particular gang 6 assisted in the first item—doubled up with Gang 3 in unloading a car of applies.

[fol. 224] Q. Why do you refer to that as work not chargeable to handling freight?

A. That is wrong. It is chargeable, and it is included in our study.

Exam. Brown: Included in what?

The Witness: Included in our study.

Exam. Brown: You mean the cost of that is included, or the time, or both?

The Witness: The time and cost, both.

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By Mr. Loos:

Q. So that that is true of the second item?
A. That is right.

Exam. Brown: You mean the item on the second page?
Mr. Loos: The second item on the first page.
Exam. Brown: I don't know what you are talking about. Which item are you talking about? I want it on the record.
Mr. Loos: The second item on the bottom of Page 1 of Exhibit 24.
The Witness: That is right.

By Mr. Loos:

Q. Doubled up on potatoes?
A. Yes, sir.

Exam Brown: It is true as to all these figures under the heading of "Detail of Work Not Chargeable to Handling Freight"?
The Witness: That is right.
Exam. Brown: They refer to both the apple and the potato [fol. 225] handling, and they doubled up with this other gang; is that right?
The Witness: That is right.

By Mr. Loos:

Q. Were there any exclusions from your time study under this heading, "Detail of Work Not Chargeable to Handling Freight"?
A. Yes. Assisting the A-line men.
Q. How do you explain the placing on these particular sheets in this particular Exhibit 24 of that type of work on fruits and vegetables under that heading indicating they were not chargeable to handling freight?
A. That is just the ordinary procedure of the men who make out the slips to indicate the information in that spot.
Q. Is it correct to say that when an unloading gang, a single unloading gang unloaded a single car, that was shown in the first block under the heading of "Detail of Work Chargeable to Handling of Freight," and when the unloading gang assisted another gang it would show in the second block?

A. That is correct.

Q. Was that pursuant to any instructions issued by you?

A. No, sir.

Q. How did you determine the time that you excluded in the fruit and vegetable unloading from the Daily Time Reports?

A. We summarized the Daily Time Reports, and to the extent that any time was shown for operations other than [fol. 226] the unloading of fruits and vegetables, it was so allocated.

Q. Now, would there be any such other items—such other operations other than the unloading of other commodities?

A. Well, for the—except for the example I mentioned of assisting the A-line men.

Q. Were the unloading gang men assisting the A-line men?

A. Yes.

Q. How would that be shown on one of these reports?

A. Assisting A-line men.

Q. Where would it be shown?

A. Under the detail of work not chargeable to handling freight.

Q. Where would the time spent on the unloading of dairy products, for example, be shown?

A. Under the detail of work chargeable to the handling of freight, except to the extent that a gang assisted another gang in unloading dairy products, then that would be shown under detail of work not chargeable to handling freight.

Q. On the last page of your Exhibit 24, at the bottom, you have an entry "Moving Hand Trucks." Was that included or excluded?

A. Our Analysis included all items of expense. We balanced out with the payroll.

Q. But to what would that particular item, "Moving Hand Trucks" be assigned? Would it be assigned to the fruits and vegetables, to other commodities, or to something else?

[fol. 227] A. It was considered one of the overhead items which was pro rated—the expense was pro rated over the cost of handling fruits and vegetables and all other items

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on the basis of directly assigned expense.

Q. Referring to Sheet 2 of your Exhibit 23, does the $57,134.84 represent all of the wages paid to all of the employees of the Seaboard Terminal & Refrigeration Company during those designated weeks?

A. I would have to read my direct testimony on that point. It does in some instances, and in others it does not. It is all shown in my direct testimony.

Q. Let me withdraw that question, if I may, and ask you whether the 319,126 unloading gang minutes represent the total time in the unloading of all commodities?

A. Yes, sir.

Q. Does it exclude time other than the unloading of commodities?

A. It excludes idle time, and shape-up time, also the time of sweeping and transferring commodities.

Q. How much of the wages paid to the unloading gangs during these designated weeks was omitted in arriving at your $45,950.27 shown on Sheet 2 of Exhibit 23? Or, if you wish to state it another way, what was the total amount paid the unloading gang?

A. $46,780.91.

[fol. 228] Q. What was the total amount during those weeks paid to the wreckers?

A. The amount shown on the exhibit, $2,712.72.

Q. Nothing was omitted there?

A. That is right.

Q. What was the amount paid to the wood-gangs?

A. The amount on the exhibit. Nothing was omitted.

Q. And to the dock counters?

A. The same comments apply.

Q. And to the float foremen?

A. The same comments apply.

Q. So that the amount omitted from those first five figures from the totals for the week were something less than $1,000?

A. That is correct.

Q. How does the figure of $1,183.54 compare with the total paid during those weeks to the night general foremen, and so forth?

A. The total amount paid to the night general foremen, assistant general foremen, and so forth, was $1,273.65.

Q. And the next item, proportion of the wages paid sweepers, and so forth? What is the total?

A. $1,959.20.

Q. What is the last item?

A. $1,071.03.

Q. What was the percentage you used in allocating the [fol. 229] salaries of night general foremen, and so forth?

A. I am sorry, I don't have it here.

Q. What were the ratios you used?

A. I would have to make the calculation to give you the ratios.

Q. Let me ask you this. You say in your direct statement that these expenses were distributed between unloading operations and other operations on the basis of the directly assigned expense?

A. That is right.

Q. You have the amount of the directly assigned expense and the total expense. Perhaps you can give me——

A. On the first item you are speaking of, on the item of $1,183.54, or the $1,273.65, the item of $1,273.65 represented the total salaries of the foremen, and assistant foremen, and so forth, or a portion on the basis of directly assigned expense for unloading $53,745.98, and for other expenses, $4,092.15.

Q. What was the basis for the next item of apportioning the wages paid sweepers and unloading gangs?

A. In addition to the two items just mentioned, there was an additional item, $7,273.71.

Q. What was that $7,273.71?

A. That is directly assigned expense to the day operation.

Q. I am trying to understand the difference between the [fol. 230] basis of allocation for these two items. Can you explain it a little further? Apparently you did not use the same basis.

A. That is correct. The first item, $1,273.65, in my direct testimony I stated was applicable not only to the expense assigned the unloading operations, but to the expenses omitted of these unloading gangs which I had already described, and were distributed between the unloading operation and other operations on the basis of the directly assigned expense. That is the amount of $53,745.98 for un-

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loading operations, and $4,092.15 for other than unloading operations during the night, or on the night payroll.

Now, the next item of expense covering sweepers, and the wages paid unloading gangs applicable to sweeping, and so forth, in my direct testimony I stated this expense was assigned to the day and night operations on the basis of directly assigned expense. So in addition to the item of $53,745.98, and the item of $5,092.15, we had the item of day operations of $7,273.71.

Q. You add that to $7,273.71?

A. Yes, that is right.

Q. Then you had something to add to the $53,745.98 for daytime assigned expense?

A. No, we did not add anything for day unloading gangs. Your day unloading gangs is entirely in your $7,273.71.

Q. You mean there were no commodities unloaded during [fol. 231] the daytime?

A. Yes, but it had nothing to do with the night operation with which we were concerned here.

Q. Your payroll figures that you have used are limited to the night operation payroll; is that correct?

A. As far as the unloading gangs are concerned, yes. Your office manager, assistant office manager, cashier and clerks are carried on the day operations payroll.

Exam. Brown: In other words, they are not included in here; am I right? You say they appear in the day operations payroll. Of what use is that to us? You mean to infer by that that the salaries covering those individuals are not on your cost study?

The Witness: A portion of the cashier and clerks' salaries is in our cost study.

Exam. Brown: All right.

By Mr. Loos:

Q. Where did you get the percentage figure shown as the percentage of the payroll for compensation and liability insurance? Did you make that computation, or did somebody give you that figure?

A. That figure appeared on a regular audit report made

by the Erie Railroad Company of the operations of the Seaboard Terminal & Refrigeration Company.

Q. Was that for the year 1946?

A. That is correct.

[fol. 232] Q. Where did you get the 10 percent that you used as the percentage to cover other expenses assumed by the contractor and for the contractor's profit?

A. I used that maximum of 10 percent because under our contract with the Seaboard Terminal & Refrigeration Company there is a refund provision for any profit on labor exceeding 10 percent.

Exam. Brown: Referring to the Erie?

The Witness: The Erie Railroad.

By Mr. Loos:

Q. Was there any refund made in the year 1946?

A. There was not.

Q. How much below the maximum was the percentage of profit?

A. I am not certain.

Q. Would the audit report to which you referred a moment ago show that?

A. Yes.

Exam. Brown: Did you refund that difference to the Seaboard?

The Witness: No, sir.

Mr. Loos: Mr. Examiner, I would like to request that there be produced for our examination the copy of the contract and a copy of the audit report to which the witness has referred.

Mr. Wells: I would like to join in that request.

Exam. Brown: Can you produce that?

[fol. 233] Mr. Smith: We have here in the room the contract, so the answer to the contract is yes, we will gladly produce that. As to the audit report, I don't know what the facts are in connection with that. Can we have a few minues recess to find out where that report is?

Exam. Brown: Yes.

(A short recess was taken.)

Exam. Brown: Please be in order.

Mr. Smith: At the request of counsel, I offer in evidence

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as Exhibit No. 25 the original agreement between the Erie and the Seaboard relating to unloading fresh fruits and vegetables at the Duane Street piers, together with the subsequent supplemental letters, making certain changes in the basic agreement.

The parties will note that the basic agreement is at the bottom of the document which I have distributed, and is dated July 16, 1929. On top of the basic agreement will be found the supplemental agreements, the one on top, and the latest one, being dated July 10, 1946.

I offer the original agreement and pray leave to substitute blueprint copies.

Exam. Brown: Is there any objection?

Hearing none, it is received as Exhibit No. 25.

(Respondent's Exhibit No. 25, Witness Root, received in evidence.)

[fol. 234] Mr. Smith: As to the audit report referred to by Mr. Root, I am informed he has a copy of it with him, and counsel are invited to inspect it if they wish.

Mr. Loos: May I examine this during the noon recess and report back on it later?

Exam. Brown: Is that satisfactory to you, Mr. Smith, to let Mr. Loos examine it and take it up after the noon recess?

Mr. Smith: Yes, sir.

By Mr. Loos:

Q. Mr. Root, did you make any exclusion of time or cost for the sorting service performed by the Erie Railroad through the Seaboard Terminal & Refrigeration Company on the fruits and vegetables?

A. I made an exclusion from the cost on Sheet 3 of Exhibit No. 23.

Q. But that is the revenue, is it not, of the sorting service?

A. That is right.

Q. Why didn't you make an attempt to exclude the cost of the sorting service in determining the cost of unloading?

A. Because the operation is so integrated—they are doing the sorting as they are doing the unloading—that it would be extremely difficult to make an actual cost separation.

Q. Have you attempted to make any determination as to whether the assorting revenue is equal to the assorting cost?

A. I have not.

Q. Have you made any adjustment in determining your [fol. 235] cost of unloading to represent services or the cost of services that would have to be performed by the Erie Railroad Company if cars were placed on team tracks on Manhattan island rather than being delivered at the piers, which costs would not be incurred when the cars are delivered at the piers?

A. I have made no study of comparative costs. I don't know which would be the greatest.

Exam. Brown: There would not be any exclusion from this particular cost study for these were actual cars handled by you?

The Witness: That is right.

By Mr. Loos:

Q. Have you any idea whether the additional cost of placing cars on the team track and taking them away from the team track is more or less than the cost of unloading?

A. I have no thoughts on the subject.

Q. You haven't made any adjustment or deduction in your cost for the possibility that there might be costs in placing cars on team tracks that wouldn't be incurred in handling the cars at the piers?

A. Our study only covered the actual cost of the unloading operations.

Mr. Loos: I think that is all I have, Mr. Examiner.

Exam. Brown: Mr. Root, referring to your Exhibit 24, are those sheets in that exhibit intended to be typical ex- [fol. 236] amples of other sheets used in your study?

The Witness: Yes, sir.

Exam. Brown: Did you use all of the sheets of this type in your study during the weekly periods covered thereby.

The Witness: I did.

Exam. Brown: Wil you tell us in a few words just how you used these particular type of sheets in your study? I am not sure the record is too clear on that.

The Witness: We had worksheets on which we show the different commodities, the different commodity classes, dif-

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ferent commodity groups being studied. We inserted in the columns on this worksheet the weight which was shown on Exhibit 24 in the column headed "Total Time Consumed," and the actual time of unloading as shown on the exhibit by the time started and finished. We accumulated all of the postings from all of the time slips during the four-week test period to arrive at these averages.

Exam. Brown: Now, the total time consumed—was that the only data you used so far as these particular sheets are concerned?

The Witness: We made a complete analysis of the time slips, that is, we accounted for all the time in one way or the other. We only allocated force to the unloading of any particular commodity, the actual time of unloading that commodity.

[fol. 237] Exam. Brown: When you say time slips, what do you mean by that?

The Witness: I should have said this daily time report, this summary of cars or boats worked.

Exam. Brown: In other words, your words "time slips" refer to this particular daily time report and summary which we are talking about now?

The Witness: That is right, Exhibit 24.

Exam. Brown: I asked you if the only data you used on that were the total time consumed.

The Witness: From the time they started working until they finished.

Exam. Brown: You have a summary here at the end of your sheet, the last column, "Total Time Consumed."

The Witness: I am sorry, Mr. Examiner, but that is not filled in. The figures which are shown in the Total Time Consumed, as I stated on direct testimony, is the weight that was unloaded. We calculated the time consumed from the time started and the time finished.

Exam. Brown: All right. Then these are not typical of the original daily time reports, are they?

The Witness: Yes, sir.

Exam. Brown: Who fills these figures in the last figures—the last column?

The Witness: As I stated on my direct testimony, the [fol. 238] contractor filled in that information in the last

column as to the weights for our use in making this study.

Exam. Brown: As to the weights?

The Witness: As to the weights.

Exam. Brown: When those figures were put in the last column is only when somebody asks for a study?

The Witness: That is right.

Exam. Brown: Are those the only items used in making your study, these particular figures in the last column?

The Witness: For the weights, yes, sir.

Exam. Brown: I asked you if those were the only figures you used in your study, figures such as those appearing in the last column. Is that right?

The Witness: Yes, sir.

Mr. Smith: As far as the weights are concerned?

The Witness: We used these down here.

Exam. Brown: I want to know exactly what you used in your study so far as these time reports are concerned. I don't think the record is clear on that at all. Did you use only these figures, or something else?

The Witness: We used only the figures which were shown on this report, and in the last column.

Exam. Brown: In the last column. All right. Now, when you have no figures in the last column, then you did not use any information in that connection?

[fol. 239] The Witness: As far as weight is concerned, no, sir.

Exam. Brown: So far as anything is concerned. How did you use any other figures?

The Witness: There would always be an entry in the last column for weight when there was shown time for unloading in the two previous columns. When there is shown time under this detail of work not chargeable to handling freight—which, by the way, is a misnomer in some cases—there will be no weight shown there, but we accounted for that time and allocated it to the work they were actually doing.

Exam. Brown: Now, in connection with the detail of work not chargeable to handling freight, you allocated certain weights in that connection, did you?

The Witness: Certain time against weights.

Exam. Brown: I don't understand what you mean.

The Witness: There are no weights, to my knowledge,

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that are shown down under detail of work not chargeable to handling freight. But there is time shown there for unloading or assisting other gangs unloading fruits and vegetables, or other commodities.

Exam. Brown: All right. Exactly how was that handled?

The Witness: That time was allocated against the unloading of that particular commodity.

Exam. Brown: How was it allocated?

The Witness: We posted it on our working sheets against [fol. 240] that particular commodity.

Exam. Brown: What effect did you give it?

The Witness: It is included in the total time of unloading from which we determined the average per ton.

Exam. Brown: Any weights included in that connection?

The Witness: The weight was shown by the gang they were assisting.

Exam. Brown: Well, if counsel is satisfied with the record as that stands we will drop that subject.

Redirect examination.

By Mr. Smith:

Q. Mr. Root, referring to Sheet 1 of Exhibit 24, is that typical of the Daily Time Reports which you used in making your study?

A. It is.

Q. Did you obtain from Sheet 1 the various commodities which were unloaded?

A. We did.

Q. Did you obtain from Sheet 1 the time when the gang started and the time when the gang finished unloading each car of freight?

A. We did.

Q. Did you obtain from Sheet 1 the weight of the commodity unloaded?

A. We did.

Q. Is the weight of the commodity unloaded shown in the [fol. 241] column furthest to the right in the middle of Sheet 1 under the heading, "Total Time Consumed"?

A. It is.

Q. You had the weight put under that column pursuant to your instructions?

A. That is right.

Mr. Smith: That is all, Mr. Examiner.

Mr. Hoffman: I am in a state of confusion on this line of testimony. Counsel, when you refer to Sheet 1, do you refer to each of the sheets entitled "1" for this entire period, or do you just refer to this particular Sheet 1 which has been brought into evidence here as a sample?

Mr. Smith: The witness stated that Sheet 1 is typical of all the time slips he used, and then he described in detail what information he get out of Sheet 1. Naturally, that was typical.

Mr. Hoffman: So that he didn't make a compilation of all weights which appeared on all sheets 1 during this period of time?

Mr. Smith: Oh, yes, he did, but I would prefer to have the witness answer your question.

You used each and every daily time report during the test period, did you not?

The Witness: I did.

Exam. Brown: Proceed.

[fol. 242] Recross-examination.

By Mr. Hoffman:

Q. And you took the weight of each of the daily time reports?

A. The weights that were shown on there, yes.

Q. And the weights were shown on each daily time report?

A. That is correct; for each car that was unloaded.

Q. You instructed them to compute the weights under this column headed "Time Consumed" in each and every case?

A. That is right.

Mr. Hoffman: That is all.

Exam. Brown: Mr. Augello, do you have any questions?

Mr. Augello: No questions.

Exam. Brown: Mr. Hoffman, do you have any further questions?

Mr. Hoffman: Yes, I have a few questions. It is a rather complex statement to grasp as we have gone along.

By Mr. Hoffman:

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Q. In connection with the computation of time, did the element of overtime enter into any of these computations?

A. It enters into the cost, of course.

Q. Looking at Exhibit 24, which shows eight hours——

A. Yes.

Q. (Continuing): —is there any overtime on that sheet?

A. No, sir.

Q. Was there any overtime in connection with other [fol. 243] sheets similar to the sheet which has been introduced as a sample which showed overtime?

A. Sheet 4 shows overtime. Sheet 5 shows overtime.

Q. Referring to Sheet 4, where does the item of overtime appear on Sheet 4?

A. Well, there is shown in the overtime column 4½ hours overtime for each man.

Q. Well, it also shows that the man only worked four hours straight time.

A. That is right.

Q. But he got 4 hours straight time, and he gets overtime for having worked in excess of 4 hours?

A. I am not familiar with the agreement with the longshoreman's union.

Q. So you made no inquiry with respect to the element of overtime at all?

A. No, we included it in our cost—whatever was paid. Whatever the Seaboard Terminal & Refrigeration Company had to pay, that is what we used as the cost.

Q. You don't know whether the item of overtime might be due to any one reason or another?

Exam. Brown: He said he made no investigation of overtime. The answer is self-evident. He doesn't know.

Q. So you don't know that the payment of any overtime might have been due to the congestion at Duane Street?

[fol. 244] A. No, I do not know.

Q. When you selected these representative periods, did you make an examination of all periods?

A. Oh, we handled every time slip, yes, sir.

Q. You looked over the whole year 1946?

A. Oh, no. I am sorry. For the four test weeks.

Q. How did you come to select these particular four weeks?

A. Because we wanted to have a period which would give us a fair cross-section of the annual volume, and of the various types of commodities that would be handled.

Q. So in making these selections, you did make an examination of all the other weeks during our deciduous or citrus fruit season?

A. I did not, no.

Q. Who did that?

A. No one that I know of. It was based merely on their experience as to what four weeks would give us the best cross-section of the annual figures.

Exam. Brown: Is it your testimony that these four weeks were not selected at random? They were handpicked?

The Witness: They were handpicked; that is right.

Mr. Smith: On what basis were they handpicked, Mr. Root?

The Witness: We discussed it between—there was a discussion by the agent.

Exam. Brown: What agent?

[fol. 245] The Witness: Mr. Har by a representative of the Seaboard Terminal & Refrigeration Company.

Exam. Brown: Who was he?

Mr. Smith: Who was he?

The Witness: Mr. Christ Haney, and I think, Mr. Michael, my assistant, and myself. And as a result of that conference we decided on these four test weeks.

Mr. Smith: Why did you decide on these particular four weeks?

The Witness: According to the experience of Mr. Haney and Mr. Hart, these four test weeks were selected as they would give us an accurate sample of the year.

Mr. Smith: Considering melons for a moment, are melons delivered in Duane Street 52 weeks of the year, or do they come at a special time?

The Witness: They only move at certain seasons of the year.

Mr. Smith: Did you pick a week which included delivery of melons?

The Witness: We did.

Mr. Smith: You show us that particular week because you wanted to get melons into the picture?

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The Witness: That is right. In my direct testimony I said because of the seasonal movement of the commodities, that that was the reason we selected one week in each season. [fol. 246] Mr. Smith: Did you select these weeks because you in any way thought these particular weeks would show higher costs than the average costs?

The Witness: Oh, no, sir.

Exam. Brown: Did you pick a week which would be typical of the Florida shipping season on vegetables?

The Witness: Well, I imagine that one of our weeks would be typical.

Exam. Brown: You don't know?

The Witness: I don't know.

Exam. Brown: Do you know whether or not these four weeks would be typical of any particular shipping season from other sections than Florida?

The Witness: They were selected for that purpose.

Exam. Brown: Were they selected because of the thought of these experienced operators that these four weeks would be typical of the year as a whole in connection with the handling of fruits and vegetables?

The Witness: They were. They were typical weeks.

By Mr. Hoffman:

Q. Now, I understand that after making a total computation of these costs and expenses, and then arriving at a unit per ton, you then deducted $2.12 per ton for the amount paid to the Seaboard on account of assorting?

A. No, sir.

Q. I understand your total figure, first, included not only [fol. 247] the unloading but also it included the time spent in assorting.

A. That is correct.

Q. After having arrived at that figure, then how did you eliminate the item of assorting from your total figure?

A. I stated that in my direct testimony in this way. We divided the tariff carload rate by the average tons per car in the test weeks in each commodity group, as shown on Sheet 1 of Exhibit 23, and deducted that amount from the total unloading cost per ton, to determine the total net cost.

Q. So that with respect to your total unloading charges,

which include assorting, they are based upon actual figures during this representative period?

A. That is correct.

Q. But with respect to your assorting, you have used an arbitrary figure by way of deduction, which figure is the figure shown in the tariff?

A. That is correct.

Q. So that you have not made any cost study with respect to what the assorting costs are?

A. That is right.

Q. To that extent, your net figures here are not based upon actual cost with respect this representative period?

A. To the extent that it would be any different, that is right.

Q. You made no independent study with respect to assorting?

[fol. 248] A. I did not.

Q. Did you have any discussion with respect to the element of overtime or how it should be handled in connection with your computations?

A. No, not that I recall.

Q. Could you tell us what part of the total labor cost during these representative periods amounted to overtime?

A. No, I could not.

Q. You have no figures available on that subject?

A. Oh, I think in our underlying working papers there were—no, they do not show that information.

Q. Would you say that the amount of overtime would represent as much as 30 per cent or 40 per cent of the total wages paid during these representative periods?

A. I have no idea.

Q. Have you ever had anything to do with the basis of a computation for the assorting charge as it exists in the tariff?

A. I have not.

Q. Now, in connection with fresh deciduous fruits, being the fruits other than the citrus, did you make any computation with respect to the cost figures regarding each particular variety?

A. I think that we made a small analysis of a day or two.

Q. What fruits are included in your computation and

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your designation of fresh fruits other than citrus?
[fol. 249] A. All the fruits that were handled during the test weeks.

Q. You tell me what fruits.

Exam Brown: You wish this witness to name each and every one of those types of fruit?

Mr. Hoffman: Well, there are only a few.

Exam. Brown: There are a great many. Examine your tariff.

Mr. Hoffman: I am asking, though, for the fruits that were handled during this period, and asking the witness to name them, and I don't think there would be very many.

Exam. Brown: He states that he was covering fruits other than citrus, including deciduous fruit. Now, if the witness wishes to name typical fruits of that character, he may do so, but I am not going to require him to go into each and every one of them.

Mr. Smith: Refer to Exhibit 24. That might refresh your recollection.

A. I know there were apples, there were grapes, there were plums, there were pears—I don't recall any others.

By Mr. Hoffman:

Q. Those fruits mentioned by you were grouped together under fresh fruits as distinguished from citrus?

A. That is right.

Q. Now, did you say that there were some Argentine pears unloaded during this period of time?
[fol. 250] A. I said there was some Argentine fruits. It might have been pears, I don't recall.

Q. You excluded those figures?

A. That is correct.

Q. Did I understand you to say that in your total computations here, there are other items which were included in your total cost of the commodities?

A. I am not sure I understand your question.

Q. Well, on Sheet 2 of Exhibit No. 23, did I correctly understand you to say that in those computations there are the costs of unloading commodities other than fresh fruits and vegetables?

A. The total of $68,763.42 does include other items than fresh fruits and vegetables.

Q. Did I also understand you to say that the cost of unloading these other commodities was higher than the unit cost of unloading the fresh fruits and vegetables?

A. I think we made some calculations that indicated that it was higher, yes, sir.

Q. Did you take that difference into consideration in making your final net computations for deciduous fruits or fresh fruits and vegetables?

A. Oh, yes.

Q. Do you know whether included in these time sheets, whether any of the individuals whose hours of labor are [fol. 251] listed during these periods, spent any time in connection with recoopering?

A. If there was any such shown, any time so shown on the time slips, and it should have been shown, it would have been eliminated as assisting A-line men, or items of that nature.

Q. Do you recollect seeing such an item?

A. I don't recollect seeing such an item, no.

Q. Do you know whether it would appear on the time slips whether there was a segregation between the work in connection with coopering and the other work?

A. My understanding that recoopering—is that recoopering is not performed by Seaboard employees. It is performed by another contractor entirely.

Q. So it would not appear in these sheets?

A. No, it would not appear in these sheets.

Q. Then you are correcting your testimony to the extent of saying it was eliminated from these sheets if it did appear?

Mr. Smith: I object to the inference. He gave no such testimony. He said if there were such items they were excluded.

Exam. Brown: I agree that is the fact, Mr. Smith. The witness said if any such items appeared on those sheets they would have been eliminated.

Mr. Hoffman: That is all.

Recross-examination.

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By Mr. Augello:

Q. Mr. Root, this question of overtime, if the overtime is [fol. 252] caused by your train No. 98 that brings in all these fruits and vegetables for the market arriving late, how would that additional overtime be charged to your unloading cost or to your loss and damage liability, which would be an operating liability?

Exam. Brown: I am not sure I understand the question. Read it.

(The pending question is read by the reporter.)

Exam. Brown: There would be no loss damage in connection with the train arriving late, unless it arrived so late as to cause damage to the vegetables.

Mr. Augello: Oh, no. In some cases their train No. 98 arrives three or four hours late.

Mr. Smith: Is that a statement of counsel?

Mr. Augello: Their train is due at 4:35 in the afternoon. The market opens up at 10 o'clock at the earliest. They have from 4:35 p.m. to 10:00 p.m. to bring those cars over. Now, if Train No. 98 is three or four hours late it results, in many cases, that the Erie will put additional men that are ready to go off at 8 o'clock or 9 o'clock to unload these cars and try to still make the 10 o'clock market, which is done in some cases.

By Mr. Augello:

Q. Now, if that was a fact, and the overtime was caused by the late arrival of their train, how would that be shown in your cost study?

[fol. 253] Exam. Brown: All right. Now you have stated certain alleged facts for the enlightenment of the examiner, but so far you have not enlightened him in any respect as to how that is connected with loss and damage claims. Withdraw your question and ask a separate question that we all can understand.

By Mr. Augello:

Q. I will ask you this question. Are you familiar with

the overtime figures on these sheets, as to what they represent and how they come about?

A. No, sir.

Q. You are not familiar?

A. No.

Q. All you do is to take the information on the sheets and compile it?

A. Right.

Mr. Augello: That is all.

Recross-examination.

By Mr. Matson:

Q. Mr. Root, your Exhibit 25 shows a contract rate of $2.12 per ton for handling fruits and vegetables. Is that the same $2.12 to which you referred previously in your testimony?

A. That is correct.

Q. Does that cover also the cost of assorting this merchandise?

A. That is right.

Exam. Brown: It does include it?

[fol. 254] The Witness: It does.

By Mr. Matson:

Q. In other words, for the $2.12 this contractor not only unloads the cars off the float but sorts the merchandise on the pier?

A. He does.

Q. You stated that you had made many studies with respect to the handling of fresh fruits and vegetables. Based on that, can you tell us how the cost of unloading these fresh fruits and vegetables from the float onto the piers would compare to the cost of unloading the same merchandise from cars directly into the truck of a consignee?

A. I have made no such studies.

Q. Based on your experience, could you express an opinion as to whether the cost of performing the latter service would be more or less?

Mr. Smith: I object to the question. I don't think it is

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material, Mr. Examiner. It is obvious that it is going to be a guess. He hasn't made a study.

Exam. Brown: As I understand it, the witness couldn't answer the question anyway. Is that right?

The Witness: No, sir.

By Mr. Matson:

Q. Have you made any study with respect to the unloading of fresh fruits and vegetables at team tracks?

A. I have not.

Mr. Matson: That is all.

[fol. 255] Recross-examination.

By Mr. Loos:

Q. Mr. Root, I show you a document consisting of three pages, addressed in the form of a letter to Mr. G. W. Oakley, under date of February 20, 1947. Is that the audit report to which you referred in your testimony?

A. It is.

Mr. Loos: That is all.

Exam. Brown: It is understood the respondents are going to have that copied and offer it in the form of an exhibit this afternoon.

Mr. Smith: That is agreeable.

Exam. Brown: Is there any further cross-examination of this witness?

Recross-examination.

By Mr. Van Arnum:

Q. Mr. Root, are you in a position to state officially that the Seaboard Terminal & Refrigeration Company is a wholly-owned—or to what extent, if it is partly owned, a subsidiary of the Erie Railroad?

A. I do not know. I am not qualified.

Q. You do not know? In your studies you didn't take into account the ownership of this Seaboard Terminal & Refrigeration Company?

A. No, I had no reason to.

Q. If later there is put in the record evidence of official knowledge or recognition on the part of the Interstate Com- [fol. 256] merce Commission in ex parte 104, Part 2. that the Seaboard Terminal & Refrigeration Company is an Erie subsidiary, then would you be willing to agree that the contract between these two companies in effect merely returns a part of the profits to the Erie Railroad?

Mr. Smith: I object to the question, Mr. Examiner. It is hypothetical and speculative. It is based on something which the witness has not put in the record. Furthermore, it is apparently based on a decision of the Interstate Commerce Commission, which is a matter of record, which I think would speak for itself. Any comment that this witness might make about the effect of a Commission decision would be beyond his competency, in any event.

Exam. Brown: I agree.

By Mr. Van Arnum:

Q. Mr. Root, the latest terms of this contract, dated July 10, provide for $2.12 per ton to be paid to the Seaboard Terminal & Refrigeration Company for unloading, which you have previously mentioned. There have been a number —at least two wage increases, as evidenced by the copy of the contract and the letter of July 10, amounting to 18½ cents per hour, and you have stated in your direct testimony that the Commission has before it a decision, or a question as to whether these employees of the Seaboard Company are to be regarded as railroad employees under the Railway Labor Act. In effect, isn't this proposal to apply unloading [fol. 257] charges to be paid by the consignee a simple matter of turning over to the consignee a segment of railway labor under the Railway Labor Act for which they will pay as the new employers?

Mr. Smith: I object to the question. It goes beyond the scope of the witness' direct examination. All he did was make a study of costs and put the costs in the record.

Mr. Van Arnum: I submit the witness has had to qualify himself on the matters concerning the Seaboard Company, and their contract, before he could engage in this survey. He certainly must have familiarized himself with the operations of the company.

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Exam. Brown: You are asking for a conclusion of the witness, are you not?

Mr. Van Arnum: A conclusion of fact.

Exam. Brown: Can't that be deduced from the evidence that has been submitted, if that is the fact? I will sustain the objection.

By Mr. Van Arnum:

Q. Mr. Root, in your study of the cost figures of the Seaboard Terminal & Refrigeration Company, you do not mention any present or past wage scales. Do you recall those, or do you have them in your worksheets? Can you give them to me?

A. No, I do not have them.

Q. You do not have the base wage rates of the employees [fol. 258] named in your exhibit?

A. I will look.

Exam. Brown: Well, did those basic wages have anything to do with your cost study?

The Witness: No, sir.

By Mr. Van Arnum:

Q. I didn't understand your answer. You say you don't know the basic wage rates?

A. I don't recall what the basic wage rates are, no.

Q. You merely took the payroll figures?

A. That is right.

Q. You did, however, say in your direct testimony that you had taken into account the wage increases that were granted last year, 16 cents per hour in one case, and 2½ in another, which were computed in your figures?

A. That's right.

Q. In the process of that, you didn't pay any attention to how much of an addition that was to the previous wage rates?

A. Not percentagewise, no.

Q. Or in amount?

A. I can give you the amount that was included.

Q. Can you give me the amount?

A. Yes. $1,892.24.

Q. What is that?

A. That is the amount of back time that was included for [fol. 259] this week ending May 22, 1947.

Mr. Smith: 1947?

The Witness: I am sorry. 1946.

Exam. Brown: That is the amount or the additional amount?

The Witness: The additional amount.

By Mr. Van Arnum:

Q. And that was the only time there was a refund involved, that one week that the full wage rate was involved?

Exam. Brown: You don't mean refund.

A. Retroactive.

Q. But you do not have the basic wage rate for which that was added?

A. No, sir.

Mr. Van Arnum: That is all.

Exam. Brown: Is there any further cross-examination? Is there any redirect?

Mr. Smith: No, sir.

(Witness excused.)

Exam. Brown: We will recess until 2 o'clock.

(A recess was taken from 12:50 p. m. to 2 o'clock p. m.)

[fol. 260] Afternoon Session

Exam. Brown: Call your next witness.

Mr. Miller: I will call Mr. Pettit.

Ernest Pettit was sworn and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you please state your full name and business address.

A. Ernest Pettit, Pier 28, North River.

Q. You are employed by the Pennsylvania Railroad?

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A. Yes.

Q. In what capacity?

A. Agent.

Q. Agent in charge of what?

A. In charge of the perishable piers.

Q. How long have you held that position?

A. Since October 24, 1935.

Q. How long have you been connected with the Pennsylvania?

A. Since 1905.

Q. Where are Piers 27, 28, and 29 located in New York City?

A. They are located on the North River, the foot of Laight Street.

Q. In your capacity as agent at Piers 27, 28, and 29, are you familiar with the handling of fruits and vegetables on those piers?

[fol. 261] A. I am.

Q. What facilities are provided by the Pennsylvania Railroad for the delivery of perishables in New York?

A. Deliveries by the Pennsylvania Railroad of citrus fruits, fresh fruits and vegetables, cantaloupes and melons to receivers in the City of New York are made at the Pennsylvania Railroad Produce Terminal (Piers 27, 28 and 29 North River) from cars on carfloats. In addition to these facilities, deliveries are also made at the Manhattan Produce Yard, located on the meadow land between Jersey City and Newark, at Henderson Street Station, Jersey City and at 37th Street Station, New York. It is only at the produce terminal that the unloading is performed by the railroad the consignees doing their own unloading at all the other stations.

Q. What are the duties of your organization with respect to this traffic prior to its arrival?

A. My duties with respect to these cars begin when the cars first reach the lines of the Pennsylvania Railroad at its western and southern connections, at which time the first passing report is telephoned to the consignee followed by a confirming notice in the mail, or by messenger. On traffic from the West such notices are normally given, in addition to St. Louis, Missouri, and Chicago, Illinois, when

the cars pass Logansport, Indiana, Columbus, Ohio, Altoona, Pennsylvania, and, occasionally, Enola Yard, located [fol. 262] near Harrisburg, Pennsylvania. On traffic from the South only one passing notice is normally given, namely, when the cars leave Potomac Yard. Similarly, notices of arrival are served on the consignees upon arrival at our Jersey City rail terminal, Harsimus Cove Yard.

Q. How are the cars handled at Harsimus Cove Yard?

A. Upon arrival at that yard all cars of fruits, vegetables, cantaloupes, and kindred melons, originating west of the Mississippi, and all cars of citrus fruits originating in Florida are held in the yard awaiting orders of the consignees except in cases where they have been ordered for delivery at the produce terminal prior to their arrival in Jersey City. In the case of all other carloads of fruits, vegetables, cantaloupes and kindred melons, the cars move direct to the piers unless specifically ordered held in Jersey City or diverted to some other destination by the consignee.

Q. How are the cars moved from Harsimus Cove Yard to Piers 27, 28 and 29?

A. Depending upon the particular market for which the cars are ordered, the time of their arrival in Jersey City and whether subject to arbitrary holding or not, a car arriving at Harsimus Cove Yard on a particular day or ordered for delivery to the piers on that day will be either moved direct to the float yard at Harsimus Cove or drilled [fol. 263] from the hold tracks and will be loaded onto a carfloat. These carfloats hold from eight to ten cars on two tracks separated by a platform to permit unloading. These floats are moved by tugs, two floats usually being moved at once.

Q. Please explain the unloading operation in detail.

A. On arrival at the piers, the float is made fast to the bulkhead and a gangplank is moved out by two men operating mechanical equipment and is made fast to the end of the unloading platform on the carfloat. Ice bunkers are then inspected, record of the car taken, and the car opened ready for unloading. The unloading gang consists of five or, in some cases, six men, two or three men working in the car, one man operating a platform tractor and two men working on the pier floor. The men in the car load the produce onto four-wheeled trucks, known as "dolly" trucks

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and then push the truck out of the car onto the carfloat platform where they are picked up by the tractor operator and hauled onto the pier floor to the place on the floor where they are to be unloaded. The number of boxes loaded on a truck varies with the commodity, the usual load in the case of citrus fruit being ten boxes. The need for a third man in the car depends on the commodity being unloaded. In the case of melons, the nature of the box and the need for particularly careful handling usually requires the use of a third loader in the car. The tractor operator hauls [fol. 264] a train of three to six trucks depending on tidal conditions.

The initial step in unloading a car is to remove any bracing or bulkheads used to hold the boxes in place in the doorway. After this bracing is removed, the men must also, during the course of the unloading, remove strips placed in the car to keep the boxes in place and to provide for ventilation. These strips are of two kinds. The Hoak strip is a vertical strip placed between piles of boxes and between boxes and the side of the car. Other strips are flat pieces of wood similar to lath placed horizontally over each row of boxes to keep the produce from sliding about in the car. Because the strips must be removed carefully to avoid any damage to the containers and because, at least in the case of the Hoak strip, the strips must be salvaged, this process requires a considerable quantity of time on the part of the men working in the car. After the removal of the strips, each package is carefully and individually picked up and placed on the platform truck. The time required to unload a car ranges from a minimum of one to a maximum of three hours. The time required depends on the commodity, the strength of the package, the number of packages in the car in need of recoopering, which must be handled with extra care to avoid further damage, weather and tidal conditions, and the distances between the car and the assigned location on the pier. A further time-consuming [fol. 265] job which the carmen must perform consists in picking up pieces of fruit from packages which have been completely demolished in transit and, depending upon their condition, either packing them into new boxes or disposing of them.

Upon the arrival on the pier of the first trailer load the

assigned location for that particular carload, the two men on the pier unload the trailer, stack the good-condition containers in an orderly pile and set aside in front of the pile any bad-order packages for recoopering. The coopers repair the packages so set aside, either furnishing new containers in the bad cases or replacing broken slats with new wood. The amount of time spent on a particular carload by the coopers depends, of course, on the amount and severity of the breakage.

When the recoopering has been completed, the lading of that particular car as stacked in its assigned section is inspected by both the consignee's representative and the Railroad Perishable Inspection Agency's inspector, and its condition is noted. In addition to these inspections, my organization must check the load as to the total number of packages received and obtain a receipt of delivery from the consignee's representative. When the carload is to be sold at auction it may be sorted and stacked either by the consignee or the carrier. When the stacking is performed by the carrier, a separate charge, not involved in this proceed- [fol. 266] ing, is made therefore.

Q. What further facilities does the Pennsylvania furnish for the convenience of the produce trade which is not supplies to receivers of ordinary freight?

A. In order to provide a separate space on the floor for the placing of individual carlots, the order sheets are checked to determine the number of cars for each receiver and the space on the pier floor then marked off with chalk. The floor space must be clean, dry, and its location well lighted with lights of greater brilliancy than are required for ordinary freight. When the outside temperature is below freezing, moreover, the space must be adequately heated to guard against freezing. This entails maintaining constant heat throughout the winter and well into the spring, in order to guard against sudden changes in temperature. In order to insure that the heat is evenly distributed throughout the piers, the railroad maintains a system of overhead blowers located throughout the pier area.

Q. For how long a time have you been using the platform tractors in your unloading operation at New York?

A. The piers have been fully mechanized for about two years.

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Q. How were the cars unloaded prior to that time?

A. Before the platform tractors were obtained, all these commodities were moved from car to pier floor on hand-propelled two-wheeled trucks. This change has greatly in-
[fol. 267] creased the efficiency of the operation, but the increased wages, overtime penalties and the adoption by the trade of a five-day week instead of a six-day week have largely offset the savings which were effected by the use of the platform tractors.

Q. Has any attempt been made to further increase the efficiency of the operation?

A. Many studies and experiments seeking new ways of handling these perishables have been made both by railroad officials and by outside experts, but no more efficient means have been developed thus far for handling this type of freight. Particular thought has been given to the use of conveyors and pallet and forked trucks, but the nature of the commodities, the containers in which they are shipped and the method of disposition on the piers is such that none of these devices has proved satisfactory for this operation.

Q. How does the five-day week affect the unloading operation?

A. The five-day market week has imposed a severe penalty on the Pennsylvania in unloading perishable freight in New York. Before the elimination of Saturday as a market day, enough cars arriving at Harsimus Cove Yard on Friday afternoon were disposed of that night to cushion the strain of the large accumulation for the Monday market. Now that the last sale is on Friday, it is necessary to unload
[fol. 268] for Monday's market the arrivals of Friday, Saturday and Sunday, thereby requiring the payment of large sums in overtime penalties. In other words, the rail carriers deliver freight five days a week and the industry ships six days a week. To meet this condition, overtime must be paid for work done over the week-end.

Q. Can you explain some of the factors which make the unloading of top-iced vegetables more difficult than unloading other fruits and vegetables?

A. Unusual difficulties are encountered in unloading top-iced vegetables. Whenever the car passes through cold weather in its movement from origin to New York, the ice

becomes encrusted in the car so that the unloaders must spend extra time chopping away and removing the ice in order to get into the car. In freezing weather in New York, moreover, the removal of the ice in order to take out the various packages is a time-consuming process. Even during warm weather the unloaders must shovel the ice away from the packages and dispose of it onto the car float in order to remove the produce. For this work, the railroad supplies special water-proof clothing. Even under good conditions, the work is distasteful and it is difficult to get men to unload these cars. In addition to the time consumed in removing the ice, the presence of the ice, the wet floor of the car and the wet boxes, which often become [fol. 269] water-logged and slippery, further hampers the work of the carmen in loading the boxes onto the dolly trucks. These vegetables must be handled with special care because the crates are inherently more fragile than are other fruit and produce containers and in addition, the water from the melted ice tends to loosen the nails holding the crate together. As in the case of the carmen, the wet and slippery character of the boxes impedes the work of the men on the pier. Even after the vegetables are unloaded onto the platform, the area is constantly wet and dirty and requires extra care to prevent the water from the melting ice from spreading onto the other parts of the floor. The present method for containing this water is to surround the area with a ring of sawdust. The vegetables also require a larger force for the removal of garbage than do other kinds of produce.

Q. Why is more time required to unload fresh fruits than is necessary for the unloading of citrus?

A. The longer time required to unload a car of fresh fruit results largely from the fact that most of these commodities are packed in smaller boxes. Under ODT regulations, citrus fruit is loaded to 525 boxes per car. In contrast with this, a carload of cherries consists of upward to 1500 boxes, a carload of plums of 1050 boxes and a carload of peaches of 800 baskets.

Q. In what respects is the unloading of cantaloupes and [fol. 270] melons different from the unloading of citrus?

A. The melons require more time in unloading because greater care must be taken in handling the boxes because

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the melons bruise very easily. Moreover, the crates are more fragile. The cars hold a larger number of crates and the men are not as well trained in handling these boxes because, at least, so far as the Pennsylvania is concerned, the volume of traffic is relatively small. Further difficulties are met in the recent development of using top-ice for the shipments of melons.

Q. What special care is taken and what extra facilities provided to assist in the display and sale of the produce?

A. To provide the consignee or owner an adequate opportunity to display his goods for sale on the terminal floor, whether it is sorted and restacked or not, the freight must be stowed in orderly piles on continuing aisles so as to allow for inspection of the goods by prospective buyers. Since a large portion of the produce is sold at auction, we must furnish a large number of clean, well-lighted and heated auction rooms, nine of which are presently being operated.

Supplementing the usual arrangements for opening and display of packages of produce at the assigned space on the floor, we have recently built and are presently using display tables at one end of the pier near the street so as more adequately to suit the convenience of buyers and sellers in [fol. 271] displaying the goods for sale.

Q. How is the produce removed from the pier floor?

A. After the sale has been completed, the produce is moved from the terminal by motor vehicle as directed by the buyer.

Q. What happens to produce which has been stacked on the pier floor but not sold on the day of its arrival at the pier?

A. In cases where the consignee fails to effect a sale on a particular day, the produce may be left on the floor for the succeeding day's market. Where the produce is left on the floor overnight before it is sold, the railroad must provide special police protection because it is responsible for the correct number of packages in the lot. After the produce is sold and delivery is made only normal policing of the pier is necessary. The consignee is required to pay storage charges for the use of the space on the pier after the first forty-eight hours.

Q. What special services does the Pennsylvania render at Piers 27, 28 and 29 which it does not provide for the unloading of ordinary freight?

A. Because of the nature of the traffic, the Pennsylvania Produce Terminal in New York is a twenty-four hour operation requiring the railroad constantly to keep employees on duty at the piers. This is a more expensive operation than would be required in an ordinary freight office which is open for only eight hours a day. Further, because [fol. 272] the piers are open at all times, police protection must constantly be maintained.

Q. Is it more difficult to unload refrigerator cars than ordinary freight cars?

A. Unloading refrigerator cars does take more time and is more difficult because the car floors are usually higher than the platform on which the cars are unloaded; because the doors on those cars are narrower than on ordinary freight cars and because flooring of the car is weaker.

Q. Mr. Pettit, can you tell me what the present price which the railroad pays to the Pennsylvania Stevedoring Company for unloading perishable freight at Piers 27, 28 and 29 is?

A. $1,148.

Q. Can you tell me what the contract figure was beginning October 1, 1930?

A. 62 cents.

Q. And beginning October 1, 1940?

A. 71 cents.

Q. Have you ever had at the piers a request from any consignee that he be permitted to unload at the piers?

A. No, I have not.

Exam. Brown: If you had had such request, what would you have said? Would you have permitted the consignee to unload?

The Witness: That would have to be taken up with our [fol. 273] people in authority to find arrangements and what way it could be handled.

Exam. Brown: What would be your first disposition at the particular time? Would you permit them to unload without taking it up with your superior?

The Witness: No, I would not. I would take it up with

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my superior first.

Exam. Brown: You would tell them they couldn't unload, and then take it up with your superiors?

The Witness: I would tell them I would have to take it up with my superiors.

By Mr. Miller:

Q. Can you tell me what the advantages are to the produce trade by having delivery made at the piers as compared with delivery on an ordinary team-track?

A. In taking delivery on a pier they have the advantage of displaying the entire car, which gives the buyers the benefit of a thorough examination of the car.

Q. These consignees use the pier as a place of business where they buy and sell produce?

A. They sell right from the pier.

Q. The auction rooms are located on the pier, are they?

A. They are located on the upper floor of the pier.

Q. Is it a convenient thing for the trade that they have the fruit available for display at a location near the auction rooms?

[fol. 274] A. I would say it is.

Q. Do you have with you a group of pictures showing the operation, the unloading operation on Piers 27, 28 and 29, North River?

A. I have.

Q. Is that the exhibit marked No. 26 for identification?

A. Yes, sir.

Q. Turning to Exhibit No. 26, and the picture in that exhibit numbered 1-A, will you tell me what is shown on that picture?

A. That is a trailer, or a dolly truck, as they are sometimes termed, loaded with crates of cantaloupes.

Q. What is being done with the trailer?

A. The trailer is being loaded to haul to the pier to the location where the car is to be stacked.

Q. At what stage of the operation is that picture taken?

A. That was taken unloading at the car—unloading from the car to the flat truck.

Q. Can you explain to me why the truck does not appear to be on the level?

A. That is because the car is higher than the platform on the float.

Q. This picture is taken as the truck is being allowed to go down the ramp from the car to the platform of the float, is that correct?

[fol. 275] A. That is correct.

Q. When the men take that truck out of the car, do they simply let it slide down the ramp?

A. No. That is held back by a rope, or the men themselves hold it from coming down too fast.

Q. Turning to the picture numbered 2-A, can you tell me what that shows?

A. That shows a tractor with a number of trailers ready to come off the float.

Q. Can you explain how the tractor picks up the trailers on the platform of the car float?

A. The men on the float, after the flat trucks are loaded, couple them up similar to a train of cars. The tractor operator comes in, he hooks onto the tractor and then pulls them off the float.

Q. How does the tide affect the operations of the tractors in the way they pull cars off the platform?

A. The tide governs the number of flat trucks you can put on at one time. At a real steep tide, that would mean a steep bank at high tide, you can only take possibly three at a time. Where the plank is more level you can take off a dozen.

Q. What plank are you referring to?

A. The plank from the car float to the pier.

Exam. Brown: In high tide or low tide?

The Witness: In high tide we have our most difficult [fol. 276] time.

Exam. Brown: Why is that?

The Witness: Well, coming down the steep plank.

Exam. Brown: You can keep it level with the low tide?

The Witness: Well, you are pulling up, but coming down you have the weight pushing behind. They are inclined to buckle.

Exam. Brown: With low tide?

The Witness: With low tide the power of the tractor will pull them up, but coming down, you see, it buckles, comes

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together, and you have to watch that from buckling.

By Mr. Miller:

Q. Will you turn to picture No. 3-A and explain what that picture is?

A. Well, a metal gangplank is placed from the pier to the end of the float to permit the tractor and trucks to go on and off the float.

Q. You mean that at high tide that plank or ramp will give the truck a steep descent?

A. That is correct.

Q. And that the weight of the dolly trucks behind the tractor will be so great that he cannot take off as many trucks in that case as he would be able to when the ramp is either level or gives an upward incline from the car float?

A. That is true.

Exam. Brown: Your testimony is that it is more difficult [fol. 277] to go downhill than it is uphill, is that right?

The Witness: That is right.

By Mr. Miller:

Q. Referring to the picture numbered 3-A again, what are the chains stretching down from the upper part of the picture?

A. Those chains are to handle the planks. When that float is finished and we are ready to remove the planks there is a chain block on either side of the plank to hook onto the plank. The plank is raised and then pulled back by mechanical equipment.

Q. I notice also that both in picture 1-A and 3-A the dolly trucks are equipped with chains along the side. What is the purpose of those chains?

A. The purpose of those chains is to hold the packages from falling off.

Q. Turning to picture 4-A, what is shown on that picture?

A. That shows a trainload of citrus being brought to the location on the pier.

Q. Looking at the pile of boxes over on the left, can you tell me whether or not those were assorted while they were placed on the pier?

A. No, I can't, but I don't believe we sorted those. Most of the sorting is done by the consignees.

Q. Turning to picture 5-A, what is shown there?

A. That shows a carload of tomatoes being unloaded [fol. 278] from the flat truck to the pile.

Q. What is shown in picture 6-A?

A. A carload of citrus being unloaded from a flat truck onto the pier.

Q. Does that indicate whether or not the fruit was sorted?

A. No, it is not being sorted there.

Q. And what does picture 7-A show?

A. 7-A shows a car in which there is snow ice, and the laborers are removing the ice from the packages.

Q. Is there any difference between snow ice and top ice?

A. Oh, yes. The snow ice becomes a solid mass. The top ice isn't near as difficult to handle.

Q. Well now, you will remember that the tariff here under suspension, one of the groups of commodities involved is top-iced vegetables. Would this carload be classified as top-iced vegetables?

A. That would be top-iced.

Q. You mean the snow ice?

A. The snow ice would be—it is on top of the packages and all over.

Exam. Brown: The distinguishing feature between top-icing and ordinary icing is that top-icing is in the body of the car, and ordinary icing is in the buttress of the car.

The Witness: Yes.

Exam. Brown: This would be termed snow icing whether [fol. 279] it was top-icing or ordinary icing?

The Witness: That is right.

By Mr. Miller:

Q. What does picture 8-A show?

A. 8-A is a good picture of top-icing, or snow icing which is blown in.

Q. And picture 9-A?

A. That is another car with top-icing.

Q. Is it correct that all that snow ice must be taken out of the car during the process of unloading the car?

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A. Oh, yes. They must remove it to get at the packages in the end of the car. They have to keep it out of the way.

Mr. Miller: Mr. Examiner, before submitting this witness for cross-examination, I have a statement to make with respect to the issue as to the willingness of the Pennsylvania to permit consignees to unload at the produce terminals. I am making this statement myself rather than having Mr. Pettit make it because I don't think the question is really a question of fact. It is more in the nature of a statement of policy of the railroad with respect to this procedure.

Obviously, it has been the previous position of the Pennsylvania that it would not be practicable to have consignees unload at Piers 27, 28 and 29. Our change from that position has come about in large part because of the tremendous increase in the cost of performing this work. The [fol. 280] Pennsylvania has for long years provided this gratuitous service at the piers, but in view of its present revenue position and the increasingly heavy costs of the operations, we now feel that it should be paid for, or, if not paid for, then that the consignee should perform the unloading himself.

Naturally, also, if such a change is to be made, it must be a change which is worked out over some period of time in cooperation with the trade. The Pennsylvania naturally cannot permit each consignee to unload his individual car on the piers in the same fashion as it is done in the ordinary team-track. What we do suggest, however, is that if the trade is willing to organize this unloading operation to make it a well organized operation so that it can be performed on the piers, then we are perfectly willing that they do so.

There are quite a number of factors which would have to be worked out in such a situation, and we cannot now give an explicit explanation of what the railroad and the trade might be able to establish in the way of a new practice.

We do not think that it is necessary that the trade simply employ the stevedore we now use and use the same personnel. We think probably that that is the most practicable operation. We certainly are not insisting on it.

Our minimum requirements are obvious, I think, to all of you. There are numbers of cars which have to be unloaded in a short time, to the extent that it is practicable to do so. [fol. 281] We stand now ready to permit the trade to take over the operation.

So far as the 48-hour free time is concerned, let it be noted that there is already provision for 48 hours on the Jersey side, that we allow 48 hours after the produce is unloaded on the pier floor.

As to the recooperage, we think that could be worked out without great difficulty. Obviously, that is a job for the railroad.

Mr. Wells: May I ask counsel if it is their position, in connection with the statement he made, that the service to which he has referred is a part of the transportation?

Mr. Miller: We don't have a position on the point, or at least, we can say this much about it, that I don't feel that that issue is proper here, and certainly that this is not an operation which is to be included within the line haul rate, if that is what you mean.

Mr. Wells: The fact is that I understand from the statement that has been made, and as far as the record goes, that it always has been compensated for in the line haul rate, and if it is a part of transportation, as I understand the United States Supreme Court decision, the shipper cannot force the carrier to permit the shipper to perform such operation.

Mr. Miller: Mr. Examiner, I prefer not to answer the question at this time, because I think it is a question of [fol. 282] law and much more properly and much more adequately a subject for briefs rather than argument here.

Exam. Brown: The parties may include that particular point in their briefs. In other words, the legal question, whether or not the service is properly a part of transportation. It is conceded, I assume, by all parties, that heretofore it was considered part of the transportation, in that the carrier unloaded at destination. What it may or might be in the future is a question of law, and, as I say, you may answer that in your briefs.

Mr. Miller: I merely want to make this comment, sir, that I would not agree with your conclusion that it is an

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assumption of all parties that the cost of unloading has been considered to be a part of the line haul rate.

Exam. Brown: I didn't use that language.

Mr. Miller: I am sorry, sir. That is the way I understood it.

Exam. Brown: If you read the transcript I don't believe you will disagree with what I said, but if you care to, you may argue that point, too.

Mr. Matson: May I ask whether the carriers propose to offer the consignees an allowance for the service if the consignees do that for themselves?

Mr. Miller: The- do not, at least speaking for the Pennsylvania. It should be noted on the record that my [fol. 283] statement is binding solely on the Pennsylvania, and in making that statement I represent solely the Pennsylvania.

If you please, Mr. Examiner, I wish to offer in evidence Exhibit No. 26.

Exam. Brown: Is there any objection?

Hearing none, Exhibit No. 26 is received.

(Respondents' Exhibit No. 26, Witness Pettit, received in evidence.)

Exam. Brown: Off the record.

(Discussion off the record.)

Exam. Brown: This witness is excused for the moment and will be cross-examined later.

(Witness temporarily excused.)

Mr. Miller: I will call Mr. Hampton.

Marshall L. Hampton was sworn and testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Hampton, will you please state your full name and address?

A. Marshall L. Hampton, business address Delaware and Oregon Avenues, Philadelphia, Pennsylvania.

Q. What is located at that address?

A. The Pennsylvania Produce Terminal.

Q. Are you employed by the Pennsylvania Railroad?

A. I am.

[fol. 284] Q. In what capacity?

A. Freight agent at the Pennsylvania Produce Terminal.

Q. How long have you held that position?

A. Since February 1, 1941.

Q. How long have you been employed by the Pennsylvania?

A. 30 years.

Q. In your capacity as agent at the Pennsylvania Produce Terminal, Philadelphia, are you acquainted with the unloading of fresh fruits and vegetables at that terminal?

A. I am.

Q. Do you have a brochure which is an announcement by the Pennsylvania of the opening of their terminal?

A. Yes, sir.

Q. Turning to the inside of that pamphlet, can you tell me what changes have been made in those facilities since they were built and since that publication was issued?

A. Well, from this picture I would say that the major change has been the elimination of the incinerator plant located at the south end of B Building, and that the southern portion of C Building is now occupied by what is known as the South Freight Station of the Pennsylvania Railroad which handles merchandise traffic.

Q. What is the other portion of C Building?

A. The general cold storage company.

Q. So that your platform operations are confined solely [fol. 285] to Buildings A and B?

A. That is correct.

Q. And it is this announcement which has been marked for identification as Exhibit No. 27, is that correct?

A. That is correct, yes, sir.

Q. What facilities does the Pennsylvania offer at Philadelphia for the delivery of perishable freight?

A. Delieveries of fresh fruits and vegetables are made in Philadelphia principally at the Pennsylvania Produce Terminal, which consists of two freight houses, team-tracks of a 510 car capacity and two private sidings. The freight houses which we refer to as shed "A" and shed "B" are served on both sides by tracks having a capacity of 72 cars. The platform area in each shed amounts to 83,600 square

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feet. Shed "A" is used for the unloading and display of carload lots to be sold at auction and is equipped with two sound-proof auction rooms, each of which accommodates 250 persons and is equipped with rostrum, desks and seats for the accommodation of the trade. Shed "B", on the other hand, is used for the display and sale of produce sold at private sale.

The team-tracks have a capacity of 510 cars on 17 tracks. Covered platforms have been erected between each pair of tracks for the display and inspection of produce in the yard. Each pair of tracks are divided by paved driveways 65 feet wide.

[fol. 286] Deliveries are also made at Engelside Station on team-tracks of a car capacity of 50 cars on 5 tracks and at 31st & Chestnut Streets Station at the freight house where there is space for 10 to 12 cars on 3 tracks, all the cars at these latter stations being unloaded by the consignees themselves.

Q. Please describe the services which your organization performs for the consignees of perishables prior to the arrival of the cars in Philadelphia.

A. The first duty of my organization with respect to these cars is to render passing reports to the consignee. Reports are received at my office by teletype and are then telephoned to the consignee, reports usually being given as the cars leave St. Louis, Missouri, Chicago, Illinois, Altoona, Pennsylvania, Enola Yards, near Harrisburg, Pennsylvania, and, on traffic from the South, Potomac Yards, Virginia, near Washington, D. C. On arrival in Philadelphia the cars are placed either alongside the house or on team-tracks, according to consignee's orders.

Q. Please explain what extra care must be taken in unloading a car of perishables as compared with other freight.

A. The unloading of perishable traffic requires unusually careful handling to avoid breakage of the container or bruising of the contents. Every package must be picked up carefully and set down carefully on the truck to take it to the platform so as to avoid any possibility of the packages [fol. 287] falling from the truck. In unloading a car, the first operation after the car door is opened is to remove any bracing or bulkheads which may have been placed in

the doorway to hold the freight in place. Unless care is used in removing this bracing, the packages themselves may be damaged. After their removal, the bracing that has been taken from the car is salvaged or otherwise disposed of.

Q. Now will you please explain how the actual unloading is performed in shed "A"?

A. The unloading operation in shed "A" is performed by six-men crews made up of two car men, two truckers and two platform men. The car men place the packages on four-wheeled, hand-propelled trucks, the number of packages placed on each truck depending on the size of the packages. In the case of citrus fruits, ten boxes is the maximum and the usual number placed on each truck. Whenever possible, and in all cases in handling citrus fruit, the boxes are loaded on their ends by the car men with labels and marks upward so as to facilitate the work of the platform men in sorting the merchandise by marks, sizes, etc. When the car men finish loading the truck, the trucker pushes it to the space on the floor where it is to be unloaded and the platform men begin unloading.

Freight is sorted by size and brand as it is unloaded from the truck, the unloading of the truck beginning at the center of the platform and the truck being gradually moved [fol. 288] toward the edge, the packages being taken off at the space allotted to the particular size or brand of that package. In making this segregation of the packages as to sizes and brands, the platform men are guided by one-page catalogues furnished by the auction company. Those catalogues are made up in individual sheets, each sheet showing the line number by which the auction company sells each lot contained in the car, the brand and size of the fruit in that lot and the number of boxes in that lot. Even though the catalogues are not always accurate, they do provide a guide for the men in performing the unloading. I have with me, as samples, a number of such catalogues issued for one day during this month. You will note from those catalogues that the number of individual segregations which the platform men must make for each car runs as high as 25.

This unloading operation in Philadelphia requires from

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a minimum of approximately 1¼ hours to a maximum of approximately 2½ hours per car.

As at New York, the men unloading the packages from the truck will set off to one side any bad order packages for cooperage. After these packages have been repaired by the coopers, packages which are not approved by the Railroad Perishable Inspection Agency inspectors as having been restored to original condition are picked up by railroad employees and moved to one end of the shed where they are sold.

[fol. 289] Q. What is the appearance of the platform when the unloading is completed?

A. When the unloading is completed, each carload occupies its own separate space on the floor, the produce being placed in orderly piles on continuing aisles so as to allow for inspection of the goods by the buyers. The auction company then opens sample packages and displays them on top of the particular brand of which that package is a sample.

Q. Is the unloading operation in shed "B" where private sale is made performed in the same manner as in shed "A"?

A. The operation in shed "B" is similar, the principal differences being that two-wheeled hand-trucks are more extensively used and that the unloading of all hand-trucks is performed by employees of the consignees. Thus, in shed "B", the trucks are loaded by two car men and moved by three or more truckers to the space where it is to be unloaded where they are unloaded by employees of the consignee. Packages found not in good order are placed at the edge of the platform behind the car lot.

In this operation the truckers are required to take more time while waiting on the platform for the consignee's men to take the produce off the truck and stack it on the floor, since they usually take advantage of that opportunity to make a careful inspection of the produce. Thus, for example, in the case of onions, potatoes, and most other commodities in bags, the consignee's men will first examine [fol. 290] the bag, then turn it over to examine the other side and only then stack it in its place on the floor. Similar inspection is also made of boxed vegetables and fruit.

With respect to both sheds "A" and "B", the tracks serving the sheds are laid on the level of the pavement. After the cars are unloaded they are pulled out and that space is left empty so as to permit motor vehicles to gain access to the platform for the purpose of removing the merchandise.

Q. What commodities comprise the greater volume of the operation on each platform?

A. In shed "A" the great preponderance of the traffic consists of citrus. There is some citrus unloaded in shed "B" but the greater volume of the traffic consists of onions, potatoes, rutabagas, tomatoes and apples.

Q. How are top-iced vegetables and melons handled?

A. We have very few requests for unloading top-iced vegetables in Philadelphia. The great volume of that traffic moves to the team-tracks where the consignee removes sample packages for display in shed "B". After the sale is made, the receiver himself unloads the car on the team-track. Similarly, most of the melons are unloaded by the consignee on the team-tracks and sold from samples placed on the platform.

[fol. 291] Q. What are the other characteristics of this traffic which make it more difficult to handle than ordinary freight?

A. I have already explained the care that must be taken in handling perishable traffic to avoid breakage of container or damage to the contents. Certain commodities are shipped in what is called the "bulge" pack, meaning that the contents of the package extend above the side and ends of the container and the top is forced down and nailed to the end walls of the crate, leaving it with a slight curve. Frequently the nails work out and such packages cannot be placed on the regular hand trucks but must be moved specially to the spot allotted to the contents of the car on the platform where, unless the package can be restored to original condition and appearance, it will not be accepted by the consignee and must be disposed of by the railroad. It requires competent experienced men to restore these packages to their original condition.

Q. Mr. Hampton, in your capacity as agent at the Produce Terminal, do you regularly make a report to your

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superiors which, among other things, shows the cost of your operations at the produce company?

A. I do.

Q. Do you have figures from that report which show the cost of operation in June, 1937?

A. Yes, I have.

[fol. 292] Q. What is that figure?

A. My platform cost was 31.9 cents per ton.

Q. Do you have a similar figure for the cost of unloading for the month of June, 1945?

A. Yes, sir.

Q. What is that figure?

A. $1.122 per ton.

Q. And the figure for the month of June, 1946?

A. $1.062 per ton.

Q. Do you know what your costs during this month are?

A. Up to the day before yesterday it was $1.24½ cents per ton.

Q. Now, how do you determine that figure of cost which is shown in your report? What items does it include?

A. Platform supervision, platform clerical, actual labor handling packages, and cleaners.

Q. In unloading the produce in Philadelphia, is it correct that your men segregate the carload according to brands and sizes?

A. That is on freight loaded on A platform.

Q. Can you tell me how many segregations are made in making that segregation of brands and sizes?

A. That will run anywhere from 5 to over 100, probably 140 or 150.

Q. I hand you, Mr. Hampton, a sheet of paper headed "Philadelphia Terminals Auction Company." Can you [fol. 293] tell me what that sheet of paper is?

A. This represents the contents of a car of plums to be sold by the representative of the California Fruit Exchange, Mr. B. M. Young, at Philadelphia, on some day in July, 1947, and it describes the number of packages in the car, along with their contents and brand, and a line number associated to each line by the Philadelphia Terminals Auction Company.

Q. Where does the line number appear?

A. On the left.

Q. That is assigned by the auction company?

A. That is correct.

Q. That is the unit of sale by which the auction company sells the various lots in this car?

A. Yes, under that package rule.

Q. What appears in the second column?

A. That is what is known as the size of the contents.

Q. Does it also show the brand?

A. At the top of the second column, yes.

Q. What appears in the third column?

A. The number of packages in the particular line bearing that brand and size.

Mr. Miller: I offer this for identification as Exhibit No. 29.

Exam. Brown: It may be so marked.

[fol. 294] (Respondents' Exhibit No. 29, Witness Hampton, marked for identification.)

Exam. Brown: Your explanation of column one isn't quite clear.

By Mr. Miller:

Q. Turn again to Exhibit 29. Tell me who publishes that catalogue?

A. The Philadelphia Terminals Auction Company.

Q. Who determines the line numbers appearing in the first column?

A. The Philadelphia Terminals Auction Company.

Q. Of what use are those line numbers to the auction company?

A. My understanding is that it facilitates the sale by the auctioneer and the sales clerks, and it is then finally passed on to the delivery clerks and they use that number as a basis for their delivery.

Exam. Brown: Tell us what the line number means. Where did they get the number, and what does it signify?

The Witness: I don't know.

By Mr. Miller:

Q. Let me ask you this question. When a particular

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item is put up for sale by the auction company, how does the auctioneer refer to the lot he is selling at that particular time?

A. To the line number.

Exam. Brown: In other words, this just identifies the lot number? The first would be lot No. 1055?

[fol. 295] Mr. Miller: That is correct.

Exam. Brown: I understand that sufficient available copies of Exhibit 29 are not available at this time. If any of the parties wish to have a copy of that exhibit, there is only one for distribution or inspection here today. If any of the parties wishes a copy of that exhibit, please give your name to counsel so it can be supplied.

By Mr. Miller:

Q. Mr. Hampton, will you turn to Exhibit 29 again. In the third column I notice the first entry at the top of that column is six crates of sugar prunes. Can you explain what the words "crates sugar prunes," means?

A. I don't know what sugar prunes mean, no.

Q. Do you understand any of the writing which appears in that column?

A. No. No, I don't.

Exam. Brown: I don't believe we need to spend too much time on that exhibit. It is not too pertinent, as far as I can see.

By Mr. Miller:

Q. Just one further question on this. Is it correct that this is the catalogue to which you previously referred in saying that your men make use of it in making their segregation of the carload among various brands and sizes?

A. That is correct.

Q. So that when the men finish unloading this car, each one of these line numbers would be separately stacked [fol. 296] on the floor, is that correct?

A. That is correct.

Exam. Brown: As a matter of fact, it is stacked on the floor first, and then the auctioneer's representative of the

auction company determines what lot number is to appear on the particular location?

The Witness: The catalogues are printed before the cars are loaded. The lot numbers, or line numbers, are assigned before the cars are unloaded.

Exam. Brown: Then when the cars are unloaded is there any attempt made to locate those particular lots on the floor so that they will be convenient in connection with this auction or not?

The Witness: There is no connection at all.

Exam. Brown: All I asked you is whether any attempt was made when the produce is unloaded to put on the floor—whether or not there was any attempt made to locate that produce so that it would have any connection whatsoever with the auction announcement?

The Witness: Yes.

Exam. Brown: Now tell us what attempts were made, please.

The Witness: It will be lined up in this manner, beginning at the center of the platform and extending toward the edge, reading from top to bottom.

[fol. 297] Exam. Brown: Who will do that?

The Witness: The railroad company.

By Mr. Miller:

Q. Turning now to Exhibit No. 28, Mr. Hampton, will you explain to me what is shown in the picture numbered one?

A. Picture No. 1 is a view of the men in the car removing the strips on a carload of melons.

Q. And Picture No. 2?

A. Picture No. 2 shows the men in the car removing slats on a carload of small fruits.

Q. Are those slats placed between each layer of boxes?

A. They are.

Q. And picture No. 3?

A. Picture No. 3 shows the men in the car loading onto a two-wheeled hand-truck 100 bags of potatoes.

Q. Which part of the terminal was that taken from?

A. B platform.

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Q. And picture No. 4? Which part of the terminal was that taken from?

A. B platform.

Q. What does it show?

A. Honeydew melons being loaded into the car on a two-wheeled hand-truck.

Q. And picture No. 5, which part of the terminal does that refer to, if you know?

[fol. 298] A. I don't know.

Q. Now turn to picture No. 6 and explain that one, if you will, please.

A. This is a picture taken of a car being unloaded on A platform, and it indicates one four-wheel truck in the car being loaded with citrus fruits.

Q. What is the difference in the manner of unloading shown on picture 6 and that shown on picture 7?

A. That shows two trucks being loaded at one time on platform A from a car on platform A.

Q. What is shown on picture No. 8?

A. That shows a trucker pushing out a four-wheel truck on platform A, loaded with small fruits.

Q. And picture No. 9?

A. That shows a trucker pulling a two-wheel truck of melons out of a car on platform B.

Q. Turning back to picture No. 4, do you know whether or not that is the same car?

A. I don't know.

Q. Looking again at picture No. 9, what are those strips in the lower right-hand corner?

A. Those are known as Hoak strips.

Q. Those are the strips you previously referred to as being used to keep the individual boxes separate, and to provide for better ventilation of the boxes, is that correct?

[fol. 299] A. That is right.

Q. What is done with those strips after the car is unloaded?

A. At the present time we are accumulating those strips.

Q. For what purpose?

A. I believe the intention is to ship them west so they can be used again.

Q. And what is shown in picture No. 10?

A. That shows a trucker pushing a four-wheel truck loaded with citrus fruits to be displayed on platform A.

Q. And picture No. 11?

A. That shows a carload of pears stacked on the floor of platform A. The single boxes on top of the front of each pile will be opened for display purposes.

Q. Who is it that opens those boxes?

A. The Philadelphia Terminals Auction Company.

Q. When this picture was taken, had your men completed their work with respect to that carload?

A. Yes, sir.

Q. Is each pile of boxes a separate line, as shown in the catalogue of the auction company?

A. Yes, sir.

Q. And what is picture No. 12?

A. Picture No. 12 shows a carload of pears that is being unloaded and displayed on the platform. That car has not been completely unloaded as yet.

[fol. 300] Q. And what is picture No. 13?

A. I believe that is the same picture as No. 12. The only thing about that is that it shows a couple of packages are set aside for recoopering purposes.

Q. Picture No. 14?

A. That looks very much like a carload of cherries that has been unloaded on the floor for display.

Q. Again, am I correct in thinking that each separate pile shown there is a different line number on the auction company catalogue?

A. Yes, sir.

Q. Am I correct also in thinking that those boxes on top of the piles will be opened for display and inspection?

A. Yes, sir.

Q. What is picture No. 15?

A. Picture No. 15 shows the carload of small fruit unloaded for display on A platform.

Q. What is picture No. 16?

A. That is a picture of a carload of citrus fruit unloaded for display on A platform.

Q. Am I correct there, as in the previous cases, that those boxes on top of the piles will be opened for inspection and display by the auction company?

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A. Yes, sir.

Q. What is picture No. 17?

[fol. 301] A. That is a carload of melons unloaded and displayed on platform B.

Mr. Miller: If you please, Mr. Examiner, I would like to offer in evidence Exhibits No. 27, 28, and 29.

Exam. Brown: Is there any objection?

Hearing none, they are received.

(Respondents' Exhibits No. 27, 28, and 29, Witness Hampton, received in evidence.)

Exam. Brown: The cross-examination of this witness will be deferred temporarily.

(Witness temporarily excused.)

Mr. Miller: I will call Mr. Dilks.

Leon A. Dilks was sworn and testified as follows:

Direct examination.

By Mr. Miller:

Q. Will you please state your name and address?

A. Leon A. Dilks, Broad Street Station, Philadelphia.

Q. What is your present occupation?

A. Chief statistician, Accounting Department, Pennsylvania Railroad.

Q. How long have you been associated with the Accounting Department of the Pennsylvania?

A. Thirty-eight years.

Q. How long have you held your present title?

[fol. 302] A. Four years.

Q. Will you briefly describe your duties as Chief Statistician?

A. The preparation of statistics and reports for the Interstate Commerce Commission, Public Service Commissions, Stockholders, and Executive Officers.

Q. Have you made a study of the cost of unloading perishable fruits and vegetables at New York and Philadelphia?

A. Yes, I have.

Q. Have you prepared an exhibit based on the study you

made of the unloading operation in New York?

A. Yes, I have.

Q. What items of cost were considered in making your cost study of the unloading operation in New York?

A. The unloading of perishables in New York at Piers 27, 28 and 29 is performed by the Penn Stevedoring Corporation under contract with the Pennsylvania Railroad. The contract with the stevedoring company provides for payment at the rate of $1.148 per ton unloaded. In addition to these payments, however, additional payments are made for overtime; for time during which the men are on duty when there are no cars available for unloading; for time spent in cleaning the piers; and for certain additional operations such as moving the cars on the float, placing lights on the float and in the cars, and making repairs to equipment including tractors and dolly trucks. In addi- [fol. 303] tion to the work performed by the stevedores, certain employees of the railroad are also engaged in the unloading operation. They supervise the work of the contractor, check each carload as it is delivered to the receiver and maintain constant police protection throughout the pier.

Q. Does your study reflect any items of cost prior to the arrival of the cars at the pier?

A. No. My study relates only to the direct cost of the unloading from cars to the piers as described by Mr. Pettit.

Q. Will you please explain how you made the study on which Exhibit No. 30 is based?

A. Men from the Accounting Department were stationed on the piers to observe the operation and to determine the cost of the unloading operation. They supplied forms to the gang foreman on which were noted the time of beginning and the time of completing the unloading of each car arriving at the terminal during the test week, the commodity in the car, and the number of men who worked on that car. From these figures we accumulated the total number of hours required to unload the freight at the piers during the test week, showing a separate figure for each class of commodity in the tariff. From the tonnage figures on the waybills the total tonnage of each class of commodities was similarly accumulated. The total man hours

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and the total tons unloaded are set forth on the lower half [fol. 304] of the exhibit.

Q. How were these basic hour and tonnage figures applied to obtain the cost per ton?

A. From the records of the stevedoring company and the railroad agent we obtained the total payments to the contractor and to the railroad employees. As shown in the exhibit, the total of these payments was $32,139.95. The total of the time actually spent in unloading was divided into this amount to produce a cost per man-hour for unloading the produce. That figure amounts to $3.17 plus.

Q. What do you mean by Cost Per Unloading Gang Productive Man Hour?

A. The Cost Per Unloading Gang Productive Man Hour is the cost to the Pennsylvania Railroad of the labor supplied both by its own forces and by the stevedoring company per man hour. The term "unloading gang" designates the kind of labor concerned and the word "productive" indicates that the figure applies only to the cost of actual working time.

Q. Will you please explain the breakdown of payments to the stevedoring company and to the Pennsylvania Railroad employees?

A. The first item on the exhibit shows the amount paid by the Pennsylvania Railroad to the Penn Stevedoring Corporation for unloading these cars during the test week. The total payments for that week amounted to $27,096. The payments to the stevedoring company are based on the [fol. 305] contract price of $1.148 per ton with certain additional payments as shown in detail at the foot of the exhibit.

Q. Will you please explain each of the items noted in your breakdown of the payments to the Penn Stevedoring Corporation?

A. The item denoted "Tonnage basis" is the total number of tons handled covered by contract price of $1.148 per ton. It includes both the product of the number of tons unloaded at the piers multiplied by $1.148 plus the cost of rehandling the recoopered boxes. You will note

an item on the exhibit of $1,742.35 which is deducted to eliminate the second handling. "Overtime" is the amount paid to the stevedoring company representing the difference between the straight time rate and the overtime rate of time and one half for work on Sundays and in excess of eight hours per day. It includes only enough to reimburse the stevedoring company for the extra compensation which it actually pays to its employees on account of such overtime.

"Idle time" is the difference between the time paid for and time worked. Under the contract between the Penn Stevedoring and the railroad, extra payments are required to reimburse the contractor for idle time continuous for a period in excess of one-half hour for which the railroad is responsible. "Cleaning" refers to time consumed in sweeping and cleaning piers. Car movers, lampmen and [fol. 306] repairmen represent time consumed in moving cars, stringing lights on the piers, floats and in cars and repairing tractors, dolly trucks and other equipment used in unloading cars. It includes the work done by the employees whom the contractor designates as gaffers, riggers and gearmen. The last two items are self-explanatory.

The figures for workmen's compensation and public liability insurance are based on the premium rate in the insurance policy issued to the stevedoring company.

Q. Will you proceed with your explanation of Exhibit 30?

A. From our records we obtained the total amount of time which the unloading gangs spent in unloading each class of commodities. Those figures were multiplied by the cost per unloading gang man hour to arrive at a total cost for unloading each class of commodities. The total cost for each class was divided by the total number of tons unloaded during the test period to arrive at a cost per ton for each class of commodities. The cost per ton during the test period was $2.33 for fresh fruit, $4.24 for top-iced vegetables, $2.24 for vegetables other than top-iced and $1.26 for citrus fruit.

Q. Did you make a similar study with respect to the unloading at Philadelphia?

A. Yes, I did.

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Q. What items of cost were included in making your [fol. 307] study at Philadelphia?

A. The study includes only the direct labor cost to the Pennsylvania Railroad in performing the unloading. Some of the employees who performed the work were supplied by a labor contractor, L. E. Pilot & Sons, and the payment to the contractor for that labor has been used as a cost item. The remaining costs include only the wages of those employees of the Pennsylvania Railroad who are used in connection with the unloading operation.

Q. Have you prepared an exhibit showing the results of your study at Philadelphia?

A. I have.

Q. Will you explain that exhibit?

A. This exhibit represents the unloading cost at the Produce Terminal in Philadelphia for the period June 8 to 13, 1947. It was prepared in similar manner to the previous exhibit. The first item of $1,656.96 represents the amount paid to L. E. Pilot & Sons for supplying curbstone labor. The breakdown of that figure is shown at the foot of the exhibit, including the wages paid to the men supplied by the contractor plus payroll taxes, wages of the contractor, supervisors, and the contractor's 10% commission on labor. The second item on the exhibit, amounting to $2,339.50, represents the wages paid to Pennsylvania Railroad employees together with the Personal Injury Insurance and payroll taxes applicable to their wages. The number of [fol. 308] unloading gang productive man-hours was obtained in the same manner as the previous exhibit. The cost per man-hour was obtained by dividing the total unloading cost by the number of productive man-hours which produces $1.784360 as the cost per man-hour. In order to eliminate the expense for replacing recoopered freight and for unloading freight for the Railway Express Agency, the number of hours consumed in these operations was multiplied by the cost per unloading man-hour which produces a figure of $647.27 which is deducted from the total cost shown above leaving the amount of $3,349.25 as representing the cost for unloading freight for delivery to patrons.

Q. How did you obtain your figures of cost per ton for

unloading the various classes of commodities?

A. The average cost per hour of $1.78 was applied to the number of man-hours consumed in unloading the various groups of commodities which produces the total cost in the third column.

Q. How did you proceed from those figures to obtain a cost per ton for each class of commodity?

A. The total cost for each class of commodity was divided by the number of tons of that class unloaded which produces a cost per ton of $1.33 for fresh fruit, $.99 for vegetables other than top-iced, $.78 for citrus fruit and $1.10 for melons.

[fol. 309] Q. What other items of cost are incurred by the Pennsylvania Railroad which are not reflected in your exhibits?

A. There are a large number of items of cost to the railroad company in the unloading of the commodities which are not reflected in my exhibits. Thus, the exhibits do not take into account the cost of furnishing the platform tractors, dolly trucks, or the other equipment used by the unloading gangs. The cost of lighting, heating and removal of garbage is not included. The pier facilities used in the unloading operations in New York are leased from the City of New York and substantial improvements have been made by the Pennsylvania Railroad. The cost study reflects no portions of either the rental of the piers or the amortization of the improvements. Similarly, with respect to Philadelphia, no allowance is made for the amortization of original cost or for cost of maintaining the facilities there. The study does not include the wages of the agency forces except for those employees directly engaged in unloading. All costs of recoopering damaged packages have been excluded. Thus, the only items of cost included in the study are those items incurred directly in the unloading of the freight.

Q. Referring to your Exhibit No. 30, Mr. Dilks, I notice that you have there a figure of $3.17 plus, which you have denominated as cost per unloading gang productive man-hour. Can you tell me what is included in that amount in [fol. 310] addition to the wages of the men on the unloading gang?

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A. In addition to the direct wages, that figure includes the overtime work, the special payments on account of idle time, wages of cleaners and auxiliary forces supplied by the contractor, the contractor's overhead and profit, insurance and payroll taxes based on the contractor's payroll, the railroad employees engaged in the unloading operation and their overtime payroll taxes and insurance coverage, and the supervisors of both contractor and railroad whose duties are engaged in the unloading operation.

Q. Did you hear Mr. Hampton refer to certain reports which he makes of cost of his operation at Philadelphia?

A. I did.

Q. Do you know whether the cost items included in his report are different from those shown on your exhibit No. 31?

A. Yes. In addition to the labor costs that Mr. Hampton included, we have personal injury insurance and payroll taxes, and police protection, or watchman.

Q. Those are the items of cost which are not included in his figures?

A. That is right.

Q. Do your figures in all other respects cover the same cost items?

A. They do.

Mr. Miller: That completes the direct examination.

[fol. 311] If you please, Mr. Examiner, I would like to offer in evidence at this time Exhibits No. 30 and 31.

Exam. Brown: They will be received, subject to cross-examination, without objection.

(Respondents' Exhibits No. 30 and 31, Witness Dilks, received in evidence)

Exam. Brown: Off the record.

(Discussion off the record.)

Exam. Brown: This witness is excused temporarily.

(Witness temporarily excused.)

Exam. Brown: Mr. Pettit.

ERNEST PETTIT recalled for cross-examination:

Cross-examination.

Exam. Brown: Before proceeding with the cross-examination, there are a few questions I would like to ask Mr. Pettit.

It is my understanding that the operations of the Pennsylvania at New York contemplates the handling by the Pennsylvania Railroad itself of these deliveries. In other words, do you use any outside organization to handle them?

The Witness: The unloading?

Exam. Brown: Yes, sir.

The Witness: We use a contractor.

Exam. Brown: You handle it through a contractor?

[fol. 312] The Witness: That is correct.

Exam. Brown: Did you testify in this respect in your testimony?

The Witness: Yes, sir.

Exam. Brown: You did cover that in your oral testimony?

The Witness: Yes, sir.

Exam. Brown: Off the record.

(Discussion off the record.)

Exam. Brown: Will counsel please develop that at this time?

Direct examination (continued).

By Mr. Miller:

Q. Mr. Pettit, what is the agency which performs the unloading of the fresh fruits and vegetables at Piers 27, 28, and 29, North River?

A. The Penn Stevedoring Company.

Q. Do they work under a contract with the Pennsylvania Railroad Company?

A. Yes.

Q. That contract provides, I assume, that the Penn Stevedoring Company will supply the labor and perform the operation, taking the packages of fruit and vegetables from the cars and placing them on the pier floor, is that correct?

A. That is correct.

Q. Who supplies the equipment used in that operation?

A. The Pennsylvania Railroad Company.

[fol. 313] Q. Who maintains it?

A. The Penn Stevedoring Company.

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Mr. Wells: I suggest the best evidence is the contract itself, and I request that it be supplied.

Mr. Miller: I have been trying all day to get a copy of that contract made, Mr. Examiner, and my efforts so far have not been successful. I will get copies for all parties as soon as possible. I am operating under some difficulty because the contracts are in Philadelphia, and I haven't yet been able to get in touch with anybody there who can obtain the copy and have it photostated. I expect to be able to supply those copies before the hearing is completed.

Exam. Brown: If those copies are not supplied before the hearing is completed, I will give you 10 days after the hearing in which to supply copies to all parties.

Mr. Miller: Thank you very much.

Exam. Brown: However, I wish you would make every effort to get it in before the close of the hearing. Meantime, I will let you continue the development of that type of evidence through this witness, with the understanding that the contracts will be furnished.

By Mr. Miller:

Q. Is it correct that that contract provides for the payment of $1.148 per ton by the Pennsylvania?

A. That is correct.

Exam. Brown: Is that the present contract?

[fol. 314] By Mr. Miller:

Q. Is that the present contract?

A. That is the present contract.

Q. Is there any distinction specified in the contract as to the price per ton to be paid among the various commodities which the Penn Stevedoring Company handles?

A. Not that I know of.

Q. It is a flat rate?

A. A flat rate per ton.

Q. Do you know what the provision in that contract is for extra payments on account of overtime?

A. No, I don't, but I do know they are paid overtime. I don't just know what the provision is.

Q. Do you know what the other extra payments in ex-

cess of $1.148 per ton are that are provided in that contract?

A. I understand that they paid for unemployment insurance, and the other various items that come under the Labor Act.

Mr. Miller: I will have another witness, Mr. Examiner, who can explain the additional payments provided for in that contract in excess of the $1.148 per ton. That is Mr. Dilks. He can make a full explanation of that.

Exam. Brown: Very well.

Now, with respect to your statement that deliveries are made to receivers in the City of New York at the Pennsylvania Railroad Produce Terminal, and so forth, you refer to deliveries of citrus fruits, fresh fruits, cantaloupes, and [fol. 315] melons. Does the expression "melons" include watermelons?

The Witness: No, sir.

Exam. Brown: You mean to exclude then from your testimony the use of the word "melons" in connection with watermelons?

The Witness: Watermelons are not handled.

Exam. Brown: Do you have any watermelons that you handle at all through this produce terminal?

The Witness: No watermelons.

Exam. Brown: Where are they handled?

The Witness: The Manhattan Produce Yards.

Exam. Brown: Where is that?

The Witness: That is located between Jersey City and Newark, in the meadow lands.

Exam. Brown: Your testimony also refers to passing reports. You mean by that when a car passes a particular city that you receive notice that car has passed that city, is that the idea?

The Witness: That is the idea. We receive notice over the teletype, and that information is conveyed to the consignee.

Exam. Brown: You testified also that your floats holding from 8 to 10 cars—other testimony shows there are some floats that handle 16 cars. Do you handle any 16-car floats?

The Witness: We do not.

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Exam. Brown: When you refer to the fact in your testimony that your car men handle packages which have been [fol. 316] injured or demolished in transit, are those car men that you refer to your own employees or the contracting employees?

The Witness: They are the contracting employees.

Exam. Brown: The witness is available for cross-examination.

Cross-examination.

By Mr. Wells:

Q. Mr. Pettit, can you tell me how much volume relatively is delivered by the Pennsylvania in Manhattan as compared to Piers 27, 28, and 29?

A. I could only make a wild guess. I couldn't tell you.

Q. As a matter of fact, the only practical delivery by the Pennsylvania in New York City of the volume of fresh fruits and vegetables, including citrus, is on Piers 27, 28, and 29?

A. That is correct.

Mr. Miller: I object on the ground that what constitutes a practical delivery is a question of law which this witness is not competent to answer.

Exam. Brown: I wouldn't say that what constitutes a practical delivery is a question of law. It is a question of fact. You will have to have better grounds for your objection than that.

The witness has answered. I will allow the answer to stand.

By Mr. Wells:

Q. The only point, as I understood your direct testimony, [fol. 317] at which any delivery could be made on Manhattan Island by the Pennsylvania, other than the piers, is at your 37th Street Station?

A. That is correct.

Q. What is the capacity there?

A. I don't know. I don't run that. I understand it is about 155 working capacity.

Q. Do you know whether or not there has been any

considerable volume of fruits and vegetables delivered at that point?

A. I don't know what the volume has been there. They have had some there, but what the volume is I couldn't tell you.

Q. You do know that it has been very minor compared to your normal delivery here at Piers 27, 28, and 29?

A. Very minor, yes.

Q. On direct examination you said that your duties in connection with the movement of fruits and vegetables commenced when the Pennsylvania received them from their connection, say, for example, at Potomac Yards, is that correct?

A. That is right.

Mr. Miller: Objection. That is not the statement. The statement is that the duties of his organization begin there, and his description of the unloading operation was considerably after his response to that question.

Mr. Wells: I am sorry, I am afraid I don't understand. [fol. 318] I understood his statement to be on direct examination that "My duties with respect to these cars begins when the cars first reach the lines of the Pennsylvania."

Mr. Miller: That is correct, Mr. Wells, but that was not your previous question. Your question was as to when the duties of his organization with respect to the unloading of the cars began.

Mr. Wells: I didn't intend to say that, if I did.

Exam. Brown: Let the witness tell exactly what the situation is in his own words.

By Mr. Wells:

Q. Your duties in connection with fruits and vegetables handled by you commences when they first reach the Pennsylvania?

A. That is correct.

Q. That applies regardless of the point at which the delivery is made by your line? That is, whether you deliver at the Manhattan Produce Terminal in Jersey, or whether you deliver on Piers 27, 28, and 29, as is usually the

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case, or whether there is an unusual delivery at the 37th Street Station?

A. We cover the 37th Street Station and our own piers. We don't get arrivals on cars going to the Manhattan Produce Yards.

Q. You don't give any passing information on those cars?

A. No.

Q. But only on the cars coming to Manhattan Island?

[fol. 319] A. That is correct.

Q. Is there any difference in the information that you give on the cars coming to Manhattan Island as between the deliveries on Piers 27, 28, and 29, and the delivery at the 37th Street Station?

A. Any difference?

Q. Yes.

A. In the notification of passing?

Q. Yes.

A. No.

Q. You give the same information in either event?

A. The same information.

Q. Is that also true as to the arrival at Harsimus Cove?

A. Yes.

Q. The normal operation is for the cars to remain at Harsimus Cove until an order has been given to you to bring them over?

A. That is correct.

Q. Is the movement across from Harsimus Cove virtually the same as for delivery at Piers 27, 28, and 29, or delivery at the 37th Street Station?

A. In what respect?

Q. In whatever respect you handle them. If there is any difference, will you so detail?

A. Well, the difference is that the cars coming over to Piers 27, 28, and 29, are unloaded, and at 37th Street they [fol. 320] go into the yard.

Q. Do they come across on the same kind of float?

A. Sometimes, yes.

Q. Then with the exception of what happens to them after they get in the yard, the operation is similar, isn't it?

A. They are placed in the yard for delivery.

Q. Do you know of a single instance in your experience, or if you have any knowledge beyond your personal experience, of the Pennsylvania Railroad, where a car of fresh fruits and vegetables has been unloaded on Piers 27, 28, and 29 by shippers or consignees?

A. Not to my knowledge has it been done.

Q. Is it practical that it be done?

A. Well, we are unloading them now.

Q. Is it practical that they be unloaded by the consignee?

A. That would have to be set up and arranged for through the company and the trade.

Q. What is your judgment on it?

A. Well, under the present arrangement, my judgment would be that it would be quite some confusion.

Q. As a matter of fact, isn't it true that your operation is one of the most efficient in producing the best and maximum results from the facilities at hand?

A. Very good.

Q. And by so doing, you get more use out of the re-

[fol. 321] frigerator cars, don't you?

A. I presume we do.

Q. Well, you know you do, don't you?

A. You have got my answer.

Q. How long does it require between the time that a car of fresh fruits and vegetables leaves Harsimus Cove on the way across the river until that float returns to Harsimus Cove?

A. That would depend upon the time the cars on that float were ordered, what markets. If it was ordered for a 10 o'clock market, why, they would be unloaded immediately, and the float would be returned. If it is for the regular market that float would be held and the 10 o'clock market floats would be given preference.

Q. If I correctly understand your answer then, you unload the floats that are scheduled for 10 o'clock market first, and then proceed with the unloading of such other floats as may be alongside the pier?

A. That is correct.

Q. Well then, can you give me a time on the previous

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question that I asked you, taking into consideration those various conditions?

A. The time would vary according to the volume you have got at the piers. You may have only four or five floats to unload for your 10 o'clock, and you would get them out in the course of possibly two hours. And again, if you had a volume you would have floats behind them, [fol. 322] and you would pull your empties out, put your next loads in, and more time is consumed.

Q. In other words, you might do it in two hours?

A. It is possible.

Q. What is the maximum number of cars that you have handled—I am speaking of fresh fruits and vegetables now—on Piers 27, 28, and 29, within a 24-hour period?

A. Oh, we have gone in the neighborhood of 400.

Q. What is the smallest number in a 24-hour period?

A. Well, in the off-season we may go 50 cars.

Q. You don't know what the average is?

A. No.

Q. Mr. Pettit, at what point do you consider delivery made to the consignee?

A. After it is placed on the pier.

Q. By the railroad?

A. By the railroad.

Q. That is prior to the trucking that I believe you referred to on your direct examination?

A. No, that is after it is unloaded, completely unloaded and stacked.

Q. Well, is the stacking a part of your delivery?

A. That isn't a delivery. That is the unloading. We stack it ready for delivery.

[fol. 323] Q. For the stacking and sorting by grades and sizes there is a separate charge?

A. There is a separate charge.

Mr. Wells: That is all.

Cross-examination.

By Mr. Augello:

Q. Mr. Pettit, how many times would you say that you have used the same space within a 24-hour period?

Mr. Miller: The same space where?
Mr. Augello: On the pier.

A. I couldn't say.

By Mr. Augello:

Q. You heard the testimony of Mr. Hart?
A. I did.
Q. His testimony was that very often they used the same space twice.
A. That is possible.
Q. Have you the same conditions on your piers?
A. We do that occasionally, yes.
Q. Do you ever use the same space more than once?
A. I don't know. We may have.

Exam. Brown: If counsel will talk louder it might encourage the witness to do the same.

By Mr. Augello:

Q. Do you stack up your crates and boxes of fruits and vegetables in the same manner that the Erie Railroad does?
A. I don't know how the Erie Railroad does it.
[fol. 324] Q. I show you Exhibit No. 22, the stacking of Sunkist oranges, stacked seven high on the Erie pier.
A. Well, we do approximately the same way, depending on the number of boxes in a car. It would depend on the height you put them.
Q. Regardless of whether or not these are loaded three high in the car, you would stack them up seven high on the pier?

Exam. Brown: What is loaded seven high in that picture? I count six.
Mr. Augello: I am sorry. Six high.

A. Yes, we would.

By Mr. Augello:

Q. So the conditions would be about the same on your piers?
A. That is right, sure.

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Mr. Augello: That is all.

Cross-examination.

By Mr. Matson:

Q. Mr. Pettit, you mentioned a contract price of $1.148 per ton which applies on fruits and vegetables. What services are performed by the Penn Stevedoring Company for that amount of money?

A. Unloading the cars and taking the contents of the car out on the pier.

Q. Does that include stacking?

A. That includes stacking them up.

Q. On your direct testimony you stated because of the nature of the traffic the Pennsylvania Produce Terminal in [fol. 325] New York is a 24-hour operation requiring the railroad constantly to keep employees on duty at the piers. Then you conclude. "This a more expansive operation than would be required in an ordinary freight office which is open for only eight hours a day." Now, what is the basis of that conclusion that this is a more expensive operation than it would be if you had just an 8-hour operation?

A. Well, your perishable operation is practically continuous. You start in with getting your orders, and you work your sheets for unloading, and your cars are unloaded. After they are unloaded then your deliveries commence, and so on through the day. Sometimes at the peak of our season we are delivering freight there at 9 or 10 o'clock at night.

Q. If all this business were compressed into an 8-hour period, could you conduct that in the same size terminal?

A. I don't get that.

Q. If all of this business that you conduct in the 24-hour period were compressed into an 8-hour period, could you do that in the same size terminal?

A. No. You couldn't do it in eight hours.

Mr. Matson: That is all.

Exam. Brown: How many car floats does the Pennsylvania normally use in a day's operation for this particular traffic?

The Witness: Well, we can, with our present operation,

[fol. 326] berth 13 floats.

Exam. Brown: You do what?

The Witness: Berth 13 floats.

Exam. Brown: You actually berth them?

The Witness: Actually berth them.

Exam. Brown: During what period of time?

The Witness: Well, from your start of unloading, the peak, when we start at 5 o'clock in the afternoon, why, you would start berthing them and working them, work them right through the night.

Exam. Brown: From 5 o'clock at night until what time tomorrow would you use 13 floats?

The Witness: Until you finished at 5 or 6 o'clock in the morning.

Exam. Brown: You say your current operations use 13 floats?

The Witness: You can berth 13 floats. You would use a great many more.

Exam. Brown: I asked you what you actually use.

The Witness: I couldn't tell you what we actually use. We may use 30 or 40.

Exam. Brown: How many does the Pennsylvania Railroad own?

The Witness: I don't know.

Exam. Brown: How many floats normally come into your [fol. 327] terminals in the course of the unloading period from 5 o'clock at night until the next morning? Is 13 your figure?

The Witness: Oh, no. You would have more than that.

Exam. Brown: All right. Tell me your figure.

The Witness: It probably wouldn't be too accurate, but I would say you would have—possibly you would have 40 floats—40 to 45 floats moving in and out of there.

Exam. Brown: It might be interesting information if you would tell us how the floats are handled when they come into your pier. Do you have any congestion there at any time with respect to handling them?

The Witness: No. That is taken care of by the Marine Department. They will have tugboats there, and we notify their office what float is ready. They will have that open. They will pull that light float out and put a loaded float in.

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Exam. Brown: You don't encounter any congestion at all with respect to loading or unloading so far as the floatage is concerned?

The Witness: So far as the floatage is concerned there is no congestion.

Exam. Brown: Is there any further cross-examination?

Cross-examination.

By Mr. Hoffman:

Q. Mr. Pettit, you are familiar with the appearance of these fruit cars, as for example, the car of deciduous fruit at the time it is opened?

[fol. 328] A. I have seen some of them.

Q. Does the car contain any lumber for bracing and stripping?

A. Sometimes they do.

Q. What do you mean by sometimes? Are there occasions when it doesn't have any lumber or stripping?

A. I will tell you, we handle so few of them at our piers that I couldn't tell you much about them.

Q. Then take by way of example a car of citrus fruit.

A. I have never seen any bracing or stripping of a car of citrus fruit.

Q. Don't you handle some deciduous fruit?

A. Very little.

Q. Would you prefer to say that you are not familiar with the lumber and bracing in that car?

A. I prefer to say I am not familiar.

Cross-examination.

By Mr. Van Arnum:

Q. Do you know, and if you do, whether the Penn Stevedoring Company's employees belong to the same union that was mentioned here this morning?

A. The longshoremen?

Q. Yes.

A. Yes, they do.

Q. They belong to the same union?

A. Yes.

Q. Have you ever, for any reason of the trade, had more orders to put cars on team-tracks at the 37th Street Yard [fol. 329] than you had space to put them on?

A. Not that I know of. I am not familiar enough with it.

Q. I believe you mentioned there was working space of——

A. A working capacity of 155 cars. Understand I am not sure whether that is correct or not, but that is my understanding, that they have a working capacity of 155 cars.

Q. Then you have never had the experience of having to decide what to do if you had more orders for cars to be placed there than you had space to place them?

A. I have not.

Mr. Van Arnum: That is all.

Cross-examination.

By Mr. Loos:

Q. Mr. Pettit, does the Penn Stevedoring Company also do the recoopering on your piers?

A. They do not.

Q. Does your company on your piers handle other commodities in addition to fruits and vegetables?

A. Not during the heavy season. All our other freight is handled at Desbrosses Street Station which is adjacent to the 29th Street Bulkhead, or what would be Pier 30.

Q. Do you ever handle any dairy products or such?

A. We handle dairy products on Pier 29. Not too much of that.

Q. Do you handle any other products on Piers 27, and 28? [fol. 330] A. No.

Q. Nothing but fruits and vegetables?

A. Nothing but fruits and vegetables.

Q. Can you give any estimate of the quantity of dairy products on Pier 29 during the course of a year?

A. No. I would say our average is not over three cars a day.

Mr. Loos: That is all.

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Exam. Brown: Piers 27 and 28 are practically idle during the daytime?

The Witness: Idle during the daytime.

Exam. Brown: Is there any further cross-examination? Is there any redirect?

Redirect examination.

By Mr. Miller:

Q. Mr. Pettit, in response to one of the questions put to you on cross-examination, you stated that you would expect that unloading by consignees would create some congestion on the piers.

A. I said confusion.

Q. Confusion. Do you mean by that that there would be confusion resulting if each consignee individually and separately unloaded his own car?

A. That is correct.

Q. It is that situation to which you were referring?

A. That is right.

Q. Isn't it correct that you think it would be entirely [fol. 331] practicable?

Mr. Wells: I suggest that counsel is leading his witness very considerably.

Mr. Miller: I am sorry. I will try to refrain from doing so in the future.

By Mr. Miller:

Q. Can you tell me your opinion as to whether or not it would be practicable for the railroad and the trade to work out a situation under which the consignees would unload and yet maintain substantially the efficiency which you have been able to attain in unloading at the piers?

A. That would be possible, I believe.

Q. In connection with a question of the Examiner, I believe, you referred to the 10 o'clock market. Do you mean 10 p. m. or 10 a. m.?

A. 10 p. m.

Q. When a carload lot is placed on the floor and is then rehandled by the consignee and restacked by the consignee, when would you say delivery occurred?

A. As soon as he takes possession of the car.

Q. Now to go into this restacking proposition on the piers, can you tell me whether or not you normally perform a restacking and sorting operation?

A. We do not.

Q. Can you give me any idea as to the number of times, or the quantity of carloads which are sorted?

[fol. 332] A. It is so seldom, I couldn't. It is very seldom we have to sort a car.

Q. Can you tell me whether or not that operation is a continuous one, or whether it is broken up in two separate operations?

A. Well, the unloading operation is one part of it, but you still have your operation with your clerks of taking care of your deliveries after the cars are unloaded, and then you have certain office work that is also connected with it.

Q. I think you misunderstood my question. Let's put it this way. Will you explain in detail, please, the various ways in which these commodities are handled on the piers insofar as the restacking is concerned. That is, is it a continuous operation, is it divided into two parts with the railroad putting the boxes on the floor and then the consignee resorting them, or——

A. It is a continuous operation. Once a car is started it is continued right on until it is finished, regardless of whether the consignee is sorting it or whether we are sorting it.

Q. Does the railroad ever unload the entire carload on the pier floor before there is any sorting done?

A. Many times they do.

Q. Does it ever happen that the railroad sorts the packages as a part of the same operation in putting them on the floor?

[fol. 333] A. If we were required to sort the car we would sort it as we bring it out and put it on the floor.

Q. Does it happen that the consignee's men sort the carload at the same time that the Penn Stevedoring men are placing the packages on the floor?

A. Sometimes they do.

Q. Can you tell me during what hours of the day this

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unloading operation is carried on?

A. That would vary, depending upon the volume you have moving.

Q. On a heavy night when does the operation begin?

A. The operation would begin at 7 o'clock on a heavy night.

Q. When would it be completed?

A. It would be completed at sometime about 6 o'clock the following morning.

Q. What goes on on the piers between 6 o'clock in the morning and the time when the unloading begins on the following evening? What operations take place on the piers from the time one day's unloading is completed until the next night's unloading begins?

A. Your operation is then your deliveries. That is going right on until that evening.

Q. What are the consignees doing on the platform during the day?

A. They are making deliveries.

Q. In your direct testimony you stated that the operation on the piers was a 24-hour operation. Can you tell me [fol. 334] whether or not the continuous operation is a result of the railroad's policy in making deliveries there, or is that a practice which has been developed by the trade?

A. I would say it is a practice developed by the trade, because they require these delivery hours. You have to have your 10 o'clock delivery.

Exam. Brown: a. m. or p. m.?

The Witness: 10 p. m.

By Mr. Miller:

Q. What other deliveries?

A. You have your regular market delivery, at midnight, then you have your peach delivery, which is 3 o'clock, I believe, now.

Exam. Brown: 3 o'clock a. m.?

The Witness: 3 o'clock a. m.

And your tomato market—when that runs heavy I think that will be 2 a. m.

By Mr. Miller:

Q. In respense to some questions by the Examiner, you stated that you would sometimes use 45 floats in making deliveries to the produce terminal. Can you tell me when that would occur?

A. That would occur in the peak of your season, probably in January, February.

Q. Can you give me any idea as to the smallest number of floats used during the light season?

[fol. 335] A. Three to five.

Exam. Brown: In connection with that 40 or 45 floats you also told the Examiner the operations start around 5 o'clock in the afternoon, yet you told your counsel the operations for heavy movement start around 7 o'clock—the unloading operations. Can you explain that discrepancy?

The Witness: The heavy movement—our operations start Sunday morning at 7 o'clock. We work our day gangs through until 5 p. m., and at 5 p. m. the night gangs come on and work through.

By Mr. Miller:

Q. Do you mean in that last statement that you begin at your heaviest season unloading at 7 a. m. Sunday morning?

A. That is correct.

Q. And that is an unloading operation?

A. That is an unloading operation entirely.

Q. That unloading operation continues through for a complete 24-hour period?

A. That is correct.

Exam. Brown: I want to get this discrepancy straightened out between 5 at night and 7 o'clock. The witness told you the operations began at 7 o'clock at night, and he told me 5 o'clock.

The Witness: That is an average start.

Exam. Brown: That is what?

[fol. 336] The Witness: That is an average time that we start.

Exam. Brown: Which is average—5 o'clock or 7 o'clock?

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The Witness: The starting time governs entirely how your markets run.

Exam. Brown: Which is the average, 5 or 7?

The Witness: I would say 7, your Honor.

Exam. Brown: All right. Then you don't wish to have your evidence considered with respect to 5 o'clock?

The Witness: No, that is right.

By Mr. Miller:

Q. Your testimony would seem to indicate that there is a wide variation during the course of the year between the time of the beginning of the unloading operation, is that correct?

A. That is correct.

Exam. Brown: What did you mean when you told me that during part of the day the piers are practically unused? As I understand it now there is quite a considerable operation there during the day, when you have your peak season.

The Witness: We have the peak season at the present time.

Exam. Brown: You mean that statement to apply at the present time?

The Witness: At the present time.

Exam. Brown: During a heavy shipping season you would work?

The Witness: Yes, we have. During the peak season there [fol. 337] is freight on the piers all the time.

Exam. Brown: Is there an unloading operation all the time during the peak season?

The Witness: No.

Exam. Brown: Tell us the situation now.

The Witness: Well, your peak season—I have explained in your peak season we start on Sunday morning at 7 o'clock, work right straight through until the following morning.

Exam. Brown: How about Monday morning?

The Witness: Monday morning it isn't necessary because you don't have the volume. You only have that volume over the week-end.

Exam. Brown: How about Tuesday and the rest of the week?

The Witness: It isn't necessary then.

Exam. Brown: What is the operation in the daytime then?

The Witness: 7 o'clock in the daytime?

Exam. Brown: Yes.

The Witness: There is no unloading operation in the daytime.

Exam. Brown: Then you are only talking about week-ends when you are talking about a 6 a. m. operation?

The Witness: That is correct.

Exam. Brown: Are there any further questions, counsel?

Mr. Miller: Yes, please.

By Mr. Miller:

Q. When the Examiner was asking you about the opera-[fol. 338] tion on the piers during the daytime, his original question, did you understand that to refer solely to the unloading operation?

A. No.

Q. Then during your slack season could you tell me at what time during the day the delivery of cars unloaded during the previous evening is completed?

A. Well, as a rule they are completed by 8 o'clock in the morning, the following morning.

Mr. Miller: That is all.

Exam. Brown: Are there any further questions of Mr. Pettit?

(Witness excused.)

Exam. Brown: I will give you a short recess at this time for the purpose of considering the direct testimony of Mr. Hampton so that you will be able after the recess to cross-examine him.

(A short recess was taken.)

Mr. Smith: The record will show, Mr. Examiner, that witness Root referred in his testimony to an audit for the year 1946 of the operations under the contract between the Seaboard Company and the Erie Railroad Company. The record will also show that counsel Loos requested that

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a copy of the audit to which Mr. Root referred be made a part of the record in this case.

[fol. 339] Accordingly, I offer in evidence as Exhibit 32 a copy of the audit to which Mr. Root referred.

You will note that such audit is in the form of a letter dated February 20, 1947, from Special Accountant T. P. Ward, Auditor of Disbursements, G. W. Oakley.

Exam. Brown: It will be marked Exhibit No. 32 and received in evidence, if there be no objection.

(Respondents' Exhibit No. 32, Witness Root, received in evidence.)

Exam. Brown: Mr. Hampton will be recalled for cross-examination.

MARSHALL L. HAMPTON previously sworn, was recalled, and testified as follows:

Cross-examination.

By Mr. Wells:

Q. Mr. Hampton, how long have you been an agent for the Pennsylvania Railroad in Philadelphia?

A. Since February 1, 1941.

Q. Are you familiar with the method of delivery by the Pennsylvania of fruits and vegetables in Philadelphia prior to the opening of the Pennsylvania Produce Terminals as shown in your Exhibit 27?

A. No, sir, I am not.

Q. Since you have been in Philadelphia, what is the actual practice in regard to unloading fruits and vegetables?

A. It is done by the railroad company.

[fol. 340] Q. In all instances?

A. Yes, sir.

Q. Both on team-tracks as well as the produce terminal?

A. No. I am talking about unloading in warehouses A and B by the railroad company.

Q. At those warehouses, or in cars alongside, are the consignees or shippers permitted to unload?

A. Occasionally.

Q. How extensive has been that practice?

A. Not very extensive.

Q. What is required to permit a shipper or consignee to unload under those unusual circumstances?

A. That would depend upon the amount of traffic moving and the availability of the space.

Q. Would it require a special request by the shipper in each instance to you?

A. By the consignee, yes, sir.

Q. What are the reasons for the unloading by the railroad company at Philadelphia on fruits and vegetables into the freight houses A and B?

A. Apparently they desire the trade to have their entire car unloaded and displayed for sale.

Q. At what points do you make delivery of the commodities in the car?

A. On the platform.

[fol. 341] Q. You mean after it is unloaded by you and stacked inside the shed?

A. That is correct.

Q. You are not familiar then with the background as to the conditions existing prior to the time that the Pennsylvania Produce Terminal was built?

A. No, sir, I am not.

Mr. Wells: That is all.

Mr. Augello: Mr. Dougherty would like to cross-examine.

Exam. Brown: Very well.

Cross-examination.

By Mr. Dougherty:

Q. Mr. Hampton, you offered in evidence as Exhibit No. 27 this announcement published by the Pennsylvania Railroad of the new produce terminal built in 1927, and I understood you under direct examination at that time to say you were familiar with it.

A. That is right. That is right.

Q. Do you know what brought about the building of this terminal?

A. No, I do not.

Q. Are you aware that it was impossible for the Pennsylvania to handle goods at auction at that time without the terminal?

A. No, I am not.

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Q. Well, if you knew about this terminal, and are acquainted with it, isn't it something that you should also know the other facilities that the Pennsylvania had in [fol. 342] Philadelphia at that particular time?

Mr. Miller: Objection. The question is argumentative. He has answered the only factual quantity in the question.

Exam. Brown: Well, we are interested in the present time. What is the present situation? History might be interesting, but I don't believe it will be of any particular use in this case. What is the present situation? As I understood, the terminal was built about 1927.

Mr. Dougherty: That is right.

Exam. Brown: That is 20 years ago, so except from the historical standpoint it wouldn't be useful to go into the situation prior to that time. In any event, this witness doesn't know, so it is not necessary to proceed in that respect.

By Mr. Dougherty:

Q. Mr. Hampton, under direct examination you testified of the fact of deliveries at Engleside Station, and also at 31st and Chestnut Streets team-track. Are these stations available for the produce trade?

A. Yes, sir.

Q. Are they used by the produce trade?

A. On occasion, yes, sir.

Q. Aren't they primarily chain store delivery points?

A. They are.

Q. It is just on a rare occasion that an independent [fol. 343] would use one?

A. That is right.

Q. You also went into detail about the method of unloading merchandise on A platform for auction. You did inadvertently miss the fact that the auction company does provide help that arranges these lines?

A. I don't know of anything the auction company does with regard to the arranging of the lines or anything like that.

Q. We do have night men on your dock?

A. What is their purpose?

Q. They mark up the floor and mark out the lines. You

also testified under direct that in the unloading of all cars you must sort as to catalogue. Is that true of a solid car of grapes?

Mr. Miller: Will you specify whether you mean a solid car in the sense of having only one grape or one brand? Is that what you mean?

Mr. Dougherty: Yes. Grapes usually arrive in that way.

Mr. Miller: With no way of segregation as to brands?

Mr. Dougherty: Yes.

A. I can answer by saying this. A solid car of grapes with one brand usually covers a catalogue with a specific number of items against a certain number of lines.

By Mr. Dougherty:

Q. You have not answered the question, though.

[fol. 344] A. Well, I will have to ask for the question again.

Q. Is there any sorting required for this on your part?

A. No, just a separation.

Q. Only insofar as number 1001 in the line?

A. Yes.

Q. Is that the way you so testified on direct?

A. That was my intention to make it read that way.

Exam. Brown: You refer to this 1001. That is not in the record, that particular lot.

Mr. Miller: May I ask him a few questions?

By Mr. Miller:

Q. On a solid carload of grapes, having only one brand and size in the entire carload, do you segregate that carload on the platform in accordance with the line numbers of the auction company catalogue?

A. We do.

Q. So that although there is no sorting as to brands and size, the various lots in the car as determined by the auction company will be set in separate piles on the floor?

A. That is right.

Mr. Miller: That is all.

By Mr. Dougherty:

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Q. While we are fresh on that, Mr. Hampton, you have just answered counsel that you separate this car of grapes as to line number in that catalogue. You have nothing to do with the line number on that car of grapes. It would make no difference if it was 500 or 4500. Our employee puts [fol. 345] the line number on after you unload them.

Exam. Brown: When you say employee you mean what?

Mr. Dougherty: We maintain two employees at the Pennsylvania platform, and two on the B & O at night while this unloading is going on to mark up the lines.

Exam. Brown: What is your company?

Mr. Dougherty: The Philadelphia Terminals Auction Company.

Exam. Brown: You are speaking solely for them now?

Mr. Dougherty: Yes, sir.

Mr. Miller: I don't believe there was a question asked.

Exam. Brown: Read it.

(Last question read by the reporter.)

Exam. Brown: Is that a statement of counsel or is it intended to be a question?

Mr. Dougherty: I didn't think Mr. Hampton meant to get into the record that when he answered counsel that he had assorted line numbers. That is just unloading and stacking 101 in the pile.

The Witness: That was my intention, to get in the record that we unload a certain number of packages against which a line number has been associated with that number of packages.

By Mr. Dougherty:

Q. How long has the custom of unloading this merchandise for auction been in vogue in Philadelphia, Mr. Hampton?

[fol. 346] A. I believe since the terminal was opened in 1927.

Q. Isn't it a fact that even before the formation of the auction company that that was the custom in Philadelphia?

Exam. Brown: If you know.

A. I don't know.

By Mr. Dougherty:

Q. Do you know of any time when there was any charge assessed?

A. I never heard of any charges being assessed for unloading fruits at the fruit auction, at the produce terminal, since it was opened in 1927.

Q. Has there ever been any unloading by the consignees in Philadelphia onto your platform?

A. On which platform do you have reference to?

Q. A or B.

Mr. Miller: I would like to ask you, Mr. Dougherty, are you asking whether or not the consignees have unloaded on the platform in Philadelphia?

Mr. Dougherty: Yes.

A. Yes, on platform B.

By Mr. Dougherty:

Q. There has been?

A. Yes, there has been.

Q. Is that privilege available and known to the produce trade of Philadelphia?

A. I believe it is generally known but it isn't always taken advantage of.

[fol. 347] Exam. Brown: It is seldom taken advantage of?

The Witness: It is seldom taken advantage of.

Exam. Brown: That was your testimony?

The Witness: Yes.

Exam. Brown: And it is your testimony?

The Witness: It is my testimony.

By Mr. Dougherty:

Q. Who does the assorting in Philadelphia?

A. The assorting on A platform is done by the railroad, and the assorting on B platform is done by the consignee or his representative.

Q. Do you believe, Mr. Hampton, that you have the facilities to deliver from team-tracks or with commodities sold by auction in Philadelphia?

A. We do.

Q. Do you have the personnel to take care of them if that method is used?

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A. We don't need the personnel because we do not deliver from cars unloaded on team-tracks.

Q. You do not deliver to the independent concerns either, is that right?

A. We do not deliver to consignees or buyers.

Exam. Brown: You mean you don't unload a car when you spot it on the team-track? You deliver it to the consignee on the team-track, is that right?

The Witness: That is right.

[fol. 348] By Mr. Dougherty:

Q. What is the method the auction company uses in signing for your merchandise?

A. The auction company signs a delivery receipt on the morning when the car has been unloaded and displayed on the platform.

Q. In the event when we do sell from sample occasionally, when do we sign for the contract?

A. I don't know.

Q. You are the agent there?

A. Well, I will ask you when you signed them.

Q. We sign for it after we get delivery of the cars. We don't do like the independents do.

Exam. Brown: Do you agree with that statement of counsel?

The Witness: He is off on two subjects there.

Exam. Brown: I asked you if you agree with the statement of counsel. If not, it will not be considered in any respect so far as this record is concerned.

The Witness: I do agree.

Exam. Brown: You do agree with it?

The Witness: Yes, sir.

By Mr. Dougherty:

Q. Then you feel, Mr. Hampton, in the event that you are upheld in this petition, that the auction company will be obliged to take this delivery from team-track in the same manner and method which is now in vogue in Philadelphia?

[fol. 349] Mr. Miller: Objection. There is no testimony to that effect that I recall.

Exam. Brown: Read the question.

(Question read by reporter.)

Exam. Brown: You may answer, if you know.

A. No.

Exam. Brown: What does the "no" mean?

The Witness: The answer is no, they will not be obliged to take team-track delivery. We will still unload it for them.

By Mr. Dougherty:

Q. That isn't the point. In the event that this unloading tariff is inaugurated and we go to team-track, is it your contention that we will have to adjust ourselves to adopt a manner now in vogue in your yards?

Mr. Miller: Objection. I don't think he can understand the question. There is no testimony to the effect that there will be any change in the present practice, and I don't understand how the witness can possibly answer the question.

Exam. Brown: Well, the question is a little involved. When you have team-track delivery ordinarily the carrier doesn't unload anyway. So under present practices the shipper would perform the unloading.

Mr. Miller: I have no objection to the question if you can put it in such form that he can answer it.

Mr. Dougherty: I am only following out what Mr. Hampton previously stated, as to just how he took it on the [fol. 350] team-track, and I pointed out to him we signed for cars after they were unloaded, not before we started to unload it even when it is from team-track. Now, I am still on the same thought.

Exam. Brown: Isn't it a fact that at the present time when a car is delivered on the team-track the shipper does the unloading? Is that right, Mr. Witness?

The Witness: Yes, sir.

Exam. Brown: So the practice wouldn't be any different if the charges were to go into effect with respect to team-track delivery, would it?

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The Witness: No, sir.

Exam. Brown: Is that right, counsel?

Mr. Miller: That is correct.

Exam. Brown: If you limit your question to unloading at warehouses I think the witness could answer that.

Mr. Dougherty: Well, I didn't mean, Mr. Examiner, to limit it to warehouses, because as to when you are compelled to sign for the car is very important in this particular case, whether it is out on 17 and you sign before you start to make deliveries, or whether you make deliveries and sign later. I contend that is very important.

Exam. Brown: Well, as your question now limited to warehouse delivery.

Mr. Dougherty: O. K.

[fol. 351] Exam. Brown: Reframe your question and make it simple.

By Mr. Dougherty:

Q. Mr. Hampton, then you expect in the event of this charge being upheld and inaugurated, that we will be compelled to accept the same type of delivery at team-track as is now in vogue?

A. No.

Mr. Miller: Objection.

Exam. Brown: When I said to limit it to warehouse delivery, I meant to limit it to that. You can take up team-track later. Simplify your question to cover delivery as to warehouses.

Mr. Dougherty: Well, I certainly understand that if the charges are put into effect that the auction company will be expected to pay them at the warehouse at the terminal. Certainly I realize that.

Mr. Miller: Mr. Dougherty, as I understand your question, it is confusing, because you have included in it an assumption that the produce trade will be forced to take team-track delivery, and then you proceeded to ask whether or not the practice would be the same. It is that confusion that I find difficult here. If you can change your question

so that you break it down into two or three questions, then I think we will have no objection whatever.

Exam. Brown: Keep your team-track delivery out of your question now and limit it to delivery at the warehouse. You [fol. 352] can go ahead with your question and there will be no objection. If you want to cover team-track delivery, do it afterwards, and then I will rule on that.

By Mr. Dougherty:

Q. Mr. Hampton, in the event the charges are instituted, the auction company will be expected to pay the same charges over their platform for unloading?

A. Naturally, it is a tariff provision.

Q. And in the event that these charges are such that could interfere with our business and we would be compelled to go to team-track, then it would be your idea that we have to accept the practice now in vogue?

Mr. Miller: Objection.

Mr. Augello: The practice of what—signing?

Mr. Dougherty: Yes.

Exam. Brown: Restate the question.

By Mr. Dougherty:

Q. Then with the inception of these charges it would affect our business to such an extent that the auction company would find it necessary to go entirely to team-track delivery, and then it would be your idea that our representative would have to sign for these cars before we started to make deliveries?

A. Not necessarily.

Exam. Brown: I understand you have no objection to that question?

Mr. Miller: I don't understand it, so I can't object.

[fol. 353] Exam. Brown: Your witness has answered and you are bound by your witness' answer. It seems clear to me. Maybe when I read it it will not seem so clear.

By Mr. Dougherty:

Q. The petition to put in the charges, Mr. Hampton, as

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I have gathered from this hearing and the preliminary hearing, is to provide additional revenue, isn't that correct?

Mr. Donadio: I object to that. This witness is not in a position to testify as to what was the railroads' purpose in proposing to publish this charge.

Exam. Brown: I don't believe this witness is qualified to answer that type of question. Are you?

The Witness: No, sir.

By Mr. Dougherty:

Q. Would recoopering of packages be handled in the same manner from team-track as they are from platforms?

A. Yes, sir.

Mr. Miller: Objection.

Exam. Brown: The objection is overruled.

Mr. Dougherty: That is all.

Cross-examination.

By Mr. Loos:

Q. Mr. Hampton, is this unloading performed by employees of the Pennsylvania Railroad Company or by the contractors?

A. The unloading is performed by employees of the Pennsylvania Railroad, and what we call our curbstone em-[fol. 354] ployees whom we obtain from a contractor.

Q. What is the name of that contractor?

A. The Pilot Company.

Q. Is the recoopering also performed by the employees of the railroad?

A. Recoopering is performed by the railroad's Perishable Inspection Agency.

Q. On a separate payroll?

A. On a separate payroll of the R. P. I. A., yes, sir.

Exam. Brown: Is that in connection with the Pennsylvania Railroad?

The Witness: The Pennsylvania Railroad.

Exam. Brown: It is a facility of the Pennsylvania?

The Witness: Yes.

Mr. Donadio: Will you read that back?

(Question read by reporter.)

Exam. Brown: Do you wish to impeach the testimony of your witness?

Mr. Donadio: I don't think it is a matter of impeaching his testimony. I think it is a matter of confusion as to what the question indicated.

Exam. Brown: We will let you wait until redirect examination.

Mr. Donadio: I don't think it is material anyway.

[fol. 355] Exam. Brown: If you want to straighten it out now, if opposing counsel has no objection——

Mr. Donadio: Could it be understood for the record that the R. P. I. A. refers to the Railroad Perishable Inspection Agency, which agency is doing this type of work for all the railroads, for which all the railroads pay their proportionate share?

Mr. Loos: That is my understanding.

Mr. Augello: In official classification territory?

Mr. Donadio: Yes.

Is that your understanding?

The Witness: Yes.

Exam. Brown: It is understood your testimony is corrected accordingly.

By Mr. Loos:

Q. Mr. Hampton, in your direct testimony you referred to the salvage of the bracing, and so forth. Will you describe that in a little more detail? What do you do with the lumber you recover, and what do you get out of it?

A. We salvage as much of this bracing as we possibly can, and we use it for the most part to make floor boards to rest our potatoes and onions on during the cold weather, or bracing cars that may be partly unloaded overnight to provide for switching operations.

Q. You use it in your own operations at the produce terminal, is that correct?

[fol. 356] A. That is right. We will make headboards for two-wheel trucks and also our four-wheel trucks that we use on the platform for the delivery of freight where displayed by consignees.

Q. Does that make it unnecessary for you to buy lumber

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for those purposes?

A. It hasn't been necessary for us to buy lumber for a long time.

Q. With respect to the so-called Hoak bracing, what do you do with that?

A. We are accumulating as much of that as we possibly can.

Q. What will you do with it when you have accumulated it?

A. I do not have the disposition of it. When I acquire a carload then I will seek disposition from my superiors.

Exam. Brown: You testified on direct you had some idea of returning it to the source of shipment.

The Witness: I believe that is the intention.

Exam. Brown: That is just a guess on the part of the railroad? You don't know what you are going to do, whether it will be economical or not to return it? You don't know? You don't know personally?

The Witness: No, but I understand that is the intention.

Exam. Brown: I don't believe it is particularly important anyway, unless the particular bracings are expensive. We have had no testimony to that effect.

Mr. Loos: I was going to ask him if he expects to get [fol. 357] any revenue from that bracing.

The Witness: Yes, sir.

Mr. Miller: Will you explain whether, by the word "revenue," you mean transportation revenue on returns, or whether you mean a selling price for the lumber?

Mr. Loos: The selling price.

By Mr. Loos:

Q. You expect to sell that Hoak bracing?

A. No. We expect to be compensated for collecting it and storing it until such time as we ship it. Then, of course, it will go out on a lumber rate, whatever rate applies.

Exam. Brown: It is quite conjectural as to what you expect to do with it, or whether you will get any revenue at all from it? I don't believe evidence of that type is of any use at all.

Mr. Loos: That is all.

Cross-examination.

By Mr. Hunter:

Q. Mr. Hampton, my predecessor, Mr. Lane—didn't he forward a letter about the Hoak bracing to you, about accumulating that Hoak bracing with a definite price for the return of same to the shipping organization in California that uses the Hoak bracing?

A. I recall a letter. Do you recall the sender of it?

Q. No, I haven't the letter. I could produce it tomorrow.

A. Well, I will say this. I distinctly remember the letter. It refers to Hoak strips and there was a price offered for the return of them. However, that particular Hoak [fol. 358] strip was not the type we are accumulating today. We are accumulating those which come in cars containing Honeydew melons. We are not interested in those other Hoak strips which are used in the plum cars, and the small fruits like that.

Mr. Hunter: That is all.

Cross-examination.

By Mr. Van Arnum:

Q. Mr. Hampton, your unloading labor at the Pennsylvania Produce Terminal is employed direct by the Pennsylvania Railroad, is that correct, except for the few employees referred to in Mr. Dilk's statement, obtained from L. E. Pilot & Sons?

A. Perhaps I can answer that by saying this. We have a certain number of their employees on our payroll, and when it is necessary to supplement them we will contact this contractor and ask him to send us a certain number of men to do that particular job for that particular day.

Q. All I wanted to ask you is what labor union do those of your employees in the first group belong to. Is it the Railway Labor Clerks?

A. Yes.

Q. What union do the ones that you get from L. E. Pilot & Sons belong to?

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A. I don't think they are organized.

Q. They are not organized?

[fol. 359] A. I don't think so.

Q. But yours are regular railway clerk station employees?

A. American Federation of Labor, yes, sir.

Mr. Hunter: That is all.

Cross-examination.

By Mr. Matson:

Q. Mr. Hampton, you gave us some figures on platform costs, and the latest one of those was $1.245 for July, 1947, is that correct?

A. That is right.

Q. Tell us what that covers.

A. That covers the pay of the platform supervision, platform clerical employees, the pay of the men who actually handle the freight, that is, car men, platform men and truckers, and also cleaners on the platform.

Q. Does that also cover the service of stacking up the boxes for display?

A. Yes, sir.

Q. Has that been broken down in any of the studies to indicate how much would appertain to that particular service?

A. No, sir, we don't make a separation of that at all.

Q. You gave us the figure of 31.9 cents per ton—I believe that was the figure you gave us.

A. Yes. 31.9 cents per ton was our platform cost for June, 1937.

Q. That covers the same services that you now pay $1.245?

[fol. 360] A. That is right, yes, sir.

Mr. Matson: That is all.

Cross-examination.

By Mr. Hoffman:

Q. Mr. Hampton, some of the lumber which is used as bracing consists of two by fours?

A. Yes, sir.

Q. How many feet of two by fours would you say there would be in a car of deciduous fruit?

A. Oh, I don't know. Probably 40 or 45.

Q. 40 to 45 linear feet?

A. Yes.

Q. In connection with the Hoak load, are any nails used in those two by fours?

A. In the Hoak load?

Q. Yes.

A. Are you describing the Hoak load as being made up by two by fours?

Q. No. Are any two by fours used in the Hoak load? Let's begin with that.

A. Yes. I believe in the doorway of the car.

Q. Are there any nails in the two by fours after they are removed from the car?

A. Yes.

Q. Are there any lengths at all that would have no nails in them?

[fol. 361] A. No.

Q. Do you use all of the two by fours in connection with your terminal operations?

A. No. Many of them are taken by the consignees.

Q. In connection with fruit that is received at the auction?

A. At the auction as well as on the team-track, yes, sir.

Q. Do you give the consignee at the auction a right to remove the two by fours?

A. We don't object if we don't need it.

Q. Have you sold any of the two by fours?

A. No, sir.

Q. Have you disposed of any of the two by fours for other uses by the Pennsylvania other than at this terminal?

A. No, sir.

Q. Do you handle eggs at this terminal?

A. No, sir.

Q. Do you handle any other perishables besides fruits and vegetables?

A. No, sir.

Q. Do you handle any other commodities that require

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care in handling?

A. No, sir.

Q. I call your attention to Exhibit 28, picture No. 10, and ask you if you can tell us what the words "Lay FL" stand for?

A. The "AT" is missing. It is "Lay Flat."

[fol. 362] Q. Is this picture characteristic of the way you handle these deciduous fruits?

A. No.

Q. The words "Lay Flat" is a direction to the handler to lay the box flat, is that not so?

A. Yes.

Q. Insofar as that direction is concerned, you have not followed the direction?

A. Not for probably five minutes in the extensive journey from California to Philadelphia, or from Florida to Philadelphia.

Q. Well, I was referring to your testimony in which you spent considerable time stressing the exceptional care which must be given to the perishables here in issue as compared with other freight. You state, "Frequently the nails work out and such packages cannot be placed on the regular hand-trucks but must be moved specially to the spot allotted." I was referring to that, and I was going to ask you whether the fact that the nails are protruding has been due to damage in transit?

A. No. I was specifically referring there to the instance where the bulge pack has sprung lids, and because of that fact we cannot put it on the same truck to dispatch it to the line where it is to be laid down on the floor. It must be put on a separate truck and passed on to the cooperer.

[fol. 363] Q. But in your opinion, the fact that the lids have been sprung, is that due to the transit movement?

A. Partly.

Q. Through a mishandling of the car?

A. Not necessarily. Just ordinary handling is liable to loosen it up.

Q. How many packages in a car would have nails protruding? I am referring to your answer in which you said, "I have already explained the care that must be taken in handling perishable traffic to avoid breakage of container

or damage to the contents. Certain commodities are shipped in what is called the bulge pack, meaning that the contents of the package extent above the side and ends of the container and the top is forced down and nailed to the end walls of the crate, leaving it with a slight curve."

Mr. Miller: Mr. Hoffman, did I understand you to say that the testimony was that there were nails protruding?

Mr. Hoffman: Yes. He says, "Frequently the nails work out."

Mr. Miller: But in the testimony there is no statement to the effect that the nails are protruding.

By Mr. Hoffman:

Q. Clear it up. When you said the nails were protruding, do you mean the nails have worked out entirely, or that they are protruding?

A. I mean the nails work out with the lid.

[fol. 364] Exam. Brown: You mean they are extruding?

The Witness: I mean the lid is nailed down, and the lid comes up, and the nails come up with it.

Mr. Miller: Mr. Hampton, do the heads of the nails protrude above the wood which makes up the top of the package?

The Witness: No.

By Mr. Hoffman:

Q. Then your best opinion is that the fact that these nails have come out, it is due to an unusual transit?

A. No.

Exam. Brown: You have used the word "transit" twice now. I think you had better explain for the record transit at what points?

Mr. Hoffman: I mean in the course of the line haul.

Exam. Brown: You mean that in the sense of the line haul movement up to the terminal?

Mr. Hoffman: Yes.

Exam. Brown: You don't mean due to any transit stop?

Mr. Hoffman: No. I mean in the course of the movement of the car from point of origin to point of destination.

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A. My answer is that a car does not necessarily have to be rough handled in order to have the lid spring on bulge packs.

By Mr. Hoffman:

Q. How many such packages would you think would be in that condition in the average car?

A. Probably 15 or 20.

[fol. 365] Q. Would there be many cars that wouldn't have that condition?

A. Some cars have been known to arrive without any lids being sprung at all, whereas others have had more than 15 or 20.

Q. In connection with those containers where the nails have been removed, the Pennsylvania Railroad undertakes to recooper those boxes?

A. Yes, through the railroad Perishable Inspection Agency.

Q. The Pennsylvania does that recoopering at its own expense?

A. Yes, through the railroad Perishable Inspection Agency.

Q. And assumes the duty of putting those packages in acceptable condition for the consignees?

Mr. Bongartz: I object to the form of the question—"duty." If he will take out "duty," and limit it to what the Pennsylvania Railroad does, I won't object.

Mr. Hoffman: Well, I think this witness is an expert, and I think this witness is entitled to make some statements that perhaps an ordinary witness wouldn't make with respect to railroad matters. We have had tariff experts here give us their opinion with respect to what tariffs contain, much in the manner that lawyers might expound the law.

Mr. Bongartz: You can argue the question of duty. Aren't you interested in obtaining facts from the witness?

Mr. Hoffman: Are you going to withdraw your objection?

Exam. Brown: The question implies an answer which was to be a conclusion of law, and I don't believe the question [fol. 366] was put in any such sense, or was intended so.

When you say "assumes the duty," opposing counsel assumed that you meant "assumes the legal duties." You didn't mean that, did you?

Mr. Hoffman: No. I meant assumed the work, the activities.

Mr. Bongartz: All right.

Exam. Brown: Under that situation the objection is withdrawn?

Mr. Bongartz: That is right.

A. I haven't answered yet. What was the question?

By Mr. Hoffman:

Q. In that situation the Pennsylvania Railroad undertakes the work, or the activity, of putting that particular container or box in a condition acceptable to the consignee?

A. Yes, through the railroad Perishable Inspection Agency.

Q. In those cases where the Pennsylvania Railroad is of the opinion that the container as it was originally loaded in the car was not in proper condition, the Pennsylvania Railroad does not undertake to perform this same operation or activity in restoring that container in a condition which is acceptable to the consignee?

Mr. Bongartz: Before the witness answers that question I want him to think about all the various items that have been put in the question which involve the Pennsylvania's investigation into the manner of the loading of packages at [fol. 367] points of origin.

Exam. Brown: The question is long and involved. It is understood the witness will take proper care in answering all these questions, because we want a record that is accurate.

You heard the question. Do you understand it?

The Witness: Yes, I do.

Mr. Miller: Read the question.

(Question read by reporter.)

A. My understanding is that the railroad Perishable Inspection Agency will endeavor to recooper any kind of package, regardless of whether it is properly prepared for shipment, provided they can restore it in good order without the contents of the package being damaged.

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Mr. Hoffman: I have no further questions.

Exam. Brown: Is there any further cross-examination of Mr. Hampton?

Is there any redirect?

Redirect examination.

By Mr. Miller:

Q. In response to some questions on cross-examination, Mr. Hampton, you stated, as I recall it, that delivery was had at the Pennsylvania Produce Terminal when the goods were placed on the platform. In making that answer, did you refer to physical delivery?

Mr. Wells: What other kind is there?

[fol. 368] Mr. Miller: As contrasted with a legal conclusion as to the point at which delivery takes place.

Exam. Brown: You objected, counsel, to the use of legal conclusions here by this witness, and I don't believe you should be permitted to indulge in the same type of question.

Mr. Miller: The question is intended, Mr. Examiner, to indicate that the witness was referring solely to the physical handling on the platform.

Exam. Brown: You can ask the question in that form without worrying him as to what a legal conclusion is, which is worrying me, too.

By Mr. Miller:

Q. In your answer with respect to the time when delivery takes place on the platform, did you mean to indicate that that is the time where physical delivery takes place?

A. What I mean to say is when the auction company takes possession of the goods they take delivery of it.

Q. And that is physical possession you are talking of?

A. Yes.

Q. You have no reference to any legal conclusion as to the legal meaning of the word "possession"?

A. No.

Mr. Wells: I object to counsel leading the witness as to legal conclusions.

Mr. Miller: I will attempt to refrain from that.

[fols. 369-371a] Exam. Brown: The answer is what? Did you answer the question?

The Witness: I believe I said "No."

Exam. Brown: The answer will stand, although it was a leading question in part. Please refrain from leading questions.

By Mr. Miller:

Q. This accumulation of Hoak strips which you are doing at the present time, did you begin that accumulation in response to a request by the shippers?

A. Through our officials, yes.

Q. In their work on the platform, are the employees of L. E. Pilot & Sons subject to orders of the Pennsylvania Railroad foremen, or do they have for-men of their own?

A. They have foremen of their own, but their foremen work under the direction of the Pennsylvania Railroad foremen.

Mr. Miller: That is all.

* * * * * * * * * *

[fol. 372] Proceedings of July 31, 1947

Exam. Brown: Mr. Dilks will resume the stand for cross-examination.

Leon A. Dilks resumed the stand, and testified further as follows:

Cross-examination.

By Mr. Pettijohn:

Q. Mr. Dilks, were there any other commodities reflected in your Exhibit No. 30 handled over Piers 27, 28, 29 during the week studied by you?

Mr. Miller: Commodities other than what?

Mr. Pettijohn: Other than on his exhibits.

A. 42 tons of dairy products.

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By Mr. Pettijohn:

Q. What was the basis of your apportionment of the expenses between the other cars and the commodities reflected on your exhibit?

A. The time was kept separately for each operation.

Q. In other words, you took the actual working time and then apportioned the total time on the basis of the working time consumed in handling the different products?

A. We took the time consumed on the various classes of commodities and applied the rate applicable to the employee.

Q. Can you tell me how many cars were unloaded during that period?

A. 928.

Q. How many cars were unloaded over those piers for the [fol. 373] calendar year?

A. I don't know.

Q. Then there is no way in which you can take your week's study and expand it into the year's activities and determine whether or not the week was representative?

A. The only way you could expand it would be by multiplying by 52.

Q. Would you figure that by multiplying by 52 you would arrive at the actual total cost? After multiplying by 52, wouldn't you have to determine the total cost and then equate your cost as found on this exhibit so that your total cost and equated cost would be identical?

A. Well, the only cost that we could arrive at would be based on this week's study by multiplying by 52. It wouldn't necessarily come out the average cost because it wouldn't be exactly 52 times the number of cars handled during the year.

Q. If you multiplied by 52, you would assume the week was representative without being able to prove it was representative?

A. We confined our cost study to this week.

Q. That isn't what I asked you. I asked you if you multiplied by 52 you would be assuming that this week was representative?

A. Well, we didn't multiply by 52 in this study.

[fol. 374] Q. You still haven't answered.

Mr. Bongartz: I submit he has. You asked him to multiply by 52. He didn't suggest it.

Exam. Brown: The witness suggested the only way to ascertain the year's results would be to multiply by 52. Now, the question is, that would assume that the week was representative. Is that right?

Mr. Pettijohn: That is right.

Exam. Brown: That is the question.

The Witness: Will you repeat that, please?

Exam. Brown: The question simply is: If you went through that computation, that would be assuming that the week you selected is representative. That is the question.

A. Mr. Pettijohn, January and February were heavy months, so I would say it would be representative.

By Mr. Pettijohn:

Q. If they were heavy months, how could they be representative?

A. Not peak months, but good months.

Q. Now, if you were directed by your superiors to determine the cost of recoopering your packages, wouldn't you take the $1,742.35 appearing on your Exhibit 30, and identify it as "repla-ing recoopered freight," as the cost of recooperage?

A. Recoopering of freight is not included here. It is only the handling of the recoopered freight.

[fol. 375] Q. I know the cost of recoopering isn't, but this handling is done for the purpose of recooperage, isn't it?

A. That is right.

Q. Isn't it a cardinal principle of cost accounting that the item that is responsible for the cost should be assigned with the cost?

A. Yes.

Q. Therefore, the labor in placing these packages for recoopering is recoopering cost rather than an unloading cost, is it not?

A. Well, we have taken that out of our cost. The handling of the recoopered freight—that is a deduction there.

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Q. Have you taken it out in determining your cost of $3.174194 man hour cost?

A. No, it isn't taken out there.

Q. Therefore, you have included that cost as an unloading cost, have you not?

A. Not in our final results, because we have eliminated that $1,742.35.

Q. Will you please explain to me where you have eliminated that item of $1,742.35 in arriving at your cost per ton on fresh fruit?

A. Well, we kept the record of the number of hours that were consumed in handling the recoopered freight, and as shown on the exhibit, it is 548.91, and multiplying that by the cost of unloading gang productive man hours, it [fol. 376] amounts to $1,742.35, and that is deducted from the cost shown above, making a net of $30,397.60.

Q. Now, in your amount paid to the Penn Stevedoring Corporation you have an item there for cleaning. What is that cleaning?

A. Cleaning the piers.

Q. On your Exhibit No. 31, were there any commodities handled other than those shown on that exhibit at the Philadelphia Produce Terminal?

A. No, not on the pier where the perishables are handled.

Q. So there was no apportionment of expenses there except that applicable to these commodities?

A. That is right.

Q. In the course of your connection with the Pennsylvania Railroad, have you ever been directed to determine what the comparative costs of unloading fresh fruits and vegetables at New York were as compared to what the costs would be if you had team track delivery here?

A. No, sir.

Mr. Pettijohn: That is all.

Cross-examination.

By Mr. Matson:

Q. Mr. Dilks, will you refer to your Exhibit No. 30,

please? This caption, "Replacing Recoopered Freight, etc." What does the "Etc." stand for?

[fol. 377] A. Why, there are a few little items there. Well, that is payroll tax, insurance, and so on. There is a portion of that included in the $3.17. We just put that "etc." in there to show that it covered other costs associated with the labor.

Q. In your last line, you show a 4 per cent payroll tax on payroll of $17,299.28, included above. Now, I don't see that $17,299.28 above anywhere. Can you tell us where that is included?

A. Well, it is buried in the items from $20,538.18 down. It is confined to the stevedoring company labor. We made that $17,299.28 from a summary of the wage payments included in the stevedoring company's bill.

Q. Why shouldn't that item be $20,538.18?

A. Well, because that includes other than labor. That is contractor's profit.

Q. Now, this $1.148 which you paid to the Penn Stevedoring Corporation, does that include the contractor's profit?

A. Yes.

Q. I have added up the tons unloaded in your next to the last column in the lower central part of the page there, and they add up to 16,705.57.

A. That is right.

Q. Now, if that were multiplied by $1.148, should not that give you the amount paid to the Penn Stevedoring [fol. 378] Company on the so-called tonnage basis?

A. No, for the reason that some of it has been deducted and is included in the replacing of recoopered freight.

Q. Is that the only deduction from that?

A. That is all. That is a deduction from various items down below, but the chief amount is in the tonnage basis.

Q. Now, I have multiplied that out, and according to my calculations, multiplying $1.148 times 16,705.57 amounts to $19,177.99, which, subtracted from your item paid to the Penn Stevedoring Corporation on a tonnage basis of $20,538.18, gives a difference of only $1,360.19. Now, shouldn't that agree with your 1,742.35?

A. No, for the reason that some of the overtime, idle

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time, cleaning, and so on, from the total $1,742.35 is made up from parts of all those items down there.

Q. I still can't see why you do not pay a 4 per cent payroll tax on the entire amount paid to the Penn Stevedoring Company of $27,096. Is all of that subject to a 4 per cent payroll tax?

A. No. The $27,096 is total bill. We only pay tax on the amount of the payroll.

Q. You mean to imply, then, that the Penn Stevedoring Company makes a profit of $10,000 on this operation for four weeks?

A. I don't know about their profit. We made it on the basis of the time consumed—worked it up that way.

[fol. 379] Mr. Matson: I have a correction on that. That should be just one week instead of four weeks.

Exam. Brown: What should be one week?

Mr. Matson: In my previous question I mentioned a four-week period. It is only one week.

Exam. Brown: You mean the stevedoring company made $10,000 for one week instead of four weeks?

Mr. Matson: That is what it looks like.

Exam. Brown: In other words, your question refers to one week duration rather than four weeks?

Mr. Matson: Yes, sir.

Exam. Brown: For that particular item?

Mr. Matson: Yes, sir.

By Mr. Matson:

Q. Is there any material difference between the handling at New York and Philadelphia in so far as your cost study is concerned?

Mr. Miller: Objection. Will you define what you mean by handling? I don't understand your question. I don't think the witness possibly can.

By Mr. Matson:

Q. Will you tell us, is there any difference between the handling which you studied at Philadelphia and the handling which you studied at New York, and which are portrayed in your Exhibits 30 and 31?

Mr. Miller: May I ask this question: Do you mean differences in the way it is handled from an operating man's [fol. 380] point of view? Do you mean differences in the way the cost study was made? Just what do you mean by this difference in handling?

Mr. Matson: I am referring to the physical handling which was studied by the witness.

Mr. Miller: I object, then, because this witness is not competent to answer any question with respect to the operations at either of these piers. This is a cost witness. The question is much more properly directed at either Mr. Pettit or Mr. Hampton.

Mr. Matson: I submit the witness can answer from the basis of his exhibits here just what he studied.

Exam. Brown: The witness should answer on the basis of his exhibits. In other words, it is up to him to explain his exhibits in every respect, and tell us how he arrived at the underlying data.

Mr. Miller: I submit, Mr. Examiner, that this question does not relate to the method in which this data was accumulated. This is a question as to how the operation is conducted at New York and Philadelphia.

Exam. Brown: If this witness doesn't know how the operation is conducted, how can he compute the figures? He must have some fair knowledge of these operations, or certainly he wouldn't be qualified to assign costs to particular operations. I think the witness should answer the question [fol. 381] to the extent of his ability.

A. The unloading at Philadelphia is done by Pennsylvania Railroad labor, whereas in New York it is chiefly a contract proposition.

By Mr. Matson:

Q. Is that the only difference?

A. Yes.

Q. Would you say that the time of year would make any difference? I notice that the test week at New York was in the winter time, and at Philadelphia it was in the summer time.

Mr. Miller: Objection. That question definitely requires

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a far greater understanding of the way in which these operations are conducted than this witness could possibly know.

Exam. Brown: Let the witness tell us whether he knows or not. You are proposing a cost study here. If you can't back up the items by the information as to the underlying data, I don't know how you can expect the Commission to give too much credence to this cost study.

Mr. Bongartz. I would like to make this observation, Mr. Examiner: Counsel has asked a very general question, the answer to which will obviously be the difference between the testimony given by Mr. Hampton and that given by Mr. Pettit.

If you will ask specific questions, I think possibly the witness could answer. The question was general in character, [fol. 382] what is the difference between Philadelphia and New York, and then because the witness does not go ahead and detail every difference between the two operations, which was the subject of the operating witnesses yesterday, counsel starts to pick it apart and say, "You didn't mention this."

Why not ask specific questions?

Exam. Brown. You are willing to stand on the operating evidence in conjunction with this?

Mr. Miller: Yes, indeed.

Mr. Bongartz: Yes.

Exam. Brown: I still think this witness should know the differences and exact types of operation in both New York and Philadelphia, in order to make an intelligent cost study. That is simply an observation.

By Mr. Matson:

Q. Mr. Dilks, why did you pick the week of June 8th in Philadelphia, and the week of February 1st in New York?

A. It was supposed to study Philadelphia at the same time as New York, but there was a strike down there, and it was postponed until that was over.

Q. That was the only reason that the studies were not made more or less simultaneously?

A. Yes, sir. We had men ready to send down to the Produce Terminal in Philadelphia.

Mr. Miller: When was it you had your men ready to send [fol. 383] to Philadelphia Produce Terminal?

The Witness: February 1, 1947.

By Mr. Matson:

Q. Is it your view that this week of June 8th is typical for Philadelphia, then?

A. I don't know whether it is or not.

Q. Do you have any explanation whatever for the wide variation in the ultimate results of these two studies?

A. No, I haven't.

Q. The only suggestion you have made so far is that at one place you have used Pennsylvania Railroad labor, and at the other place you used contract labor. Is that the only suggestion you mean to leave on this record?

Mr. Bongartz: Suggestion for what? Don't answer the question until he clarifies the question.

By Mr. Matson:

Q. The only suggestion you have made so far as to the reason for the difference between the operations in Philadelphia and in New York has been based on the fact that at one point you used Pennsylvania Railroad labor and at the other point you used contract labor.

Mr. Miller: Mr. Examiner, I would like it noted that the previous question of counsel, as I understood it, was a question as to the total sum of differences in the way in which these commodities are handled at New York and Philadelphia.

As I understand his present question, it is directed to [fol. 384] the issue as to why there is a difference in cost at New York and Philadelphia.

I think it is wholly unfair to construe the witness' previous answer to an entirely different question, as now meaning that he has testified as to the total sum of reasons for the difference in cost between the two operations.

Exam. Brown: The testimony you have just referred to will be considered in the light of the statement you have made.

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If the witness wishes to qualify his answer in any respect, I will permit him to do so now.

The Witness: We simply used the facts of the amount of time consumed and the rate of pay applicable to that time in arriving at our total cost, along with insurance and payroll taxes, and so forth.

By Mr. Matson:

Q. That is as far as you wish to go in amplification of your answer?

A. That is all I have to say.

Mr. Matson: That is all.

Exam. Brown: Just a moment, please.

Docket No. 29504 is set for hearing this morning at 9:30. This hearing we are now engaged in has interfered with the calling of that case for hearing. We will go off the record at this time so that I may discuss with the parties in that case exactly how we will handle the hearing.

[fol. 385] (Discussion off the record.)

Exam. Brown: On the record.

The hearing in Docket 29504 will start at 3:00 p. m.

Mr. Augello, do you have any cross-examination?

Mr. Augello: I have no questions.

Mr. Loos: Mr. Examiner, I would like to ask a few questions.

Cross-examination.

By Mr. Loos:

Q. Mr. Dilks, in your Exhibit 30, in arriving at the cost per ton, did you make any adjustment for sorting charges or sorting costs on the Pennsylvania Pier?

A. We didn't include the sorting time, so they are not in our figures.

Q. How did you determine what was sorting time and what was unloading time?

A. From the men on the pier that kept a record of the time consumed.

Q. Where did you determine that the unloading time ended and the sorting time began?

A. That was the opinion of the men on the piers between the unloading and the sorting.

Q. You don't know?

A. No further than that.

Q. Have you with you any sample of the reports from which you determined that information?

[fol. 386] A. I don't have the New York form here. I have the Philadelphia. There is such a volume of those I didn't bring them.

Q. There are no sorting charges in Philadelphia, are there?

A. I meant the forms on which we kept a record of the time of unloading the cars.

Q. Did you make any comparison between the time at which you concluded the sorting charges began and the time at which the sorting charges began in the study in which the cost of sorting was determined in a proceeding before the Interstate Commerce Commission 179 ICC 780?

A. I am not familiar with that proceeding.

Q. Do you know that there was a study made of the sorting costs and sorting charges in another case before the Commission?

A. No, I don't know.

Q. You didn't make any investigation of that situation, then, in connection with your present study?

A. No.

Exam. Brown: What case is that?

Mr. Loos: 179 ICC 780.

Mr. Bongartz: What is the name of the case?

Mr. Loos: I & S 3590.

Mr. Bongartz: I still like words besides numbers.

Mr. Miller: Allowance for stacking at New York.

[fol. 387] Mr. Hoffman: What was the page number?

Mr. Loos: 780.

By Mr. Loos:

Q. You are not able, then to give us any information whatever with respect to the time included in the sorting compared with the time included in the unloading?

A. No, because we didn't take a record of the sorting.

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Mr. Loos: That is all.

Mr. Hoffman: I have no questions.

Exam. Brown: Is there any further cross-examination of this witness?

Is there any redirect?

Redirect examination.

By Mr. Miller:

Q. Mr. Dilks, do you know with respect to the operation at New York the volume of traffic which is restacked at Piers 27, 28 and 29, relatively?

A. No, I don't.

Q. In the choice of the weeks February 1st to 7th, 1947 and June 8th to 13, 1947, do you know whether or not those weeks were chosen as being typical weeks showing the operation at New York and Philadelphia?

A. They were the weeks set by my superior. I don't know any further than that.

Q. In connection with the handling of freight other than fresh fruits and vegetables, and with respect to the handling of recoopered freight, both in New York, can you tell me how you arrived at the cost of handling that [fol. 388] freight?

A. Did you say handling of other than fresh fruits and vegetables?

Q. Yes. And recoopered freight.

A. Well, the time was kept separately for dairy products, amounting to 43 tons, and likewise the time was kept for the second handling, or the replacing of the recoopered freight.

Q. In making an allowance for those two operations, am I correct that the same figure, $3.17, would apply in determining the cost of handling those two items?

A. Definitely, yes.

Mr. Miller: That is all.

Exam. Brown: Exhibits 30 and 31 have been received. There is one question I want to ask you: Whether or not the item "melons" includes watermelons on Exhibit 31?

The Witness: There were no watermelons.

Exam. Brown: No watermelons included in these costs?

The Witness: That is right.

Exam. Brown: Is there anything further of this witness?

(Witness excused.)

Mr. Francis L. Brown: I will call Mr. May.

Richard G. May was sworn, and testified as follows:

Direct examination.

[fol. 389] By Mr. Francis L. Brown:

Q. Will you state your full name and business address?

A. Richard G. May, West 72nd Street and North River, New York.

Q. By whom are you employed?

A. The New York Central Railroad.

Q. In what capacity?

A. Assistant Superintendent.

Q. How long have you held that title?

A. Thirteen months.

Q. How long have you been employed by the New York Central?

A. Nineteen years.

Q. In your capacity as Assistant Superintendent, are you familiar with the handling of fresh fruits and vegetables at Pier 17 and the Bronx Terminal Market?

A. I am.

Q. First, will you describe the handling of fresh fruits and vegetables at Pier 17 in New York City?

A. The carloads of fruits and vegetables are brought to Barclay Street on what they call platform floats. Those are floats which have a raised platform through the center of the float, and cars are placed upon the float on each side, or on both sides, of the platform.

Q. What rail heads furnish cars for this particular pier?

A. Weehawken and the 72nd Street Yards.

Q. Will you continue?

[fol. 390] A. After the floats arrive at the terminal, the contents of the cars are unloaded by railroad labor and placed upon the floor of the pier. After it is placed upon

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the floor of the pier, we have no further labor in connection with that freight.

Q. Will you tell us just how that operation from the float, from the car on the float to the pier is carried on?

A. We handle that in two manners: In many cases, we truck direct from the side of the car nearest the pier to the pier floor. In other cases, it is often necessary to put the gang planks on the platform and then to the pier floor by separating the cars.

Q. Are those cars unloaded by gangs?

A. Yes, by gangs.

Q. How many men are in one of those gangs?

A. Normally, about six men.

Q. Will you tell us what each of those men do?

A. Well, we have two classes of labor, one of which is called stevedore, and the other is a trucker. The stevedore is what we call the break man. He is the man who opens the car and breaks into the load. He also loads the hand trucks. And the trucker who actually performs the labor of trucking the freight to the pier floor is called the trucker.

Exam. Brown: Is that true of other piers in New York, that those who actually carry the freight in the trucks [fol. 391] from the floats onto the pier are called truckers?

The Witness: Yes, we call those truckers—that is, the New York Central.

Exam. Brown: Is that the situation with other carriers? In other words, are you any different?

The Witness: We are different in this respect: In that all our work is done by railroad labor. Now, what a terminal, or what a contractor might call his man, I don't know.

By Mr. Brown:

Q. Do those truckers unload from the trucks to the pier floor?

A. They do. They unload their own trucks.

Q. Who furnishes and maintains the equipment used in the unloading of these cars?

A. The railroad company.

Q. Will you describe to us the unloading at Bronx Terminal Market?

A. At Bronx Terminal Market the cars are placed on a track adjacent to a freight house which is leased from the City of New York. The track is also a privately owned track by the City of New York and is covered by a track agreement.

When the cars are placed on this track adjacent to the freight house, they can be delivered in two manners: one, through the freight house, or the truck can be backed up against the car opposite the freight house and delivery received at the car door.

[fol. 392] Q. So that the consignee does have access to that car if he wants to, from the opposite side?

A. Either way.

Mr. Augello: Just a minute, for clarification. When you say freight house, don't you mean the consignee's warehouse?

The Witness: No. No, that is the New York Central freight house.

Mr. Augello: I see. You are not talking about the Bronx Terminal Market owned and operated by the City of New York?

The Witness: No. We lease from the City of New York a building 50 feet wide and about 365 feet long.

Mr. Augello: And that is what you are talking about?

The Witness: That is the building I am talking about.

By Mr. Brown:

Q. Is it true also, Mr. May, that the New York Central employees unload the cars?

A. They perform the labor of unloading the cars.

Mr. Brown: That is all.

Exam. Brown: Is any car float operation involved at all in your operation?

The Witness: All freight arriving at Barclay Street arrives by car float, and there are some cars which arrive at Bronx Terminal Market that are removed from a privately owned float bridge of the City, and are placed at the freight house for unloading. There are car float operations there.

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[fol. 393] By Mr. Brown:

Q. In your unloading at the Bronx Terminal, what is the consist of a gang that unloads that car?

A. The operation there is performed entirely at night, starting at about 10:00 p. m., and the gang depends entirely upon the amount of business to be performed; at the peak season, that runs about 18 men in the gang who are under the supervision of a checker.

At times such as we have at present, when it is less than normal, it is four truckers and a checker.

Mr. Brown: That is all, Mr. Examiner.

Cross-examination.

By Mr. Wells:

Q. Mr. May, is the only delivery of fruits and vegetables by the New York Central on Manhattan Island by way of Pier 17?

A. No. We have team track facilities at the 33rd Street Yard.

Q. To what extent?

A. We have a working capacity there of 325 cars. We can place 325 cars which can be reached by team track driveways.

Q. That is of all commodities?

A. Of all commodities.

Q. Can you tell us how much of that is fruits and vegetables in your general classes?

A. Yes. We normally have between 60 and 80 cars placed for unloading in what we call the 10th Avenue Yards, [fol. 394] which is a part of the 33rd Street Yards.

Q. Of what does that consist—fruits and vegetables?

A. Well, we have top-iced lettuce, and in past years a considerable part of that volume has been bananas.

Q. Imported?

A. Yes, they are imported bananas.

Q. The principal commodities, then, of fruits and vegetables that have been handled at your team track delivery have been the imported bananas and the top-iced lettuce?

A. That is right.

Q. What was the origin of that?

A. The origin?

Q. Of the lettuce?

A. Much of the lettuce originated in Louisiana and western states.

Q. Can you tell us what percentage of your deliveries of fruits and vegetables were delivered to your team track?

A. About 3 cars on the team track to 1 car at the Barclay Street Station. We handled slightly over 17,000 cars in the year of 1946, and about 13,000 of those were off the team tracks.

Q. And consisted principally of the commodities you have mentioned?

A. That is right.

Q. What is the volume over Pier 17 of fruits and vegetables?

[fol. 395] A. In the year of 1946 the total perishables for the entire year was 3,063 carloads. In the first six months of 1947 it was 2,238 carloads.

Q. On Pier 17?

A. On Pier 17.

Q. As I understand, all of your unloads and deliveries on 17 are floating?

A. That is right.

Q. Is that also true of your team track delivery?

A. No. The bulk of our team track delivery reaches 33rd Street overland.

Q. And that is, then, the bulk of your delivery in New York City?

A. That is right.

Mr. Wells: That is all.

Cross-examination.

By Mr. Hoffman:

Q. In connection with the unloading at Pier 17, where, as I understand it, you handle fruits and vegetables——

A. That is right.

Q. —you stated that the stevedore opens the cars?

A. That is right.

Q. Does he break the seal?

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A. We have delivery clerks, and it is their duty to take the seal record and break the seal, but after the record is [fol. 396] taken, the work is generally performed by a stevedore.

Q. What work?

A. Of breaking the seal.

Q. Is there any check made with respect to the contents of the car?

A. Just as a check is made after the car is unloaded on the floor of the pier.

Q. Does the unloading gang make any check?

A. No.

Q. Who performs that duty?

A. The delivery clerk.

Q. Do any consignees do any unloading at Pier 17?

A. No, sir.

Q. Do you permit consignees to do unloading at Pier 17?

A. No, sir.

Q. You referred to the total number of cars handled in 1946 at Pier 17. What would be the next point in importance by way of volume where fruits and vegetables would be handled on Manhattan by the New York Central?

A. That is the only pier station where we handle fruits and vegetables.

Q. I am inquiring, though, with respect to any other points.

A. The 33rd Street Yard.

Q. What would be the volume in 1946 of fresh fruits and vegetables at 33rd Street?

[fol. 397] A. Well, I haven't got that exact figure, but approximately 13,000 cars of all types of perishable freight, including bananas.

Q. You have no idea of how many cars would be unloaded there of fresh fruits and vegetables, outside of bananas?

A. No. Before I gave you that figure I would have to have an examination of the records.

Q. All unloadings at 33rd Street are performed by the New York Central?

A. No. At 33rd Street, by the consignee.

Q. There is no unloading by the New York Central at 33rd Street?

A. No, sir.

Q. Now, where a car is placed on team tracks at 33rd Street, what is the next service, or what is the next work which the New York Central might perform in connection with that car, once it is placed on the team track?

A. The consignee is notified that the car has been placed. After the proof of ownership has been turned over to the delivery clerk, he goes to the car with the truckman to show him where the car is and see that, on the original opening, everything is all right with the car.

Q. Does the delivery clerk break the seal in the presence of the consignee?

A. Not always.

[fol. 398] Q. How long does it take for the delivery clerk to perform the function just referred to by you?

A. That depends entirely upon the volume of business at the time. There are many cases where you have as high as 40 cars of freight in one train, which usually would take much longer than if he had only 10 or 12 cars.

Q. Does he examine the contents of the car at that time?

A. Only if requested.

Q. What service or operation is next performed in connection with that car by the carrier?

A. If the consignee unloads part of the car—I mean by that, takes one or two truckloads away—he then requests the delivery clerk to close the car and seal it, or lock it.

Q. Who performs those same duties or functions where the car is delivered at Pier 17?

A. We perform all of the work in connection with the car at Pier 17.

Q. I am trying to find out from you just what workers, or what representatives of the railroad perform a similar function or duty at Pier 17?

A. At Pier 17, the first that the consignee sees his freight ordinarily is when the freight is placed on the floor of Pier 17.

Q. I again am inquiring what type of employee of the New York Central performs the functions at Pier 17 with respect to the car which you just testified to regarding [fol. 399] 33rd Street?

A. At Pier 17 the delivery clerk takes a seal record of

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the car, and in most cases the stevedore breaks the seal on the car. At 33rd Street, again the delivery clerk takes the seal record of the car, and in most cases the delivery clerk breaks the seal on the car.

Q. Now, at Pier 17, who makes an inspection of the contents of the car?

A. The railroad labor, the delivery clerk.

Q. Is he a part of this so-called unloading crew?

A. No. The delivery clerk is not a part of the gang which performs the unloading.

Q. Do you handle any other perishables at Pier 17 besides fruits and vegetables?

A. No. You are speaking of dairy products?

Q. Any other perishables, other than fresh fruits and vegetables?

A. No.

Q. Do you handle any other commodities at Pier 17, other than fresh fruits and vegetables?

A. Yes.

Q. What is the nature of those commodities?

A. Well, we handle carload lots of merchandise, that is, the general run of merchandise, flour——

Q. Do you handle any canned fruits at Pier 17?

[fol. 400] A. Yes.

Q. Do you handle any dried fruits at Pier 17?

A. An occasional car.

Q. Do you handle any foreign fruits at Pier 17?

A. No.

Q. In connection with canned and dried fruits, does the New York Central perform the same operation in connection with unloading as it performs in connection with the fresh fruits and vegetables?

A. Yes.

Mr. Hoffman: That is all.

Cross-examination.

By Mr. Logwood:

Q. Mr. May, you are with the New York Central, and you operate Pier 17 in New York?

A. This exhibit shows the cars, tons, man hours, and labor costs of unloading perishable freight at Pier 17, Barclay Street, and Bronx Terminal Market in New York City during the test weeks of February 10 to 15, inclusive, and June 15 to 20, inclusive, 1947.

The top half of this exhibit shows a breakdown of the unloading costs according to the class of employee as indicated in the first column headed "Classification," which is further broken down to direct labor as distinguished from supervisory.

The bottom half of this exhibit is a breakdown according to the type of commodity as shown in the first column headed "Commodity."

[fol. 404] Each half of this exhibit is broken down as shown in the second, third and fourth columns headed "Vegetables other than top-iced," "Vegetables top-iced," "Cantaloupes and Melons," respectively.

The totals are combined and shown in the last column.

Under each of these columns is shown the man hours and labor costs for the individual class of employee, as shown in the first column, and the cars and tons of each item of commodity as shown in the first column.

In the center of this exhibit is shown the total direct labor and supervision. This item when divided by the total tons shown in the last line at the bottom will give the total cost per ton.

For vegetables other than top-iced it cost $2,301 to unload 1,614 tons with an average cost of $1.426 per ton.

For vegetables top-iced it cost $57 to unload 28 tons, with an average cost of $2.035 per ton.

For cantaloupes and melons it cost $212.00 to unload 81 tons, or an average cost of $2.617 per ton.

Q. Mr. Jarvis, how were these figures obtained?

A. These figures were obtained by actual time study during the weeks mentioned to determine the hours that were actually spent on the time of unloading these commodities.

Q. Was that time study conducted right on the pier and at the Bronx Terminal Market?

[fol. 405] A. It was.

Q. While the work was going on?

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A. It was.

Q. Were those figures obtained by you personally, or by men under your supervision at the time?

A. Men under my supervision.

Q. You know those figures to be true?

A. True.

Mr. Brown: I offer that exhibit in evidence.

Exam. Brown: Is there any objection to this exhibit? It is received as Respondents' Exhibit No. 33.

(Respondents' Exhibit No. 33, Witness Jarvis, received in evidence.)

Mr. Brown: That is all I have.

Exam. Brown: Did you listen carefully to the testimony of the accounting witnesses who preceded you?

The Witness: Yes, sir.

Exam. Brown: Was your exhibit compiled generally in the same manner as the exhibits prepared and introduced by these other accounting witnesses?

The Witness: Yes, sir.

Exam. Brown: With respect to their exhibits, was your exhibit compiled along the same lines as the corresponding exhibits introduced by these other accountant witnesses?

[fol. 406] The Witness: Yes, sir.

Exam. Brown: You may cross-examine.

Cross examination.

By Mr. Wells:

Q. Mr. Jarvis, did I understand correctly that you took the time study on Pier 17?

A. Yes, sir.

Q. I notice that your caption reads, "At Pier 17, Barclay and Bronx Terminal Market." Did you make any study at Barclay Street and Bronx Terminal?

A. Yes, sir.

Q. Is that incorporated in the exhibit?

A. Yes, sir.

Q. Was the total number of cars of fresh fruits and vegetables delivered by the New York Central in New York City the two test weeks 89 cars?

A. For Bronx Terminal and Barclay Street.

Q. Sir?

A. For Bronx Terminal and Barclay Street, 89 cars.

Q. Vegetables other than top-iced, a total of 89 cars—that totals three stations, is that right?

A. 89 cars?

Q. 89 is the total over on the right, isn't it?

A. Oh, I see. Why, 89 of those cars were the Bronx Terminal Market, and for Barclay Street for vegetables other than top-iced, 28 of those cars of vegetables top-iced [fol. 407] were the Bronx Terminal Market. Or rather, 2 cars vegetables top-iced, for the Bronx Terminal Market. 7 cars of cantaloupes and melons were the Bronx Terminal Market.

Q. How many cars were at Pier 17 in that test period?

A. 82. No. Of the total, you mean?

Q. How many cars of fresh fruits and vegetables were delivered by the New York Central at Pier 17 during the two test weeks?

A. 82 cars.

Q. Where is that figure?

A. It doesn't show on the exhibit.

Q. Is that 82 cars of vegetables other than top-iced?

A. No. 82 cars of the total number of cars handled at Pier 17 during the test weeks.

Exam. Brown: What was the total?

The Witness: 98.

Exam. Brown: 98 instead of 89?

The Witness: 98.

By Mr. Wells:

Q. Out of the 89 cars of vegetables not top-iced, will you tell us how many were delivered at each of the stations, Pier 17, Barclay Street, and Bronx Terminal Market, in those periods?

Mr. Brown: Mr. Examiner, may I make a statement? Perhaps Mr. Wells didn't hear my last question of Mr. May and his answer. Barclay Street and Pier 17 are one and the same place. There are not three stations involved [fol. 408] in this exhibit. There are only two.

By Mr. Wells:

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Q. Pier 17 or Barclay Street, and the Bronx Terminal Market. How many were delivered at each of the two stations of this 89 cars of vegetables other than top-iced?

A. There were 7 cars delivered to the Bronx Terminal Market, and 82 cars at Pier 17.

Q. Were the 7 cars at Bronx Terminal Market unloaded by the New York Central?

A. Yes, sir.

Q. How many of the vegetables top-iced were delivered at each of the stations?

A. 2 cars of vegetables top-iced were delivered at Bronx Terminal.

Q. And none at Pier 17?

A. Yes, sir.

Q. How many cars of cantaloupes and melons were delivered at each of those stations?

A. 7 cars of cantaloupes and melons were delivered at Bronx Terminal Market.

Q. Did you have stevedores at Bronx Terminal Market?

A. Yes, sir.

Q. What were the factors considered by you in selecting those two test weeks?

[fol. 409] A. They were selected by my superiors.

Q. You have no information as to why they were selected?

A. That is right.

Q You don't know whether they were representative or not?

A. I couldn't say.

Mr. Wells: That is all.

Cross-examination.

By Mr. Matson:

Q. Mr. Jarvis, these figures on your Exhibit 33 include the cost of sorting and stacking of this merchandise?

A. We don't have any sorting or stacking of merchandise.

Q. This is entirely an unloading service?

A. That is right.

Mr. Matson: That is all.

Cross-examination.

By Mr. Hoffman:

Q. Mr. Jarvis, referring to Exhibit 33, and to the notation "Delivery Clerks," are the hours of labor and the cost of labor of the delivery clerks included within your computation of the ultimate charge for labor in connection with unloading?

A. Well, if you mean are the delivery clerks included in the average cost per ton, they are.

Q. Does the same answer apply to the checker?

A. Yes, sir.

Q. In turning to your exhibit, then, we find that the hours [fol. 410] allocated to delivery clerks are 136 hours and to checkers 18 hours.

A. That is correct.

Q. Making a total of 154 hours, which are allocated to delivery clerks and checkers out of an aggregate of 283 hours.

A. That is correct.

Q. What are the duties that are performed by the delivery clerks?

A. Well, the delivery clerks at Pier 17, which they are confined to, they check all the commodities as they are unloaded from the car onto the Pier at Pier 17.

Q. And what are the functions of the checkers?

A. The checker is solely at Bronx Terminal Market—that one checker. He is in a supervisory capacity—he is in supervision.

Q. This Exhibit 33 presented by you purports to be a study and a compilation of figures with respect to unloading costs?

A. That is correct.

Q. Did you give any consideration to the question whether delivery clerks and checkers should or should not be included as items of your unloading costs?

A. Well, the delivery clerk and a checker—a certain proportion of their time should be considered part of the unloading cost.

Q. Have you an opinion as to whether the functions performed by delivery clerks and checkers are more prop-

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[fol. 411] erly referable to transportation rather than to unloading?

A. I can't see where a delivery clerk has any function as far as transportation is concerned. After all, we are unloading a car from the float to the pier.

Q. Has a delivery clerk anything necessarily to do with unloading?

A. Quite so, yes.

Q. Do you have delivery clerks and checkers where the car is not unloaded by the New York Central?

A. No.

Q. Do you have anyone who performs a similar function?

A. Well, we have a seal clerk.

Q. You heard the testimony of the previous witness in which he stated that in connection with deliveries at team tracks the railroad engages in certain work in connection with the opening of the car, the checking of the contents, and so forth?

A. Yes, I did.

Q. As I understand from you, then, you have the opinion that the so-called delivery clerk and checker is properly an item of unloading?

A. Yes, sir.

Q. Could you roughly tell us how much the difference would be in your figures if the item of delivery clerks and checkers were eliminated?

[fol. 412] A. I am sorry; I can't do that here.

Mr. Hoffman: That is all.

Exam. Brown: Is there any further cross-examination? Is there any redirect?

Mr. Brown: No redirect.

(Witness excused.)

Exam. Brown: We will have a short recess.

(A short recess was taken.)

Exam. Brown: Call your next witness.

Mr. Donadio: Mr. Harries.

E. P. HARRIES was sworn and testified as follows:

Direct examination.

By Mr. Donadio:

Q. State your name and address.

A. E. P. Harries, Pier 22, North River, New York, New York.

Q. What is your railroad connection?

A. I am Terminal Agent in New York for the Baltimore & Ohio Railroad.

Q. What are your duties as Terminal Agent at New York?

A. I am in direct charge of B. & O. Terminal facilities in New York and all operations in connection therewith.

Q. Does the B. & O. Railroad have facilities in New York where carloads of fruit and vegetables traffic are received?

A. Yes.

Q. Where are those facilities located?

[fol. 413] A. They are located on the Manhattan side of the North River on West Street at Pier 22 and at West 26th Street.

Q. At which of these facilities is the unloading of fruits and vegetables done by the railroad?

A. Unloading of fruits and vegetables is performed by the railroad only at Pier 22.

Q. Is there any charge now made by the railroad to the consignee for unloading carload fruits and vegetables at Pier 22?

A. No charge of any kind is made at the present time.

Q. Describe the facility which you designated as Pier 22.

A. Pier 22 is in the heart of the fruit and vegetable district and is a completely enclosed pier extending from West Street, on which it faces, back into the river about 900 feet.

The building is shaped like a "T" with the horizontal part on West Street and the vertical part extending into the river. The front part is 300 feet wide and part extending into the river is 69 feet wide, and has clear space without pillars of roof supports from wall to wall and for its entire length.

There is a broad driveway from West Street in the center, which permits consignees' trucks to drive into the

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pier building along the entire length of the pier floor, and remove the fruit and vegetable packages which have been unloaded and stacked on the pier floor.

It has 15 openings with doors along each side, and 4 open- [fol. 414] ings with doors on the front facing West Street.

The slips which abut on either side each accommodate two rows of floats abreast so that a total of four rows can be placed at the pier. The length of the pier is such that three floats may be placed tandem, so that a total of 12 floats can be placed.

Q. Who owns this pier?

A. The City of New York, from which we lease it.

Q. Do you have a first-hand knowledge of the actual handling of fruits and vegetables at Pier 22, including the unloading operation?

A. Yes, as Terminal Agent, I am charged with direct responsibility for all activities at this pier and must therefore know what is actually done and why, and I do know from constant and continued observation just what the operation is, how it is performed, *why* whom it is performed, and all details.

Q. How long have you been in charge?

A. Three years.

Q. Do you have a staff of clerks, supervising men and others at this pier under your supervision who devote their services to any extent to the unloading of fruits and vegetables at Pier 22?

A. Yes.

Q. Describe in detail the members of your staff who in any way devote any time to the unloading service, and the [fol. 415] extent to which they are so engaged.

A. I have an Assistant Agent who devotes all of his time to this fruit and vegetable operation in a supervisory capacity; an Assistant Foreman who does some clerical work as well as supervising, four clerks who spend their time making and keeping records pertaining to the arrival and delivery of this traffic; from two to four delivery clerks engaged in delivering the produce to the consignees; one man who takes seal records, installs the lights in the cars on the floats, and takes car doors off when necessary, to permit unloading of the cars.

Q. Are these members of your staff employed directly

by the Baltimore & Ohio Railroad, and paid by it?

A. Yes.

Q. Are they necessary in carrying out the complete unloading and delivering service accorded fruits and vegetables?

A. Yes.

Q. Is that service in addition to the actual mechanical or manual unloading service?

A. Yes.

Q. How do the cars of fruits and vegetables reach Pier 22?

A. They are brought to Pier 22 from Jersey City on car floats upon the orders of the consignees who have previously had notice that the cars had arrived at Jersey City.

Q. Are cars brought to Pier 22 for railroad unloading [fol. 416] only in cases where the consignee so direct?

A. Yes.

Q. Does the consignee have discretion or choice to order some other disposition of the cars consigned to them, and of the arrival of which at Jersey City he has been given notice by the railroad, and if so, what other disposition is ordered?

A. Yes, the cars of fruits and vegetables may be and are ordered placed at West 26th Street Station for team track delivery or other disposition requested.

Q. What other disposition, in your knowledge, may be and is requested?

A. At times cars are reconsigned.

Q. You might at this juncture describe the West 26th Street facility.

A. At West 26th Street is a dry land operation for team track delivery, located between 11th Avenue and 12th Avenue. It has 18 tracks with 4 cement driveways level with the street pavement, each one serving two tracks. The driveways have ingress and egress from 11th Avenue. The cars are switched into the yard across 12th Avenue, after having been taken from car floats over a float bridge at 12th Avenue, opposite the yard.

Q. What is the car capacity of these team tracks?

A. 45 cars.

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[fol. 417] Q. Are cars of fruits and vegetables received on those team tracks?

A. Yes, daily.

Q. Who does the unloading of fruits and vegetables placed on those team tracks?

A. The consignees perform all unloading and all services to effect unloading. All we do is place the cars on the team track and advise them of such placement. Complete delivery is accomplished upon such placement.

Q. Does the railroad furnish any personnel at all in connection with the unloading?

A. None so far as work of unloading is concerned. We have a checker who breaks the seal from the car door when delivery is taken, and that is all.

Q. Now, Mr. Harries, will you please describe the handling of fruits and vegetables at Pier 22, beginning with the placement of the car floats alongside the pier?

A. After the floats are berthed and made fast to the bulkhead of the pier, or on the sides, the required number of gang-planks are placed from the pier floor to the platform of the float so that the hand trucks used in unloading may be taken on the float and into cars, and packages of fruits and vegetables moved and placed at designated locations on pier floor.

Q. What do you mean by the term "bulkhead"?

[fol. 418] A. The bulkhead refers to the front of the pier facing directly on West Street, and the slip with openings from the slip at which the floats, two abreast, are berthed for unloading, and unloading is done from those openings. The space in front of pier is 300 feet wide, and extends the width of the slips, as well as of the pier building. The openings directly on West Street gives access to the entire bulkhead to trucks which back into or park adjacent to the bulkhead for removal of packages placed on the platform for the various consignees. Access to the pier floor by trucks is by the driveway between the north and south bulkheads.

Q. Describe these so-called gangplanks.

A. They are movable platforms of varying lengths ranging from 18 feet to 21 feet long, and are 3 feet 6 inches wide, consisting of heavy wooden boards permanently fastened

together with steel reinforcements to strengthen them.

Q. Is more than one of these gangplanks used to make a runway from the float to the pier floor?

A. Yes. It depends on the elevation of the float due to the tide, and often the elevation of the float platform is 6 to 8 feet higher than the pier floor, and 3 or 4 gangplanks or sections must be securely fastened together to make a runway from the float platform to the pier floor.

Q. What effect does this long runway have on the op- [fol. 419] eration of the hand trucks?

A. Well, it makes a pretty steep incline and decline about 50 feet long, which slows up the operation, adds to the danger involved, and reduces the number of packages loaded on the hand trucks which can be handled safely by the trucker.

Q. What happens after the gangplanks have been placed?

A. As soon as the gangplanks are put into place, a railroad employee boards the float and takes a record of the seals, and the unloading gangs proceed to unload the cars.

Q. How many men compose a gang, and how are their duties divided?

A. Each gang works one car and is made up of 7 men—3 men are assigned to the hand trucks—2 men are assigned to work in the car loading the packages on the hand trucks —2 men are assigned to the pier floor to unload the hand trucks and stack the packages in orderly piles.

In addition to these men which comprise a gang, one man is assigned as a checker for two cars, so that it may be said that each car is given a crew of 7-1/2 men to perform the actual unloading service.

Q. When the tide is high is there any extra help needed in connection with the physical unloading of these cars?

A. Yes; when the plank is steep it is necessary to put one more man to a gang to assist the truckers up and down the planks.

[fol. 420] Q. Will you describe what actually is done in the procedure of unloading these fruit and vegetable cars?

A. The first thing that is done after the car is opened is to remove the extensive wooden bracing from the car so that the hand trucks can go into the cars and remove

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the packages; gangplanks are placed from the car floor to the float platform.

The two men of each gang (car men) then go into the car and load the packages on the hand trucks, and then 3 truckmen, each handling one truck, take the loaded trucks to designated locations on the bulkhead or pier floor where the 2 dock men remove the packages from the trucks and stack them.

This operation is repeated until the cars have been completely unloaded.

Q. Are all cars completely unloaded?

A. No; the consignees sometimes order their cars only partially unloaded, that is to say, we are directed to unload only a designated number of packages and place them on pier floor.

Q. What happens to the part of lading not unloaded?

A. It is leveled off and braced if necessary, by which I mean that packages are re-stacked in the car so that when the car is switched in the yards there will be no damage to the packages left in the car. The car is refloated to Jersey City, switched from the floats, and taken back to the yards to await consignee's orders for return.

[fol. 421] Q. What subsequent disposition is made?

A. We are ordered to bring the car back to Pier 22 and unload, in which event the precedure previously outlined is repeated.

Q. How many gangs perform the unloading?

A. Usually as many gangs as will permit the unloading of all the cars which we know will be brought to the pier for unloading each day. The number ranges from 4 to 15 gangs, but on occasions we are unable to get the required number of gangs. This fluctuates, and manpower in times of peak traffic is short.

When we do not get enough gangs, overtime must be put in by the gangs we are able to get, which adds very substantially to our cost.

Q. Are all cars brought to Pier 22 on consignee's orders unloaded whole or in part?

A. No. There is a practice in connection with the ordering of cars by consignees which creates a state of uncertainty

as to the number of cars brought in to Pier 22 which are actually to be unloaded.

After the cars are ordered in by consignee and are not completely unloaded at consignee's request but are ordered returned to Jersey City Yards, we have to pay for gangs for full time whether they worked the full time or not.

Q. Why is that so?

[fol. 422] A. Under the contract between the Longshoremen's Union and the Spencer Corporation at least four gangs of seven men each for eight hours must be arranged for each night. They are paid straight time for eight hours and time and one-half in excess of eight hours. Each additional gang we arrange for must be paid for at least four hours initially, and paid for an additional four-hour period if it works in excess of the first four hours, or a total of eight hours whether the work takes five hours or eight hours. Time and a half is paid after eight hours.

Q. Are the men who compose these unloading gangs directly employed by the railroad?

A. No.

Q. Are they union men, and by whom are they directly employed?

A. Yes, they are union men—members of the I.L.A., and are directly employed by the William Spencer & Sons Corporation. These men alone may perform this unloading service and are under their control, direction and supervision.

Q. Under what arrangement do they perform this unloading service for the Baltimore & Ohio Railroad?

A. We have a contract with the Spencer Corporation covering the unloading service described, under which they assume the complete responsibilities for the proper unloading for us, and we have no direct arrangement with the men.

Q. Who pays them?

[fol. 423] A. Spencer Corporation pays them the prevailing union scale wages.

Q. What is the basis for -our paying Spencer Corporation?

A. We pay Spencer Corporation on a weekly basis the actual amount they pay for wages, etc., plus a certain additional amount to cover supervision, accounting, clerical

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work and other expense incurred in doing the unloading for us under their complete responsibility.

Q. Is there any difference in the unloading services required with the different kinds of fruits and vegetables?

A. Oh, yes, there is a difference in so far as the sizes of the packages are concerned—the smaller the package more handlings are required to effect the unloading of, say, one car. There is a difference as to how the car is loaded; the type of bracing employed; whether the cars have, in addition to the bunker icing, loose ice in the car scattered on top of and between the packages, or in the center of car between tiers of packages separated by the bracing.

Q. Is this icing in the car itself more prevalent as to certain of these commodities?

A. Yes; certain vegetables invariably are received with large quantities of finely shaved ice (snow ice) in the body of the car, completely surrounding and covering the packages in the car.

Q. Does this present any particular difficulty, and if so, [fol. 424] will you describe it?

A. Yes, it does. Immediately as the car is opened an avalanche of ice descends upon the one who opens the door; the ice must be cleared away before the unloading can be started. During the entire process of unloading, ice must be cleared away so that the packages may be removed.

Some of the unloaders will not handle this type of car because of the ice and wetness. Those who will do so must be equipped with boots, rubber aprons and other protective covering. Aprons are furnished, and sometimes rubber gloves.

In addition to these matters, the process of unloading is slowed up, affecting unfavorably the cost. The melting ice results in very wet platforms, gangways, and floors, which must be wiped up as much as possible from time to time during unloading to protect the men from slipping and falling.

Q. What time of day is the unloading mostly done?

A. The unloading takes place at night. The floats with these fruits and vegetables are ordered in for late afternoon. Unloading in full force starts at about 7:30 o'clock

in the evening, and continues until all cars ordered by the consignees to be unloaded are unloaded, and the packages placed on the pier floor, at locations designated for each consignee.

Q. When and how is delivery of these fruits and vegetables to consignees accomplished?

A. After we have unloaded them, and stacked them at various locations on the floor, the consignees send their [fol. 425] trucks for them, either for the entire carload or for a designated number of packages. Railroad employees turn over to the truckmen the specified number and kinds of packages of which delivery is taken, with appropriate receipt taken and record made of such delivery. This is repeated until complete delivery is made of each and all packages unloaded.

Q. Does the railroad provide any facilities which are necessary to effect this unloading?

A. We provide a well lighted and heated pier, gangplanks, the hand trucks, extension lights into the cars, and constant and continuous police protection for the packages on the pier floor.

Q. Will you describe a car float?

A. As the word indicates, it floats. It is a hollow shell or barge varying in length and width, constructed some of steel, some of wood, and are equipped with manholes on the deck from which any seepage of water may be pumped, or for making repairs.

The floats have two tracks on the open deck, with a raised platform in the center approximately even with the car floor. This platform is roofed. The floats are equipped at one end with bumpers, and at the other with toggle boxes or fixtures which makes it possible to secure the car float to the float bridge during the process of unloading the cars [fol. 426] to or from float.

Q. What is the car capacity of the floats used in this service?

A. Some are of ten and others twelve car capacity.

Q. Will the operation you have described, which represents the present operation, continue in the future?

A. As long as we perform the unloading service it must, necessarily, and so will be performed in the future.

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Q. Based on your experience in these matters, do you know of any change which could be made in the method of operation which would lessen the cost and expense?

A. No. The present operation is efficient, and gives the service the consignees require, and is done at the lowest cost possible.

Exam. Brown: The cross-examination of this witness will be deferred until later.

(Witness temporarily excused.)

Mr. Donadio: I will call Mr. Crossan.

Charles E. Crossam was sworn and testified as follows:

Direct examination.

By Mr. Donadio:

Q. State your name and address.

A. Charles E. Crossan, Philadelphia, Pennsylvania.

Q. What is your railroad connection?

A. Agent, Perishable Products Terminal at Philadelphia, Pa. This is a joint facility of the B. & O. and Reading [fol. 427] Railroads.

Q. What are your duties?

A. I have direct charge of the handling of perishable traffic at this terminal, including unloading and delivery to consignees.

Q. Do you have direct knowledge of the handling, unloading and delivery of fruits and vegetables at Philadelphia?

A. Yes, I have first-hand knowledge since I am in complete charge, and have direct responsibility for the entire operation.

Q. Do the Baltimore & Ohio and Reading Railroads perform an unloading service at Philadelphia, and if so, what products are unloaded, and where?

A. Yes, the Baltimore & Ohio and Reading unload various kinds of fruits at a building known as Auction Sales Platform.

Q. Will you describe in detail this facility?

A. The building where we unload carloads of fruit is located in South Philadelphia, and contains a platform about 800 feet long, the south side of which is 40 feet 3 inches wide, and 34 feet 6 inches wide on the north side, with an aisle in the center 12 feet 5 inches wide.

In the front of the building are offices, and a second floor with offices and auction rooms for the trade, in which the Philadelphia Auction Company sells the fruit which we unload for various consignees.

[fol. 428] The building and platforms are served by tracks running the full length of the building and platforms.

Q. Have you had prepared a layout of this building and tracks?

A. Yes, I have it before me.

Q. From this layout, will you describe in detail the tracks and buildings shown, and what purpose they serve?

A. The exhibit shows specifically, marked as such, the auction platform at which we unload the fruit, and also shows private sales platforms which is an adjoining building with 5 tracks between the two facilities.

The private platforms have leased space to Penn Fruit, Baltimore Market, Food Fair Stores. The Quaker City Cold Storage is located in front of this building. The tracks between these buildings may be used for placing cars either for the auction platform or for the private sales platform.

Q. Do the Baltimore & Ohio and Reading unload fruits or vegetables at the private sales platform?

A. No. All fruits and vegetables consigned to and placed at the private sales platform are unloaded by the consignees, and we perform no service at all in connection with such unloading or handling. Delivery is accomplished when the cars are placed adjacent to the platform, as is the case in any side track delivery.

Q. What are the other tracks shown on the exhibit?

[fol. 429] A. The track immediately adjacent to the auction platform, which geographically is on the south side of that platform, has been designated for the placement of cars to be unloaded at the auction platform.

All the other tracks shown are team tracks, where cars, including fruits and vegetables, are placed for team track delivery.

There are cement driveways between those tracks where consignees drive in to receive their consignments.

Q. What is the capacity of the tracks from which unloading is performed at the auction platform?

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A. The track on the south side of the platform has a capacity of 18 cars, and the 5 tracks on the north side will hold 100 cars for unloading.

Q. Do the Baltimore & Ohio and Reading perform any unloading service with respect of fruits and vegetables placed on those team tracks?

A. No. All that we do is place the cars ordered placed by the consignees, and delivery is accomplished when the cars have been placed and the consignee is notified of such placement.

Q. Under what circumstances are the cars placed for railroad unloading?

A. Cars arriving at the Philadelphia Perishable Terminal are held in the yards for disposition orders from the con- [fol. 430] signees. We receive orders from the Auction Company by way of a fruit wire as to the cars which are to be unloaded by us at the auction platform. We receive these orders at 4:30 p.m. on Monday, and at 4:00 p.m. Tuesday, Wednesday and Thursday, and 2:30 p.m. Saturday for Monday sale.

After we receive the fruit wire, I arrange for the placement of the cars at the platform, and arrangement is made to unload them.

Q. Now will you explain the unloading operation?

A. The unloading is a piecework operation, and is not done the same time each night. The General Foreman comes on about one hour before the time to start unloading, to check the cars that are placed, and get catalogs for each car, which have been printed by the Auction Company. He marks the floor with chalk to designate the location on the floor for each car according to the catalog number, to which contents of the particular car is trucked and piled.

He gives each checker catalogs for the cars he is to unload. This checker is in charge of a gang of men which consists of 3 truckers, 2 pilers and 1 checker, or a total of 6 men.

Before we start unloading, my Foreman gets seal record of cars, Fruit Growers gets amount of ice in each car and R.P.I.A. gets temperature, and also a check on the load in each car. We have a man to break the seals, and also to [fol. 431] remove the bracing in the cars. We are using 3 gangs of men at present to unload cars.

Q. You gave the consist of the gangs; will you now describe their work?

A. Two truckers load fruit on 4-wheel trucks which are taken into the car. One trucker brings the loaded truck out of the car and takes it to the designated locations on the floor, where the two pilers pile and sort the fruit according to the catalog, and they put up samples of each size of fruit at end of pile. We put 10 boxes of citrus fruit on each truck, and a greater number of other fruits according to size of package.

Q. I have two pictures which I desire to submit as exhibits. What do they portray?

A. One shows the trucking from car to the location at which the fruit is piled, and the other shows the manner in which the packages are piled in the allotted space, and the samples displaying the different varieties and grades of fruit.

Q. After the car is unloaded and all the packages are placed in the allotted space, what further action is taken by your force?

A. The packages are checked by the Foreman, and then turned over to the Auction Company checkers.

Q. Are your forces dismissed when piling is completed?

A. No. Delivery of fruit by the Auction Company is stopped at 5:30 p.m. on Monday, and at 3:30 p.m. on other [fol. 432] days. We then close the doors, after which no deliveries are made by the Auction Company on that day.

Q. Are you required to hold any of your force after deliveries are stopped for the day by the Auction Company?

A. I have a gang of 4 truckers and one checker that start at 3:00 p.m. to move packages which are not sold and delivered during the day, to the rear of the platform, so that space is made available for the following day's unloading. They also sweep the platform, and remove the rubbish from both platform and tracks.

Q. Is this sweeping all done after 3:00 p.m.?

A. No. We use two sweepers on the floor during the time cars are being unloaded, to keep the platform clean and avoid accidents to the trade by slipping on damaged or crushed fruit that may be on the platform.

Q. When are doors opened in the morning?

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A. The doors are opened at 6:00 a.m. on Monday, and at 6:30 a.m. during the balance of the week, to permit the buyers to come on platform and inspect the fruit before going to the auction rooms.

Q. Where are the auction rooms located?

A. There are two auction rooms located on the second floor front, which seat approximately 200 people each. The rooms are heated and lighted by the Railroad Company [fol. 433] without charge.

Q. Based on your experience in these matters, do you know of any change which could be made in the method of operation which would lessen the cost and expense?

A. No. The present operation is efficient, and gives the service the consignees require, and is done at the lowest cost possible.

Mr. Donadio: I offer in evidence the exhibit which has been marked Exhibit No. 34.

Exam. Brown: Without objection Exhibit No. 34 will be received in evidence.

(Respondents' Exhibit No. 34, Witness Crossan, received in evidence.)

Exam. Brown: Is there any further direct examination of this witness?

Mr. Donadio: Nothing further.

Exam. Brown: The cross-examination of this witness will be deferred.

(Witness temporarily excused.)

Mr. Donadio: I will call Mr. Talbott.

E. M. Talbott was sworn and testified as follows:

Direct examination.

[fol. 434] By Mr. Donadio:

Q. Will you state your name?

A. E. M. Talbott.

Q. What is your business address?

A. I am Special Accountant in the Comptroller's Office of the B. & O. Railroad Company, Baltimore, Maryland.

Q. How long have you occupied that position?

A. I have been employed by the B. & O. since 1912. During the past 15 years I have been engaged in the preparation of cost and accounting data, including field studies, especially in respect to cases before the Interstate Commerce Commission and the Public Service Commission.

Q. Have you appeared as the witness, on frequent occasions both before the Interstate Commerce Commission and various State Commissions?

A. I have.

Q. Have you made special studies dealing with cost studies?

A. I have made a study in connection with the operations at Philadelphia and New York.

Q. Have you made a special study of the expense, the cost to the B. & O. Railroad Company of the unloading of fruits and vegetables at New York and at Philadelphia?

A. I did prepare such a study.

Q. Did you prepare, or have you prepared under your supervision, as a result of that study, or those special studies at New York and Philadelphia, exhibits?

[fol. 435] A. I prepared two exhibits, one for New York and one for Philadelphia.

Mr. Donadio: If the Examiner please, both of those exhibits have already been distributed, and the New York exhibit has been marked for identification as Exhibit No. 35, and the Philadelphia exhibit has been identified as No. 36.

By Mr. Donadio:

Q. Mr. Talbott, will you take up first the exhibit that deals with the cost of unloading fruits and vegetables at New York?

Will you describe your New York exhibit which has been identified as Exhibit No. 35?

A. Exhibit No. 35 was compiled to show the actual out-of-pocket cost in the unloading of fresh fruits and vegetables at Pier 22, North River, New York, for the week February 2nd to 6th, inclusive, 1947.

The car floats are usually at the pier so that the unloading operation can start about 7:30 p.m., each night, except Fridays and Saturdays, or days preceding holidays.

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Daily time sheets are prepared each night for each gang. These time sheets show the name of each member of the gang and the distribution of time is made.

We followed up the operations closely during the week of study in an effort to have all information shown on the time sheets which would enable us to assign the time or [fol. 436] expense to the individual cars unloaded.

These time sheets were the basis for the allocation of expense in the various classes of traffic.

The unloading operation is handled by a contractor on a cost plus basis.

During the period selected, 87 cars of fresh fruits and vegetables were unloaded, or 1,131 tons.

Q. Mr. Talbott, may I interrupt there? When you refer to contractor, do you mean that there is a formal or written contract in effect under which that unloading is done?

A. There is not. We simply have an arrangement with the contractor to handle these operations on a cost plus basis, and no formal contract.

Mr. Augello: Who is that contractor?

The Witness: William Spencer Corporation.

By Mr. Donadio:

Q. Will you continue, Mr. Talbott?

A. The out-of-pocket cost for the week in connection with the unloading of this traffic amounted to $3,326.79, as shown in the upper part of Exhibit No. 35.

Now, the cost has been broken down in the lower part of the exhibit into three classes, as listed in column 1. In columns 2 and 3, we show the number of cars and the number of tons involved for each class of traffic.

The labor directly assignable to each of the three classes of traffic on a time basis is shown in column 4, totalling [fol. 437] $1,405.97.

In column 5 I have prorated additional expense totalling $1,920.82, which we could not assign direct. This expense was prorated on the basis of the expense in column 4.

The figures in columns 4 and 5 are totalled in column 6, and these figures are divided by the number of tons in column 3 to arrive at the average cost per ton shown in column number 7.

As indicated on the exhibit, we have arrived at a cost for fresh fruit, other than citrus, of $2.27; vegetables, top-iced, $3.12; and vegetables other than top-iced, $1.79.

No citrus fruits or melons were unloaded on the B. & O. pier during the recent study.

Q. Mr. Talbott, do these costs which you have shown in your Exhibit 35 relate exclusively to the actual work of unloading?

A. They do.

Q. Is there any other expense involved in this unloading operation which you have not included?

A. We have excluded many items which should be partly charg-able to this operation. I might mention some of them: heating the piers in cold weather to protect the fruits and vegetables; the time of the night agents and clerk; rental and maintenance of piers, and the furnishing of trucks and gangplanks.

[fol. 438] Q. Mr. Talbott, will you take up your study concerning the operation, the unloading operation, at Philadelphia, which is shown on Exhibit marked 36 for identification, and will you describe what that exhibit shows?

A. Exhibit 36 was compiled to show the actual out-of-pocket cost incurred in connection with the unloading of fresh fruits and vegetables at the Perishable Produce Terminal, Philadelphia, Pennsylvania, during the test period May 23rd to 29th, 1947.

The cars were spotted so that the unloading usually starts from 3:00 p.m. to 9:00 p.m., depending on the number of cars to be unloaded.

During the period selected, 94 cars of fresh fruits and vegetables were unloaded, or 2,096 tons, at a total out-of-pocket cost of $2,716.88.

The upper part of the exhibit lists the items making up the amount.

Now, this exhibit has been prepared along similar lines to Exhibit 35 at New York, and the costs in the lower part of the statement are broken down so as to arrive at an average per ton for each of the three classes of traffic handled at Philadelphia.

We arrive at a cost for citrus fruit of $1.27; for fresh

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fruits other than citrus, $1.50; for vegetables other than top-iced, 61 cents per ton.

[fol. 439] Q. Mr. Talbott, is this exhibit and study confined to the costs involved, strictly relating to the unloading operation?

A. It is.

Q. Is there any other expense incurred by the B. & O. at Philadelphia which might be charg-able to the unloading operation but which you have not included?

A. There are several such items at Philadelphia also. I might mention there the agent and the clerks, heating the shed in cold weather, furnishing the tractors and trucks, and maintenance of the platform and terminal, and light furnished.

Mr. Donadio: The witness may be cross-examined.

Exam. Brown: Do you wish to introduce these exhibits?

Mr. Donadio: Yes, sir. I offer Respondents' Exhibits 35 and 36.

Exam. Brown: Is there any objection?

Hearing none, they are received.

(Respondents' Exhibits Nos. 35 and 36, respectively, Witness Talbott, received in evidence.)

Cross-examination.

By Mr. Augello:

Q. Mr. Talbott, are these costs that you refer to in your Exhibit 36 at Philadelphia based on the work being performed by railroad labor?

[fol. 440] A. It is performed by railroad labor on a special force paid on a weekly basis. The force has no connection at all with our other operations at Philadelphia.

Q. But they are railroad employees?

A. Yes.

Q. Entitled to railroad pass privileges?

A. Yes.

Q. Whereas the New York operation is different to the extent that it is being done by a contractor on a cost-plus basis?

A. That is correct.

Mr. Augello: That is all.

Exam. Brown: Did you hear the testimony of other accounting witnesses at this hearing?

The Witness: I did.

Exam. Brown: Are your accounting exhibits and your testimony in connection therewith along similar lines?

The Witness: Yes.

Exam. Brown: There is no material distinction between the method used by you in arriving at these computations as compared with the exhibits introduced by other witnesses?

The Witness: No. We took in all the costs that were incurred in connection with the unloading of this traffic at both points.

Exam. Brown: You haven't used any different accounting [fol. 441] principles in preparing your exhibits?

The Witness: I think that the other railroads may have relied on a cost for unloading gang, a cost per minute unloading gang. To that extent, we might be a trifle different, in that we attempted to assign direct to the cars each day the actual expense involved in unloading a particular car, and what we couldn't assign direct, we threw into a pool and prorated that on the basis of the directly assigned expense.

Exam. Brown: In the final analysis, however, your figures are along the same type of accounting lines as the figures introduced by other witnesses; is that correct?

The Witness: I would think they would arrive at the same result.

Exam. Brown: The same type of result?

The Witness: The same type of result, yes.

Exam. Brown: You may cross-examine this witness prior to the cross-examination of the witness Harries.

Mr. Fogg: Mr. Examiner, may I ask a question in the nature of direct examination?

Exam. Brown: Yes.

By Mr. Fogg:

Q. Mr. Talbott, do I understand this terminal is operated for both the B. & O. and the Reading companies?

A. That is correct.

[fol. 442] Q. To the extent that the Reading Company

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participated in the cars which are covered by your Exhibit 36, the expense figure shown on that exhibit would be applicable to the Reading Company?

A. That is correct. Both the cost and the cars and the tons for the Reading Company are in these figures. They are unloaded all together, you see.

Exam. Brown: Your question is directed solely to Philadelphia, I take it?

Mr. Fogg: That is correct.

Mr. Donadio: That is all I have.

Cross-examination.

By Mr. Wells:

Q. Mr. Talbott, on your Exhibit 36, what kind of vegetables is that that you show as 25 ton?

A. I think that was a car of potatoes. A car of potatoes.

Q. From where?

A. I don't know where it came from. I didn't check the origin.

Mr. Augello: That is all right. 500 bags.

By Mr. Wells:

Q. You don't consider that a typical illustration of the load in a car of vegetables, do you?

A. I am afraid we couldn't, because only one car was unloaded that week, and perhaps it might not be considered so.

Q. Do you consider 25 tons as being a typical load in a car of vegetables any place in the country?

[fol. 443] A. Well, I don't know what the average would be, but I know potatoes run around that. That is, that car did, anyway.

Q. Well, that is much different. You don't mean to say that you know the average load of potatoes is even 25 ton, would you?

A. No, I wouldn't say that. I would say this car is 25 ton.

Mr. Donadio: I think Mr. Augello indicated that that was nearly correct.

Mr. Augello: During that time of year out of Maine we have shipped potatoes with 50,000 pounds, so it is entirely possible that that was a car of potatoes from Maine that had 50,000 pounds.

Exam. Brown: This is not evidence, of course. It is just an observation of counsel.

By Mr. Wells:

Q. Does your Exhibit 36 include all of the commodities that were handled during that test period?

A. It does.

Q. Can you tell me what is your annual volume at that terminal?

A. I am not sure, but our operating witness, I think, has the figures to answer that question.

Q. You have no information, then, as to whether the number of cars handled in the test period might be considered representative of the year's operation?

A. I will tell you; I attempted to develop that, but during [fol. 444] the first part of the year in Philadelphia we had a strike, and the records, that is, the comparative records, were very much distorted, and I discussed the matter with our agent and we came to the conclusion that this was a fair week for a study.

Mr. Wells: Another witness will be prepared to give those figures, then, I understand.

Mr. Donadio: I suppose he will give it to you if you ask it on cross-examination. There is nothing in his direct testimony about it.

Mr. Wells: I will direct it to the operating witness.

By Mr. Wells:

Q. On Exhibit 35, which, as I understand, covers your operation at Pier 22, North River—is that correct?

A. That is correct.

Q. Do you have any information as to whether that was a representative period?

A. Well, we discussed that with our operating people, and came to the conclusion that those costs were representative.

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Q. How many cars were handled over that pier during the year?

A. In a six-month period there were 1959 cars handled over that pier.

Q. That is fruits and vegetables?

A. Fruits and vegetables.

[fol. 445] Q. Were any other commodities handled over the pier?

A. Yes.

Q. Were any citrus fruits handled over the pier in that period?

A. No.

Q. You don't handle citrus fruits?

A. We don't handle citrus fruit in New York. It is handled for our account by the Erie Railroad.

Q. Do you know what the weather was that week?

A. I don't recall. I was up here, but I don't recall.

Q. You know that weather is a very considerable factor in your pier operations?

A. It is a factor, but high tides are just as much a factor. We have them all the year around. Fogs also are a factor in operating.

Mr. Wells: That is all.

Mr. Donadio: You don't imply that weather is a railroad disability, do you?

Mr. Wells: No, sir, but I certainly think the witness should know what the weather situation was if he is going to testify as to the conditions which he says were representative of the year's operation.

Mr. Donadio: Irrespective of the weather, we have the costs.

Cross-examination.

[fol. 446] By Mr. Pettijohn:

Q. Have you ever made a cost study at Pier 22, New York, other than this one?

A. Not a pier cost study, no.

Q. I understood you, in answer to a question by Mr. Wells, to state that you and the agent came to the conclusion that the costs were representative. How did you arrive

at that conclusion if you didn't have a total cost for a year, or for some other representative period?

Mr. Donadio: I think your question is based on an improper premise. It is not my understanding that this witness testified that in consultation with the agent he had arrived at the conclusion that the costs were representative. I think he said the operation was representative.

I therefore object to the question, based on an improper premise.

By Mr. Pettijohn:

Q. Do you, or do you not, think the costs are representative?

A. I do think they are. Based on the amount of traffic done, it was an average week. We handled 87 cars of traffic a week, and it averaged 76 per week for the six months of the year.

Q. You also said, I believe, that there were some maintenance costs of the pier, and the rental of the pier, that could properly be included in the cost of operations.

A. I said that.

[fol. 447] Q. Why didn't you include them?

A. Well, we would have had to separate that among the perishable traffic and the other types of traffic handled on the pier.

Q. Haven't you already made some separations pro rated on the directly assigned labor basis?

A. No. No, none of this labor I have shown on this statement has anything to do with the other freight on the pier.

Q. No, but when you got your total cost, didn't you pro rate that labor?

A. I pro rated the labor which could not be directly assigned incurred in connection with the perishable operation over the strictly assigned labor incurred in connection with the perishable operation.

Q. You had to have the total directly assigned labor in order to make that pro rata?

A. Only the directly assigned labor involved in the unloading of perishable traffic operation.

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Q. Let's see. You say, "pro rated on basis of directly assigned labor, foremen and time keepers, $167." What was the total amount you paid for foremen and time-keepers?

A. $167.

Q. Then it wasn't pro rated at all? It was directly assigned?

A. I think you must misunderstand my exhibit. In column 4, in the lower part of the exhibit, I have broken down the first item in the upper part of the exhibit, the [fol. 448] $1,405.97. I have broken that down on the actual basis. Do you see that? That is broken down in column 4.

And then the other expense—the difference between $1,405.97 and $2,933.06 is $1,409.47, which I have shown in column 4. Only that amount is distributed—I should say is shown on the basis of column 4.

Q. Then all of the expenses of this pier were directly assigned expense to fruits and vegetables?

A. That is so. All of this force is directly assignable to the fruits and vegetables. Nothing else. They don't do anything else.

Q. Did any other commodity move over the pier during that week?

A. Not at night, and this is a night force.

Mr. Pettijohn: That is all.

Cross-examination.

By Mr. Matson:

Q. Mr. Talbott, your Exhibits 35 and 36 include the cost for the performance of the service of assorting?

A. We don't do any. Philadelphia does, but there is no charge made for sorting at Philadelphia, so I made no attempt to separate it.

Q. In other words, this cost of $1.27 for citrus fruits includes the cost of sorting?

[fol. 449] A. Any sorting that is done there would be included in that cost if done there. At New York, we didn't have any sorting under the tariff for that week.

Q. You did no sorting during this particular week?

A. No.

Q. Is that a usual situation?

A. Well, I don't know. We didn't have any under the tariff for that week.

Q. The tariff does provide for an additional charge to be made if sorting is done in New York, doesn't it?

A. Yes.

Q. How about Philadelphia?

A. It is charged in the tariff if it is done with the exception——

Mr. Donadio: He asked you about Philadelphia.

A. Oh, no. There is no charge in the tariff for Philadelphia.

By Mr. Matson:

Q. I notice in Exhibit 36 that you show a cost for "Breaker Out, Sweepers, and Tractor Operator." What is this tractor operator?

A. We use a tractor to handle the trucks at Philadelphia to pull the trucks over the platform.

Q. As distinguished from your operation in New York where you use hand trucks?

A. All hand trucks, yes, sir.

Q. Is there any other distinction between the two operations which might be used to account for the wide varia-[fol. 450] tion in costs of performing similar service at the two points?

A. I think the main difference is the fact that at Philadelphia the platform is on a level with the car floor, practically on a level, and the planks used, or apron, whatever they call them, are very short, maybe 3 or 4 feet long. We don't have that tide condition in Philadelphia. Naturally, the operations are cheaper where you are unloading directly from the car to the platform. You don't truck as long a distance. You don't have that tide condition.

Q. How much difference in time would there be in taking a truck of vegetables from a car in Philadelphia as distinguished from taking a truck from the car in New York and placing it on the pier in the respective points?

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A. Well, I didn't check that particular section of the unloading operation. I would have to make a time study of that and nothing else.

Q. Would it take twice as long?

Mr. Donadio: I object to any question, asking this witness to guess at what the answer might be. I think he has answered it will take a special study to find that out. We will rest on that answer.

Exam. Brown: The witness apparently is not able to answer that question, except as a pure guess on his part, [fol. 451] and we are after facts here.

Are you able to estimate with any reasonable exactness as to what those figures might be?

The Witness: I wouldn't care to answer. It would simply be a guess, and I wouldn't care to.

By Mr. Matson:

Q. You did refer to the difference in distances. Can you tell us what that would amount to?

A. There is a difference in distance, because where you have a car on the car float in New York, you have to truck it the length of the car float in addition to your distance on the platform.

Q. The difference in the distances would be the length of the car float, or the distance traveled on the car float?

A. That is right, plus the fact that the operations spread out in New York over a larger area of platform space.

Do you mean pier space?

A. Pier space, yes.

Q. You couldn't tell us in figures, however, how much difference it would be?

A. I wouldn't care to guess at it. I don't know.

Mr. Matson: That is all.

Cross-examination.

By Mr. Hoffman:

Q. In Exhibits 35 and 36 you have included as an item checkers and delivery clerks.

A. That is correct.

[fol. 452] Q. In preparing this study and compilation, was any consideration given to the exclusion of the item of delivery clerks on the ground that it is an item probably referable to transportation, the service performed by the carrier, irrespective of whether the carrier would or would not unload?

Mr. Donadio: I object to the question. It is improper for the reason that it has no application to the study that this witness has testified about on direct examination.

Exam. Brown: I will sustain the objection on the ground that the question is too complicated.

Please restate your question.

Mr. Donadio: I will accept your grounds. They are much better than mine.

By Mr. Hoffman:

Q. I guess it is in the record already, but I will simplify it.

In preparing this study and compilation, was any consideration given to the elimination of the item delivery clerks on the ground that the service rendered by the delivery clerks is an item of transportation rendered by the carrier, irrespective of whether the particular car is unloaded by the carrier?

Mr. Donadio: I object to that question. It is based on improper assumptions, assumptions that this witness has not made, and it is obvious that the fact that he did not use [fol. 453] those assumptions renders the question improper.

Exam. Brown: Read the question.

(The reporter read the following part of the question: "In preparing this study and compilation was any consideration given to the elimination of the item delivery clerks?")

Exam. Brown: Stop there. Modify the question by eliminating what I have indicated. In other words, your question will be stricken so far as it covers reasons why that would not be taken into consideration.

Now, will you read that particular question to the witness so he will know what we are talking about?

(The reporter read the question as follows:

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"In preparing this study and compilation was any consideration given to the elimination of the item delivery clerks?")

Exam. Brown: Is there any objection to that question?

Mr. Donadio: No.

Exam. Brown: The witness may answer.

A. I put the expense in the study because I considered it a proper cost of the unloading of this traffic.

By Mr. Hoffman:

Q. On what ground did you consider it a proper part of the unloading cost?

A. It is a special force employed to deliver this traffic.

Q. Do you know whether delivery clerks are employed in connection with deliveries where the carrier does not perform the operation of unloading?

[fol. 454] A. You mean carload traffic?

Q. Yes.

A. In New York we do.

Q. In New York you do?

A. Yes.

Q. So that in connection with delivery of cars where the carrier does not perform the function of unloading, you do have delivery clerks?

A. I may have misunderstood your question. In connection with the delivery of carload traffic, for example, at 26th Street in New York, we don't check and count the delivery of every package out of a car like we do on the pier at the pier operation.

Q. Well, Mr. Witness, I was attempting to separate my questions by first addressing myself to the matter of delivery clerks rather than checkers.

Mr. Donadio: You mean delivery clerks at team track delivery or private siding delivery?

Mr. Hoffman: Team track delivery.

Mr. Donadio: Will you answer that question? He wants to know of the railroad employs delivery clerks to deliver merchandise from cars which are placed on team track for delivery to consignees on team track.

A. We don't check and count the number of packages

for team track delivery. We don't count the number of packages for team track delivery in the same manner we [fol. 455] would for a delivery on Pier 21.

By Mr. Hoffman:

Q. What was the distinction between delivery clerks and checkers?

A. Well, the checker on the pier—he simply checks the car after it is unloaded and piled up.

Q. What is the function or duty of the delivery clerks?

A. He counts and checks the packages as the consignee takes delivery. He backs his truck up on the pier at Pier 21, and he is supposed to see that the number of packages delivered is properly signed for.

Q. Are the functions of the checker and delivery clerk performed by the same person?

A. No.

Mr. Donadio: At what place, Mr. Hoffman? Here or——

By Mr. Hoffman:

Q. At the pier.

A. No, they are not.

Mr. Hoffman: I have no further questions.

Cross-examination.

By Mr. Logwood:

Q. Mr. Talbott, in your Exhibit No. 35 you have given us your computation of the cost of unloading fresh fruits and vegetables traffic at Pier 22?

A. Yes.

Q. Now, Mr. Harries has testified that in addition to your Pier 22 facilities, you also operate a 45-car capacity [fol. 456] team track at West 26th Street Station. Have you any cost figures, any per ton cost figures on handling fruit and vegetables at West 26th Street?

A. We don't unload the traffic there.

Q. Yes, but you do have costs beyond the car float, do you not?

A. There are some costs.

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Q. You maintain a switching engine at that point?
A. That is correct.
Q. And a crew?
A. Yes.
Q. You have some maintenance and operation in the plant facilities?
A. Yes.
Q. All that costs money?
A. Yes.
Q. But you have no figures on it?
A. No, I do not.

Mr. Longwood: That is all.
Exam. Brown: Is there any further cross-examination?

Cross-examination.

By Mr. Dougherty:

Q. Mr. Talbott, referring to your Exhibit No. 36 covering the period May 23rd to 29th, do you have a breakdown of the 17 cars of fresh fruit including deciduous?
[fol. 457] A. I think I do. Yes, I do.
Q. Were any of those cars express cars?
A. There was one express car unloaded during that week.
Q. There was one?
A. One express car.
Q. You paid for the unloading of that, but you don't show whether you were reimbursed on that.
A. We counted the tonnage and the number of cars into the figures, and also the costs are in there.
Q. How do you bill the express company for unloading the cars?
A. We make a charge for that. I don't know exactly what the charge is. We do make a charge for it.
Q. You did arrive at this and you allowed for it?
A. No. We included in the tonnage these figures, and the cars, and also the money, assuming it would cost just as much to unload a ton of express car traffic as it would the refrigerator car traffic.
Q. But you also included in your labor charges the money you paid out for that?
A. That is right.

Q. Then you got some of that money back, didn't you?

A. Yes, but we included the number of tons in here in arriving at our average cost per ton. The tons are in column 3.

Q. I am not referring to the tons. It is immaterial to me [fol. 458] whether you had one ton or 20 tons in that particular car. You show your total cost of $2,716.88, which includes cost that you paid for unloading a car that came by the express company.

A. That is right.

Q. Now you got part of that money back, and it is not shown here.

A. Wait a minute. If I were to produce my cost, and produce my tons, I should arrive at the same figure in column 7, because the expenses are all in there, and the number of tons are in there.

Q. I am not referring to column 7. I am referring to the labor at the top.

Mr. Donadio: Whether he got that part back, or all of it back, the cost will still be the same, Mr. Dougherty.

Mr. Dougherty: No. I believe that if you spend——

Mr. Donadio: This is a cost study. It is not a study as to what revenue the railroad gets.

Mr. Dougherty: I am not questioning about the revenue the railroad gets.

Mr. Donadio: The point I am making in connection with your question is that whether the railroad collected from the express company a certain amount for the unloading service, or whether he collected the entire amount from your Auction Company, the cost would still be the same, and this is designed to portray the cost of the unloading [fol. 459] operation.

By Mr. Dougherty:

Q. Isn't it a fact, Mr. Talbott, that if I pay out this week, $300, and next week I get back $40, that I have only paid out $260?

A. That is correct. But in arriving at the average cost——

Q. This is not average on the top, Mr. Talbott.

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A. Yes, but the top is only a means of arriving at the figures in column 7. There is the figure we arrive at in column 7.

Q. Let's still talk about the top and forget about the average down at the bottom. You do know the amount you got back from the express company?

A. I don't know exactly how much it is. I think it covers the cost. We revise those figures from time to time.

Q. Do you charge them on a per hour, per car, per package, or would you mind telling us that?

A. We charge on a per car basis.

Q. How much is it per car?

A. I have forgotten. I have told you before, I don't know the figure. I have seen it, but I wouldn't want to say it because I don't remember.

Q. Is it possible to get that for the record?

Mr. Donadio: I object to this line of questions, Mr. Examiner, because it neither adds to nor detracts from any showing made on the exhibit. It does affect the result [fol. 460] at all.

As I tried to point out, this exhibit is designed to show the average cost of unloading fruits and vegetables, or fruits, rather, at this Philadelphia Terminal.

Exam. Brown: I am not going to rule that that information will not be pertinent here. It is a question of whether you want to furnish it or not.

Mr. Donadio: I don't think it is necessary.

Exam. Brown: As I say, I am not going to rule on that point. In other words, my personal thought is that it is pertinent. Now, whether you wish to supply it or not is something else.

Mr. Donadio: I — think that it adds anything, and with all due respect to your ruling, I see no occasion for furnishing the information. I am not trying to hide anything.

Exam. Brown: You will not be required to furnish it.

By Mr. Dougherty:

Q. Mr. Talbott, on your pro rated basis of directly assigned labor you show foremen which down below is directly charged to unloading at $138.01. Would you mind tell-

ing me what the total foremen is for that Philadelphia operation?

A. We put into these costs one foreman, $73, and one assistant foreman, $64.13.

Q. And he works only on this unloading?

[fol. 461] A. Yes.

Q. He has nothing to do with the private merchandise which is on that dock?

A. That is correct.

Q. Now this quite exhaustive item of "Haul Rubbish—Contract Truck." What is the total amount of the cost of that truck?

A. We pay the trucker $1.50 a load for hauling the rubbish away, and this rubbish we figured as being hauled away in connection with the fruit operation.

Q. How much rubbish did he haul that week?

A. I don't know how much he hauled, but he hauled a lot more than this from the team tracks, and so forth, which is not in here.

Q. To arrive at this figure, didn't you have to know what you assigned to us?

A. I doubt if I have the figure for the total. But I know there was a lot more, and we figured on a certain number of loads coming off the platform in connection with the fruit operation. I don't have the figures on the total rubbish that week.

Q. There must have been a lot going bad. At $1.50 a load, there must have been a lot coming off the platform. Now, you don't know the total cost. You do know that you had quite an extensive operation at that particular point, other than these fresh fruits and vegetables.

[fol. 462] A. Yes.

Mr. Donadio: What point?

By Mr. Dougherty:

Q. The B. & O. Produce Terminal?

A. Yes.

Q. Now, to delivery clerks and patrolmen, you have allocated $165.80. Would you mind telling me the total of that?

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A. I have the cost for the delivery clerks, and the amount assigned covered the men wholly engaged on this operation. As to patrolmen, we have four patrolmen.

Q. At night?

A. In that immediate area, who cover that platform day and night. There is some day operation connected with the fruit. We have four patrolmen, but I took the full time of only one as being applicable to this operation.

Q. This is purely a night operation, is that right?

A. It is purely a night operation, except that we make some deliveries during the day there. There is some operation there during the day. The fruit is moved back at night on the platform to accommodate the current day's traffic.

Q. Didn't you testify that this was a night operation?

A. This is a night operation.

Q. How many patrolmen do you have there at night that you assign to just this produce?

A. I don't have the time that all these patrolmen worked. I have the time on two of them here. I went into that [fol. 463] question of patrolmen and discussed it with our General Superintendent of Police, and after the discussion we came to the conclusion that it was proper to assign the cost of one man for this night operation.

Q. Well, there is no one policeman that just stays on that night operation.

Mr. Donadio: I object to the statement of counsel. It is not a question.

Exam. Brown: He can translate it in the form of a question.

Mr. Donadio: If he wants to do that, I would have no objection.

By Mr. Dougherty:

Q. Mr. Talbott, how many delivery clerks do you have there at night?

A. Two.

Q. What do they do?

A. They check on delivery of the packages to the trucks.

Q. They check on the delivery of the packages to the trucks?

A. That is what I understand.

Q. That is a function, then, that I don't understand takes place there.

Mr. Donadio: I move that the statement of counsel be stricken and that he be confined to asking questions.

By Mr. Dougherty:

Q. Then to what trucks?

A. To the consignee. However, he takes it away.

[fol. 464] Q. Then your men make deliveries at night?

A. They make deliveries in the daytime.

Q. I thought this was an unloading charge?

A. Well, we consider that a part of the cost of the unloading. The delivery clerk makes delivery in the daytime. I should have mentioned that before. The delivery begins after the unloading stops in Philadelphia. The operation is not continuous there.

Exam. Brown: What does unloading stop? When does delivery start?

The Witness: The delivery is usually made after the auction goes into operation. I don't know what time of the day they start, but we generally aim to have all the traffic on the platform in Philadelphia during the night.

Exam. Brown: When does your cost study stop as far as that particular item is concerned, unloading and delivering?

The Witness: We go on during the day at Philadelphia. The main unloading gang work during the night, then in the daytime are called upon to complete the unloading of occasional cars which we do during the day, and deliveries are made during the daytime.

Exam. Brown: With reference to that point, do any of your items cover any services in connection with those deliveries?

[fol. 465] The Witness: Yes, the delivery clerk.

Exam. Brown: You tell us just exactly where it occurs, and how, in your cost study.

The Witness: Delivery clerks work during the daytime and deliver this traffic to the truck, or whoever takes it away.

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Exam. Brown: What sort of an operation is that? How do they do that?

The Witness: Well, the cars—I think an operating witness may explain this exhibit—but the cars are spotted along the platform and unloaded, and then the cars are pulled, and the trucks back up against the platform and take the traffic away.

Exam. Brown: Are your operations any different in the daytime than they are at night, except from the standpoint of volume?

The Witness: Well, at night it would be pretty difficult to make deliveries because we have our cars spotted alongside the platform.

Exam. Brown: When you say make deliveries, I don't understand that in the way in which you use it. Your cost figures are based upon those deliveries, and all I want to know is what you mean by making deliveries? From the platform?

The Witness: From the platform to the vehicle that hauls the traffic away.

[fol. 466] Exam. Brown: From what platform?

The Witness: From our freight platform in Philadelphia.

Exam. Brown: To the vehicle?

The Witness: To the vehicle.

Exam. Brown: In other words, that is a loading charge, a loading cost, if you put it in that vehicle?

The Witness: We consider that a part of the loading operation in Philadelphia.

Exam. Brown: The loading operation?

The Witness: The unloading operation.

Exam. Brown: You put it in the truck of a consignee. Is that included in your cost?

The Witness: That is included in the cost.

Exam. Brown: All right. I don't care for your reasons, but I want to know if that is included in those costs.

The Witness: Delivery clerks perform the operation and are included in the cost.

Exam. Brown: Delivery clerks—only the clerks?

The Witness: Yes, only the clerks.

Exam. Brown: And their function would be to check the consist of the merchandise, is that the idea?

The Witness: As it is taken off the platform.

Exam. Brown: They wouldn't perform any manual labor?

The Witness: No.

Exam. Brown: It is just a checking operation?

[fol. 467] The Witness: Yes.

Exam. Brown: You consider the loading of that vehicle as a properly used item in connection with an unloading cost?

The Witness: The loading—the physical loading is done by the consignee or the auction employees.

Exam. Brown: I understand, but you have a checker who checks the merchandise as it is loaded on that vehicle, do you not?

The Witness: That is right.

Exam. Brown: And you consider that a proper cost in connection with unloading?

The Witness: We do.

Exam. Brown: All right.

By Mr. Dougherty:

Q. Mr. Talbott, you do consider this period as representative of the operation? I believe you said so.

A. We do.

Q. I noticed down here in the citrus fruit 76 tons, with a total tonnage of 1760 tons, which arrives at a better than 23 tons average per car.

A. Yes.

Q. Applying the same principle to the deciduous, it would be a 18 ton average.

A. Yes.

[fol. 468] Exam. Brown: What is that?

Mr. Dougherty: An 18 ton per car average. The bottom one we will discount because, while it could be potatoes, that is unusually heavy.

I also take your figure that you handled 94 cars, in column 2, and I go over to column 6, with a total of $2,716.88, which makes an average cost of $28.90 for the unloading and delivery of these cars, and I believe that that is representative as to the weight of the cars, taking the 17 car basis, and the 76 on citrus, I do believe that it would be

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unreasonable to take the bottom one as the average car.
That is all, Mr. Examiner.
Exam. Brown: Is there any further cross-examination?

Cross-examination.

By Mr. Hunter:

Q. Mr. Talbott. In making your cost study was any study made as to B. & O. Reading Produce Terminal in Philadelphia of any team track deliveries?
A. It was not.
Q. Do you know whether team track deliveries are made there or not?
A. I understand they are made there.
Q. Do you figure in your actual unloading costs that hauling rubbish—contract truck, delivery clerks and patrolmen are applicable to actual unloading costs?
[fol. 469] A. I do.
Q. However, would you or would you not have the same costs on team track delivery, although you haven't made a survey of that?

Mr. Donadio: Costs relating to what service?

By Mr. Hunter:

Q. You would have the rubbish from team tracks, you would also have your patrolmen and clerks on team tracks; is that correct?
A. You would have some rubbish, but you wouldn't have the same expense for clerks because on a team track in Philadelphia when you break a seal on the car, the car is delivered. We don't count the packages coming out of the car.
Q. Nevertheless, you would have rubbish?
A. You would have rubbish.

Mr. Hunter: That is all.
Exam. Brown: Is there any redirect examination?

Redirect examination.

By Mr. Donadio:

Q. Mr. Talbott, these costs that you have shown on your Exhibit 36 for Philadelphia relate to unloading done by the railroad at the auction platform?

A. That is correct.

Q. That is the only place that the railroad unloads fruits and vegetables?

A. That is right.

Q. And the hauling of the rubbish is from the auction [fol. 470] platform?

A. The rubbish that we included in this study is from the auction platform.

Q. It doesn't take into account any refuse, debris, or rubbish that is hauled from the team tracks, or any other place?

A. It does not.

Q. Now, in connection with your figures applicable to delivery clerks and patrolmen, the patrolmen which you have included calls for expense of the patrolmen, the patrolman that is stationed on the auction platform?

A. As my study indicates, there are four patrolmen who work throughout the entire operation there, terminal, team tracks, and platform, and we studied the operation and discussed the matter with our General Superintendent of Police, and we came to the conclusion that the time of one man would properly be charg-able to the unloading operation in the fruit operation.

Q. The services of one man were devoted to the patrol duty on the platform?

A. Yes.

Q. Now, referring to the delivery clerks, where did you get those figures?

A. That is the time of two men who devote all of their time to delivery of this traffic included in the study.

[fol. 471] Q. What does that include? Does that include delivery, check and delivery of fruits and vegetables that are delivered to the Auction Company?

A. Only those delivered to the Auction Company. That is included in the study.

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Q. I think you said something in your cross examination in answer to questions by Mr. Dougherty and by the Examiner that it also included the services of those clerks in connection with delivery to ultimate buyers. Did you understand that is what the Examiner and Mr. Dougherty were referring to? Do you understand that the railroad delivery clerks check the packages that are sold by the Auction Company and delivered to the buyers?

A. That is my understanding.

Q. Then you understand it includes both?

A. Yes.

Q. Do you know what proportion of the cost that you have shown relates to one service and the other?

A. I do not.

Mr. Donadio: I think that is all.

Exam. Brown: The item covering patrolmen in your cost study, is that the same as the item used by other preceding witnesses as police protection?

The Witness: I understand it is.

Exam. Brown: Are there any further questions of this [fol. 472] witness?

(Witness excused.)

Exam. Brown: Mr. Harries will be recalled for cross examination.

E. P. Harries resumed the stand and testified further as follows:

Exam. Brown: Mr. Harries, were you present when prior witnesses testified as to the operations of the terminal facilities at New York?

The Witness: Yes, sir.

Exam. Brown: As I understand it, you are Terminal Agent for the Baltimore & Ohio at New York; is that right?

The Witness: Yes, sir.

Exam. Brown: You have charge of the operations at Pier 22?

The Witness: Yes, sir.

Exam. Brown: Your operation is generally similar, and

is your evidence generally similar, of the preceding witnesses, or substantially so?

The Witness: Substantially so, yes, sir.

Exam. Brown: Is there any difference that amounts to anything that you can tell us about?

The Witness: No, sir.

Exam. Brown: Mr. Wells, you may cross examine.

Cross examination.

[fol. 473] By Mr. Wells:

Q. Mr. Harries, you have stated on direct examination that you perform an unloading of fruits and vegetables only on Pier 22. Do you unload any other commodities there?

A. Yes, sir.

Q. The only place on Manhattan Island at which you make deliveries of fruits and vegetables is at Pier 22; is that correct?

A. No, sir.

Q. Where, on Manhattan Island, do you make delivery of fruits and vegetables?

A. Pier 22, North River, and at our West 26th Street Station.

Q. What volume do you deliver at the West 26th Street Station?

A. About one-third of our traffic.

Q. Of fruits and vegetables?

A. Yes, sir, fruits and vegetables.

Q. Do you have facilities at 26th Street by which you can make delivery of all of your traffic there?

A. Yes, sir.

Q. On time?

A. Yes, sir.

Q. What is the extent of your facilities there?

A. At 26th Street?

Q. Yes.

[fol. 474] A. We have 18 tracks, but they are not all accessible to motor trucks. There are 4 tracks accessible to motor trucks that have a capacity of about 45 cars.

Q. A total of 45 cars?

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A. Yes, sir.

Q. That would be the extent of your facilities, then, for all commodities, is that correct?

A. Yes, sir. That could be reached by motor truck. We have other tracks there that serve other purposes.

Q. Well, do you have any tracks from which you can make delivery?

A. No, sir.

Q. Do you have less than 45 carloads of freight a day for delivery in New York City?

A. What kind of freight?

Q. All kinds.

A. No, sir.

Q. Then you do not have sufficient facilities for team track delivery for the freight which you receive in New York City; is that correct?

A. That is correct.

Q. Do you handle any citrus at all?

A. Indirectly.

Q. What do you mean by that?

A. The Erie Railroad handles our citrus under an oper- [fol. 475] ating arrangement.

Q. In other words, the delivery made by you of citrus fruit is through an arrangement you have with the Erie?

A. Yes, sir.

Q. On Piers 20 and 21?

A. Yes, sir.

Exam. Brown: That isn't limited to citrus, is it.

The Witness: Our arrangement isn't limited to citrus, no. But it is seldom applied to anything else.

Exam. Brown: Don't they ever handle grapes for you?

The Witness: I believe they might have.

Exam. Brown: Is that the practice, or is that unusual?

The Witness: On certain traffic, it is the usual practice. Traffic which was reconsigned at Philadelphia, or points like that, it goes to the Erie.

Exam. Brown: What is the usual practice? Do they ordinarily handle only citrus?

The Witness: Yes, sir.

Exam. Brown: As you testified, it is unusual for them to handle commodities other than citrus for you?

The Witness: Yes, sir.

By Mr. Wells:

Q. Did I correctly understand you to say that in your judgment it is necessary for the B. & O. to employ the force that you described on the pier in order to make delivery in New York?

[fol. 476] Mr. Donadio: Do you mean the longshoremen that he referred to in his direct examination?

Mr. Wells: I mean the Assistant Agent, the Assistant Foreman, the clerks specified as four delivery clerks, and the longshoremen, and the truckers, and so forth.

The Witness: Will you repeat the question, please? What was the question, sir?

Exam. Brown: Restate the question, please.

Mr. Donadio: I object to the form of the question.

Exam. Brown: Restate your question.

By Mr. Wells:

Q. Do you consider that the employment by the B. & O. of those employees at your pier——

Mr. Donadio: What employees? I ask, Mr. Examiner, that Mr. Wells be required to state specifically what employees he is referring to. There is any number of them here, and his answer might be yes as to one set of employees and no as to another.

Exam. Brown: Try it again, Mr. Wells. At this time, let him complete the question.

By Mr. Wells:

Q. Do you consider, Mr. Harries, that the employment by the B. & O. on the pier of your Assistant Agent, who devotes all of his time in the fruit and vegetable operation; the Assistant Foreman, who does some clerical work as well as supervising; the 4 clerks who spend their time making and keeping records pertaining to the arrival and [fol. 477] delivery of the traffic, and the delivery clerks engaged in delivering the produce to the consignee, and the

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one who takes the seal record and calls the cars on the list on the boat, and takes the car doors off—are they necessary in order for the B. & O. to make delivery of that traffic in New York City?

A. I do consider them necessary.

Q. When do you consider delivery of the fruits and vegetables is completed with the B. & O.? At what point?

A. When it is in position for the consignee to take delivery.

Q. Where is that?

A. After the consignee has proven his ownership and we have made it accessible for him.

Q. Where would that be in connection with a delivery onto a pier?

A. At the present time, after it has been unloaded to the pier floor.

Q. And not until it has been unloaded on the pier floor?

A. That is right.

Q. Mr. Harries, if the delivery is completed at the time it is available on the dock floor to the consignee, what functions are you serving by checking it off again to the truckers who come there and take it away from the pier?

A. Well, the trucker can't take it all in one load, and we want to know to whom the merchandise is delivered. They [fol. 478] don't come with one truck big enough to take it away.

Q. In other words, you consider you have a responsibility not only after it is available for delivery from the dock floor, but continuing up to the doorway at which the truck takes physical possession of it?

Mr. Donadio: I object to that question. It calls for a legal conclusion, or at least it may have legal implications.

Exam. Brown: I think the question can be answered from an operating standpoint.

Read the question.

(Pending question read by the reporter.)

Exam. Brown: Answer that from an operating standpoint only.

The Witness: I don't know what the legal aspect——

Exam. Brown: Skip that.

The Witness: You want to know where the merchandise goes from an operating standpoint?

By Mr. Wells:

Q. What I am getting at is: Do you get a receipt for it before that time?

A. No, sir.

Q. You don't get a receipt for it while it is sitting on the dock floor?

A. No, sir.

Mr. Wells: That is all.

Cross examination.

[fol. 479] By Mr. Matson:

Q. Mr. Harries, in response to a question from your counsel, "When the tide is high, is there any extra help needed in connection with the physical unloading of the cars?" you answered, "Yes, when the plank is steep it is necessary to put one more man to a gang to assist the truckers up and down the planks."

At that point in your testimony, were you referring exclusively to the gangplank extending from the platform of the car float to the pier floor?

A. Yes, sir.

Q. What do you mean by "high tide" in that respect? Is that the tide which occurs every 24 hours, or how often does that occur?

A. Twice in 24 hours, but in certain seasons of the year it is much higher than in other parts of the year.

Q. How often do you need to put on this extra man per gang, then?

A. Quite frequently, but not every night.

Q. Once a week, maybe?

A. No. It depends on what time the flood and ebb tide is as compared to the hours in which we operate.

Q. Well, do you know how often this has occurred in the past? Can you tell us in respect to Exhibit No. 35 how many times you had to put on an extra man in the week of February 2nd?

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A. It is my recollection that in the spring we have several [fol. 480] months when the tide is higher, and again in early fall we have several months when the tide is again unusually high.

Q. Then would you say that throughout the week of February 2nd you had an extra man on each of these gangs?

A. I don't know.

Q. How high does the tide have to get before you put on this extra man?

A. Oh, I never measured it, but it has to get pretty high before we do it. But I don't know.

Q. Who determines whether the extra man is necessary?

A. The stevedore foreman, or assistant foreman. The stevedoring company's foreman or assistant foreman.

Q. You cannot tell us then with respect to Exhibit 35 whether these gangs were 7-men gangs or 8-men gangs?

A. No, sir.

Q. Now, in regard to the space on the piers, previous witnesses have testified that the same space was used more than once in the 24-hour period. Can you tell us what the situation is at Pier 22?

A. Yes, sir. We generally use the space more than once in 24 hours.

Q. Do you use it three times?

A. No. In the daytime we have a dead, or dry freight operation, and in the evening we have a perishable produce [fol. 481] operation on the same space floor.

Q. As a rule you use it at least twice in a 24-hour period?

A. Yes, sir.

Mr. Matson: I have no further questions.

Cross examination.

By Mr. Van Arnum:

Q. Mr. Harries, in your direct statement it is rather clearly indicated that you pay the Spencer Corporation on a cost-plus basis. I merely wanted to make sure by asking you whether you have any minimum per ton charge that you pay them for unloading?

A. No, sir.

Q. You do not?

A. Simply cost-plus.
Q. Simply cost-plus?
A. Yes, sir.
Q. This question that I am going to ask you has its genesis in a newspaper item, it is true, in the New York Times, of July 26th, and it is directed at the last answer in your direct testimony, in which you say, "The present operation is efficient, and gives the service the consignees require, and is done at the lowest cost possible."

The item I have in mind here from the New York Times refers to a survey by an engineering concern known as Preben-Jessen Company, Chrysler Building, that was made on Pier 22 in regard to fruits, it specifically refers to, [fol. 482] in which it is stated that labor-saving costs could be incurred in the amount of about $250,000 a year on that pier.

Do you have any knowledge of that?

Mr. Donadio: I object to this witness being cross examined by what somebody has written, or had published in a newspaper article.

Exam. Brown: The witness can state his opinion. I don't believe any harm will come.

By Mr. Van Arnum:

Q. First, I merely ask you if you know of the survey?
A. I never heard of the survey or the outfit.
Q. So you can't have any answer to it?
A. No, sir.

Mr. Van Arnum: That is all.

Cross examination.

By Mr. Logwood:

Q. Mr. Harries, are you also in charge of the 26th Street Station?
A. Yes, sir.
Q. That facility has a maximum capacity of 45 cars. What is your turnover at the 26th Street Station? Do you handle only 45 cars in one 24-hour day, or do you handle them several times a day, or what?

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A. Are you speaking strictly of produce, or all kinds?

Q. You handle all kinds of business there, do you not?

[fol. 483] A. Yes.

Q. Dead freight as well as perishable?

A. Yes, sir.

Q. Can you handle only 45 cars in one 24-hour day, or do you handle 45 cars several times during the 24-hour period?

A. We can do that.

Q. I would like to ask you how you could handle 100 carloads of peaches from South Carolina on your track facilities at 26th Street Station in one day?

Mr. Donadio: Mr. Examiner, I think I object to the question. It assumes 100 cars of peaches would be offered to the railroad for unloading in one day.

Mr. Logwood: You have the tariff obligation to take them if we do offer them, and I tell you South Carolina is becoming a number one peach producing State in the Union. South Carolina peaches——

Exam. Brown: You can proceed on the basis that South Carolina does have available that number of carloads for receipt at this terminal and ask your question accordingly.

By Mr. Logwood:

Q. We anticipate shipping 11,000 cars of fresh peaches this year, and one of our major markets is the New York area. It is not entirely improbable that 100 carloads of peaches will come from South Carolina in one day. If that volume was handed to you, and the consignees designated 26th Street Station delivery, how would you handle it?

[fol. 484] A. We have been in business there a long time, and have a long list of customers, and we would like to take a list of all of them instead of just one customer.

Q. Then to the extent that you could not handle freight at the 26th Street Station, the only other Manhattan facility you have is Pier 22?

A. For fruits and vegetables, yes, sir.

Q. Now, you have outlined your handling of fruits and vegetables at Pier 22 very extensively in your testimony,

but you haven't given us much as to your physical operations at 26th Street.

After you bring cars over from the Jersey railheads to your pier leading to the 26th Street Station, what happens?

A. They are pulled from the float.

Q. With a switch engine?

A. Yes, and spotted in the yard for delivery.

Q. Do you maintain only one switch engine?

A. One engine, yes, sir.

Q. Does it operate 24 hours a day?

A. For the most part, at present, two tricks, sometimes a third trick is on.

Q. Do you have a full engine crew?

A. Yes, sir.

Q. That costs money?

[fol. 485] A. Yes, sir.

Q. You have an idea of the relation of costs there compared with the unloading of freight at Pier 22, have you not?

A. Yes.

Q. Well, you have no track layout at Pier 22?

A. No, sir.

Q. You operate no switch engine?

A. No, sir.

Q. The main part of your cost so far as the Pier is concerned is labor costs, is that not right?

A. There are a lot of other costs besides labor.

Q. I mean so far as effecting delivery to the consignee is concerned?

A. Yes, sir.

Q. Well, then, don't you think that the difficulties you have at Pier 22 in handling freight, where because of your lack of track layout and switch engine facilities, and things of that sort, you unload the freight—don't you think that cost is partly compensated in team track delivery where you have a switch engine cost, switch engine operation crews to pay for, and track installations to put in, maintain and replace?

A. Your question is too long.

Q. I will see if I can cut it down. I understand that the respondents' proposition here is predicated upon the cost

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[fol. 486] of unloading fruits and vegetables from cars to your piers. It is a cost you have been absorbing, but now you propose to make a charge for it. Is that your understanding?

A. Yes.

Q. All right. At Pier 22 you have no switch engine cost?

A. True.

Q. No track installation layout cost to start with, and no maintenance expense on track layout?

A. No tracks to maintain. Floats to maintain on which tracks are——

Q. Yes, but you have floats to maintain whether you make delivery at Pier 22?

A. True.

Q. So that is of little consequence. But after you hit land, your costs of operations differ, is that correct?

A. True.

Q. You do not propose to make any unloading charge on fruits and vegetables delivered to the consignees at 26th Street?

A. No, sir.

Q. But you do have a terminal cost there?

A. Yes.

Q. Beyond the car floats?

A. Yes, sir.

Q. I know you are not an accountant, at least I haven't heard that you were, but do you have any idea of the [fol. 487] relationship of your cost per ton at 26th Street compared with your cost per ton at Pier 22?

A. I have some ideas.

Q. Could you give it to us?

A. It costs much more at Pier 22.

Q. Much more, but you can't go any further than that?

A. At least twice as much.

Mr. Logwood: That is all.

Exam. Brown: Is there any further cross examination? Is there any redirect?

Redirect examination.

By Mr. Donadio:

Q. Mr. Harries, these 45 cars that you mentioned as being available for team track delivery at the 26th Street Station relates to cars which may be placed at one time, from which the consignees may take deliveries from the cars?

A. That is true.

Q. The total capacity of the yard is how much?

A. The yard will hold about 115 cars, but from an operating standpoint we don't like to have over 85 or 90 in it.

Q. So that, in a 24-hour day, if the 45 cars were placed for team track delivery, were promptly unloaded, you could put in more than 45 cars, make more than 45 cars available?

Mr. Wells: I object to the question as argumentative, because under the tariff 48 hours are allowed in which to [fol. 488] unload.

Mr. Donadio: That is all right.

By Mr. Donadio:

Q. You can take that into consideration in answering.

A. We could usually float the first set away, and float a new set of loads over.

Mr. Donadio: That is all.

Recross examination.

By Mr. Wells:

Q. How long is the average time that those cars stay on the tracks before they are unloaded?

A. Produce cars?

Q. Yes.

A. I never made a study of it, but I think it is four or five days.

Mr. Wells: That is all.

(Witness excused.)

Exam. Brown: We will recess at this time until 1:30.

(A recess was taken from 12:15 p.m. to 1:30 p.m.)

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[fol. 489] AFTERNOON SESSION

Exam. Brown: Mr. Crossan will resume the stand for the purpose of cross-examination.

Mr. Donadio: Mr. Examiner, before Mr. Crossan is cross-examined, I would like to ask a question or two on direct.

Exam. Brown: Very well.

CHARLES E. CROSSAN resumed the stand and testified further as follows:

Direct examination (cont'd).

By Mr. Donadio:

Q. Mr. Crossan, will you refer to Mr. Talbott's Exhibit No. 36, which shows the cost of unloading at Philadelphia, and particularly to the item relating to delivery clerks and patrolmen. Is that item included as a result of checking figures in your office?

A. No, sir.

Q. How was that item included by Mr. Talbott? Where did he get those figures?

A. We have a day gang on days to unload parked cars, and that gang has a delivery clerk. That is how he is put on our payroll.

Q. He took that designation "delivery clerk" from your records?

A. That is right.

Q. Now, will you state just what the function of that delivery clerk is?

[fol. 490] A. He is the head of that gang. He runs that gang of men.

Q. Does he have any functions in connection with making deliveries?

A. No, sir.

Q. And that is the same man that Mr. Talbott, in answer to questions of the Examiner and of Mr. Dougherty, described as making deliveries to purchasers?

A. No, we make no deliveries.

Q. I mean, that is the same man?

A. Yes, that is right. The other man, the other delivery clerk is a man that comes on at three to eleven, who moves fruit back that is not moved that day. He is in charge of that gang.

Q. Who is that man?

A. That is the other delivery clerk.

Q. But you have no employees, whether you call them delivery clerks or anything else, that make deliveries of these various products that have been sold by the auction company to the buyer?

A. No, sir.

Q. I think you covered this in your direct examination, but this may be a convenient place for you to describe just what you mean by delivery clerk.

A. Well, a delivery clerk—that is how we carry them on our payrolls, as a delivery clerk, to get his rate of pay. He [fol. 491] is in charge of that gang of men whom he handles.

Q. Does he make deliveries to anybody?

A. He doesn't make deliveries to anyone.

Mr. Donadio: That is all.

Cross-examination.

By Mr. Wells:

Q. Mr. Crossan, on your direct examination you indicated a certain time or point at which delivery was accomplished, where the fruits and vegetables were placed on team tracks or for private sale, but you did not indicate when delivery was completed by your company for fruit sold at auction. Will you please state for the record when you consider that delivery completed.

A. Well, at various times, but we try to get through—we open the doors at six o'clock on Mondays, and 6:30 during the week; sometimes we are a little later than that.

Q. Six o'clock on Mondays?

A. Sundays.

Q. You mean that is the time when it is ready for delivery?

A. That is right, ready to be turned over to the Auction Company.

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Q. Well, do you make delivery then to the Auction Company and not directly to the consignee?

A. That is right.

Q. Who makes delivery to the consignee?

A. The Auction Company.

[fol. 492] Q. So that your transportation has been completed with your delivery to the auction company on or after six o'clock, in the case of Sunday, and 6:30 in the case of other days, to the auction company?

A. That is right.

Q. Does the consignee have any opportunity to receive that fruit delivered to the auction company prior to that hour of opening?

A. No, sir.

Q. When is the first time that he can obtain it?

A. After it is sold.

Q. Can you tell us when that is?

A. Well, they start at 8:30 in the morning.

Q. And if it happens to be the first car sold he can get it at 8:35; is that the idea?

A. That is right.

Mr. Donadio: I think your question was consignee or buyer, the ultimate receiver or buyer.

By Mr. Wells:

Q. Well, whoever gets the fruit. I think I used the term, consignee, but in that case it is the assignee of the consignee; is that correct?

A. That is right, the buyer.

Q. So that, if you want to make that distinction, actually the consignee never gets physical delivery of it at all if it delivered by you through the auction company?

[fol. 493] A. That is correct.

Q. In your direct examination you said the unloading is a piecework operation. What did you mean?

A. We pay them by the car. Our men work piecework.

Q. You pay the men that unload the car by the car?

A. That is right.

Q. Does that vary with different commodities?

A. No, it is just the same. The only thing that we have

is excess loads. Their figure is a car, a standard load. All excess boxes they get extra money for.

Q. In proportion?

A. Yes, sir.

Q. What is that rate, for example, on citrus?

A. We have truckers at $1.47, plus excess boxes; $1.53 for pilers; $1.58 for checkers.

Q. Per car?

A. Yes, sir.

Q. What is your basis of what a car consists of?

A. We have a chart that shows a car of California lemons as 406 boxes. That is a standard load.

Q. Is that the tariff carload minimum?

A. That is right.

Q. In each instance for the fruits you use the base car as being the car specified in the tariff for the carload number?

A. That is right.

[fol. 494] Exam. Brown: I don't believe your question is clear. They use different size cars, do they not, in transporting fruits and vegetables in these various origin areas?

Mr. Wells: I don't know. There is a difference in the carload minimum in that case, though.

Exam. Brown: I don't know, either, but the fact remains that they have different sizes of cars. We all know that. Now, whether they might or might not have a different carload minimum, surely the different size cars would have different loadings.

Mr. Wells: Under the ODT minimum that is true. But as I understand, where there is an increase in number of boxes per car under the ODT loading requirements in excess of the published tariff carload minimum, that extra is paid for in proportion.

By Mr. Wells:

Q. Is that right?

A. That is right.

Q. Using the tariff minimum as the base rate?

A. That is right.

Q. Do you have any other data available here to show

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the difference in turnaround or availability of the refrigerator cars as between the three different kinds of deliveries that you described on your direct examination?

A. No, sir.

Q. How long does it require to make the refrigerated cars [fol. 495] available for the empty return movement when it is delivered by unloading onto the platform by railway labor?

A. Well, it is pretty fast.

Q. A matter of minutes or hours?

A. We unload a car an hour, each gang.

Q. And it is then available?

A. That is right.

Q. Do you know of any other similar method of delivery that even approaches that rapidity of release of cars?

A. No, I don't know of any.

Q. What is the closest approach to it that you know of?

A. Well, our private sales unload cars as fast as we do—that is, the private sales' platform.

Q. At the private sales platform is the car invariably released on the same day it is placed?

A. Yes, sir.

Q. Is that true of team track delivery?

A. That is hard to say. I don't know.

Q. Your 48 hours' free time applies to that instant after placement?

A. That is right.

Q. Sometimes it runs beyond that, doesn't it?

A. Yes, sir.

Mr. Wells: That is all.

[fol. 496] Cross examination.

By Mr. Matson:

Q. Mr. Crossan, with reference to your Exhibit No. 34, just where is this produce terminal located in relation to that of the Pennsylvania Railroad? How far away?

A. We are only three or four squares from the Pennsylvania Railroad. They are on Ogden Avenue, whereas we are on Delaware and Wolf.

Q. How long has your terminal been in operation?
A. Since 1926.
Q. 1926?
A. Yes.
Q. Between the time that this terminal was put in operation and the time that the Pennsylvania terminal was put in operation, what proportion of this fruit and vegetable traffic did you enjoy at Philadelphia?

Mr. Donadio: I don't see the materiality of that question, Mr. Examiner. I don't see how it will throw any light on the issues involved here.

Exam. Brown: The witness may answer for what it is worth.

A. I can't answer the question.
Q. Did the volume of traffic handled by the B & O and the Reading at Philadelphia drop off after ethe Pennsylvania Terminal was put in operation?

Mr. Donadio: I object to it.

[fol. 497] Exam. Brown: If you know.

A. I don't know.
Q. You don't know the answer to that?
A. No, sir.
Q. I believe you stated that you pay these members of the unloading gang on a per car basis, and that the checkers receive $1.58 per car, the truckers $1.47, and the pilers $1.53. Is that right?
A. That's correct.
Q. Your testimony has been that each gang will consist of one checker, three truckers, and two pilers.
A. That is correct.
Q. Adding up the amounts paid to each, I compute that to be $9.05 per gang for unloading one car.
A. Excess boxes are not in that.
Q. What is the general situation as to excess boxes? Do you always have excess boxes?
A. Yes, most all the time.
Q. To what extent would that increase the amount paid per gang per car?

Mr. Donadio: Mr. Examiner, I have no objection to Mr. Matson asking Mr. Crossan any questions about operations,

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but I don't want him to get into the cost question. He can go into the minutest detail as to what is done and how much time is taken, and all that sort of thing, but I want [fol. 498] to object to his cross-examining Mr. Crossan about any costs. That is a cost question.

Exam. Brown: I think you had better limit your questions to operations.

Mr. Matson: I submit the last question asked, Mr. Examiner, was strictly related to operation.

Exam. Brown: Read the question. I am afraid you will find it does refer to cost.

(Pending question read by the reporter as follows:

"Q. To What extent would that increase the amount paid per gang per car?")

Mr. Donadio: That is a cost question.

Exam. Brown: You can ask how many additional employees they will need. That will be proper.

By Mr. Matson:

Q. Mr. Crossan, when you unload a car which has additional boxes in it, do you increase the size of the gang or use the same gang?

A. Sometimes we put extra men in the gangs to get the cars out.

Q. Now, during the time within which the ODT orders relating to loadings have been in effect, is it true that all of these cars have had extra boxes?

A. Yes, you will run into some that don't have, but a carload of pears or something like that generally runs the same all the day—all the time, standard load.

[fol. 499] Q. When you have extra boxes, the average would be about 20 percent extra?

A. I don't know just what it amounts to. We have figures to figure it. That is the only thing we can go by.

Exam. Brown: Do you know how many boxes would be in a particular size car?

The Witness: Well, a carload of California oranges runs 99 boxes over.

Exam. Brown: In other words, you would know offhand

by seeing the car arrive at the terminal approximately the number of packages that would be in it?

The Witness: Yes, sir.

Exam. Brown: You would also know that such car was due to arrive and you would know the exact number of boxes in it, would you not, from your records?

The Witness: That's right.

By Mr. Matson:

Q. Mr. Crossan, will you tell us what the standard load of citrus fruit would be—how many boxes.

A. Floridas?

Q. The citrus fruit set forth in Exhibit 36, as handled at your terminal at Philadelphia.

A. Excess boxes?

Q. Tell us the standard number.

A. 420 for Floridas, and 462 for Californias.

Q. How many extra boxes?

[fol. 500] A. Well, that is hard to tell. Floridas will run 544 or 564. Californias will run 561 or 693. Lemons will run 464 or 696.

Mr. Donadio: 464 is the normal?

The Witness: 406.

Mr. Donadio: And they run 464 to 496?

The Witness: 696.

By Mr. Matson:

Q. How about fresh fruit, including deciduous?

A. Why, your grapes will run 14 or 15 hundred boxes.

Q. That is the standard loading?

A. No.

Q. What is the standard on them?

A. 1098, I think—I am pretty sure.

Exam. Brown: What size car?

The Witness: I don't know.

Exam. Brown: Don't you have different sizes of cars? Cars in which that traffic is handled?

The Witness: We have different size cars, but that is the contents of the car.

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Exam. Brown: You say that 1098 is the contents of the car. That surely isn't right for a large sized car, is it?

The Witness: A 50-foot car.

Exam. Brown: How about a 50-foot car?

The Witness: It varies as to the number of boxes in the [fol. 501] car.

Exam. Brown: Do you consider 1098 as the standard?

The Witness: Yes.

Exam. Brown: Is that in a 50-foot car or a 42-foot car, or what?

The Witness: Any size car, you put that many in.

Exam. Brown: Yes, you can put, perhaps, 1098 in a 42-foot car, whereas you ordinarily would put more than that in a 50-foot car.

The Witness: That is right.

Exam. Brown: What is the fact?

The Witness: That is the fact.

Exam. Brown: When you say that is the standard, 1098, you mean that figure is used for any type of car?

The Witness: Yes, sir. That is our standard number of boxes on grapes.

Exam. Brown: Irrespective of the size of the car?

The Witness: That is right.

By Mr. Matson:

Q. Mr. Crossan, can you tell us whether it would be possible that these unloading gangs would be paid twice as much for unloading a car just because it had a few extra boxes in it?

Mr. Donadio: There ag-in you are going into the question of cost, and I submit, Mr. Examiner, that he can listen to all the facts he wants to by proper questions and then make [fol. 502] all the deductions and arguments and contentions that he sees fit. I object to the question. It is argumentative.

Mr. Matson: I would like to point out the inconsistency in Exhibit 36, in view of the witness' testimony, and I would like to have it straightened out for the record. I think the Commission will be much interested in it.

Mr. Donadio: I am interested in keeping the record

straight, perhaps more so than you are, so if you can point out any inconsistencies on it to be straightened out, go right to it.

Exam. Brown: Develop such facts as you can from this witness which would permit us to check Exhibit 36. I don't believe you should ask cost questions of this witness. If necessary we can have Mr. Talbott recalled for cross-examination.

Mr. Matson: I don't think there is anything so deep that it would necessitate a cost accountant to understand it, and I think this witness could answer it. You have on Exhibit 36 a showing of 94 cars, and by the testimony of this witness——

Exam. Brown: Which witness?

Mr. Matson: The man on the stand at the present time. The price paid per gang is $9.05. Now, $9.05 multiplied by 94 cars is only $840.70.

Mr. Donadio: That is your computation?

Mr. Matson: Yes.

[fol. 503] Mr. Donadio: And you are assuming that that is the total expense of that gang, which I submit, Mr. Examiner, there is nothing in the record that substantiates it.

Mr. Matson: I am not assuming any such thing. I am taking the testimony of this witness and showing that if a gang consists of one checker, three truckers, and two pilers, who were paid in accordance with the rates stated by this witness, that adds up to $9.05 per car. You have 94 cars. And 94 times $9.05 amounts to $840.70, which is a long way from $1,615.46.

Mr. Donadio: I still say your computations do not cover the entire cost of those unloadings, the unloadings of those cars.

Exam. Brown: My suggestion is to develop from this witness such facts as you wish which will permit you to check with Witness Talbott in his Exhibit 36. I will have him recalled for that purpose.

Mr. Matson: Thank you. That is all.

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Cross-examination.

By Mr. Hoffman:

Q. What is the number of boxes in a standard load of pears?

A. 720.

Q. And in the case of plums?

A. 1020.

Q. Now, you handle pears, plums, grapes—any other de-

[fol. 504] ciduous fruits other than apples?

Q. Prunes.

Q. What else?

A. Apples.

Q. Those varieties that you have now enumerated are approximately all the varieties of deciduous fruits handled by you?

A. That is right.

Mr. Hoffman: That is all.

Exam. Brown: Is there any further cross-examination of this witness?

Cross-examination.

By Mr. Dougherty:

Q. Mr. Crossan, isn't it a fact that most of our deciduous fruit arriving now, and arriving for the past year, are not overloaded if they do have the normal loads in deciduous?

A. Well, they are not too much overloaded, like the citrus.

Q. Well, are they overloaded?

A. Yes.

Q. Isn't it rare when we get more than 720 pears?

A. 740 or 760.

Q. I think you made a statement that we had 1500 grapes. Do you mean to say that we actually had 1500 grapes in a car?

A. Yes.

Q. And that arrived in Philadelphia on your platform?

A. Yes.

[fol. 505] Q. Well, that most certainly would be a real rare one, wouldn't it?

A. Well, we have large cars today.

Q. I thought you answered the Examiner that the cars were all the same.

A. No, they are not all the same.

Q. I mean the size of the car.

A. No.

Q. You are using this large car for these grapes?

A. I don't know the size of the car. It is nothing to me what the size of the car is. It is the contents that I worry about.

Q. Well, I will agree with you that deciduous fruit generally arrives overloaded.

A. That is right.

Q. And in most cases we would say it runs 25 percent over.

A. Yes.

Mr. Wells: May I say what is overloaded is excess of the tariff minimum.

The Witness: That is right.

Q. This greater load they were permitted under the ODT. In other words, the 420 is now 425 and 462. California is now 561. But in your direct testimony you are positive that it costs $9.05 to unload a car.

A. No.

[fol. 506] Mr. Donadio: That was Mr. Matson's testimony. You might cross-examine Mr. Matson on that.

Mr. Dougherty: Pardon me, I think it was Mr. Crossan's testimony.

Mr. Donadio: No, it wasn't.

By Mr. Dougherty:

Q. Do you say how many people it takes to unload a car in your testimony?

A. That is what our agreement reads with the men.

Q. Your agreement with the men?

A. That is right. We use extra men in the cars to get the cars unloaded.

Q. That is three truckers?

A. And two pilers, and one checker.

Q. That is the basis on which you pay these men?

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A. No. We pay them according to the number we have in the gang. They all get paid the same in proportion to their wages.

Q. On Page 3, a checker is in charge of the gang of men which consists of 3 truckers, 2 pilers and 1 checker, or a total of 6 men.

A. Yes, sir.

Q. Doesn't that constitute your gang in the unloading of a car?

A. Just as I said, we use extra men to keep our gang together for the unloading. Sometimes we will have one or [fol. 507] two men over in a gang.

Q. This constitutes the amount of men necessary for the normal car?

A. That is right.

Q. Okay. And the cars are running 25 percent overloaded?

A. That is right.

Q. Then that would make it just 25 percent greater?

A. That is right. I don't know what it would make it. I don't admit as to the cost.

Q. Now, but Mr. Talbott did say, when I was questioning him, that he got his figures from conferences with you.

A. Mr. Talbott got his figures from my office, and the time.

Q. He did mention the fact that the agent would and could develop it.

Mr. Donadio: You go ahead and ask Mr. Crossan any facts you want to about operations, and I think you will get the answers.

Mr. Dougherty: That is what I intend to do.

Exam. Brown: Just a minute.

Mr. Donadio: I object to Mr. Dougherty making comments that are not questions.

Exam. Brown: All right, Mr. Dougherty, proceed.

By Mr. Dougherty:

Q. On the basis of granting that the cars are 25 percent overloaded, and we allow the 25 percent on all [fol. 508] cars, which is certainly not true in the deciduous, it brings the cost of unloading up to $11.31.

Mr. Donadio: I object to the question because it is assuming a certain percentage, and Mr. Crossan made no statement giving the cost, or giving the consist of the gangs when the cars were overloaded, based on a percentage basis. He just stated he employed extra men, paid the men extra per car when the cars were overloaded. Mr. Dougherty is translating it into percentages, and I object to his question on that basis.

Exam. Brown: Perhaps Mr. Dougherty's computations may be correct. I don't know. But assuming they are accurate, and that he asked them on the basis of his computations, that doesn't mean that the computations are right. If you wish to proceed on an assumed state of facts and ask the witness a question, you may do so for what it is worth.

By Mr. Dougherty:

Q. Well, I have allowed a 25 percent increase, Mr. Crossan, on these loads to the gang by multiplying that by the 94 cars, I arrive at a cost of $1,063.14, where as the cost on Exhibit 36 shows for checker, truckers, and pilers, and that is all I am including, $1,615.46.

Mr. Donadio: I object to the question as argumentative. He is arguing with the witness to place his own interpretation on his testimony.

Exam. Brown: The argument is pretty much one-sided. I [fol. 509] haven't heard the witness say a thing.

Off the record.

(Statement off the record.)

Exam. Brown: Let us go back on the record.

By Mr. Dougherty:

Q. Mr. Crossan, the delivery clerks that you say stay on in the daytime and unload this merchandise—isn't the checker in charge of the unloading crew?

A. The delivery clerk—that is what you are talking about or the checker?

Q. Yes, delivery clerk.

A. That is right. That is a day man's gang, and he is a

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delivery clerk from 3 to 11. He moves the fruit back. It is another delivery clerk.

Q. I am talking about the delivery clerk where the car is unloaded in the daytime. Why does that gang need a delivery clerk if the checker is in charge at night?

A. You will have to take that up with the organization.

Q. Is it really hard to unload them in the daytime?

A. Do we have to have a delivery clerk with each gang of men we have working? Yes. The organization——

Mr. Donadio: Tell him what you mean by organization.

A. (continuing) The organization—that is what the organization makes us do.

Q. Which organization?

A. The railroad organization.

[fol. 510] Q. Are you referring to the B & O Railway Company?

A. The organization of the B & O.

Mr. Donadio: The union?

The Witness: The union.

By Mr. Dougherty:

Q. But you don't have that at night?

A. Yes.

Q. You still have the checker in the daytime along with the delivery clerk?

A. No. The checkers are with the night gang.

Q. One checker for each gang?

A. Yes. There are two delivery clerks, a day delivery clerk and the one that comes on at 3 to 11 to move the fruit back. That is two gangs, with two delivery clerks.

Q. They are not concerned with the unloading, then, are they?

A. The day man unloads half cars—we unload half cars for the receiver, and he tries to sell them. If he doesn't sell it all we bring the balance of the car out in the daytime.

Q. The checker or the delivery clerk?

A. The delivery clerk.

Q. Then you do have an extra man in the daytime delivering?

A. We don't deliver anything—only to the platform.

Mr. Donadio: That is a misnomer. I think Mr. Crossan explained that that is the way he has to carry them on the payroll. But it is a misnomer. We don't deliver any-
[fol. 511] thing to anybody.

By Mr. Dougherty:

Q. Why doesn't he do it at night, too?
A. We have a gang on daytimes that has a delivery man. That is how we have to classify that man.
Q. In reality he is a checker?
A. Just the same thing.
Q. Well, the checker is covered up in the top of the exhibit. I tried to question this item of $119.57 for hauling this rubbish which is all allocated to the unloading.
A. Of course, I can't answer that one. That is the accounting department.

Mr. Dougherty: That is all.

Cross-examination.

By Mr. Hunter:

Q. Mr. Crossan, in your direct examination you say that you have firsthand knowledge, since you are in complete charge and have direct responsibility for the entire operation.
A. That is so.
Q. You also state that on fruits and vegetables for private sale, for team track, they are unloaded by the consignees and you perform no service in that connection.
A. That is right.
Q. On the team tracks there is, of course, rubbish?
A. That is right.
Q. The team tracks are policed?
[fol. 512] A. Yes, sir.
Q. Would you consider that a service of the transportation company, the policing and cleaning of the yard?

Mr. Donadio: I object to that question as calling for a conclusion. I have no objection if you are asking the wit-

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ness if the railroad removes the rubbish and polices the team tracks. I object to asking the witness a conclusion.

Exam. Brown: Ask the witness a question in response to which he will give you the facts, and then your question will be proper. You are calling for a conclusion there. Just ask him what the railroad does and does not do. You will get the same type of information.

By Mr. Hunter:

Q. The railroad does clean the rubbish from the team tracks, does it not?

A. Yes.

Q. The railroad also polices the team track deliveries?

A. Yes, sir.

Mr. Hunter: That is all.

Exam. Brown: Is there any further cross-examination? Is there any redirect?

Mr. Donadio: Nothing on redirect.

(Witness excused.)

Exam. Brown: I will now recall Mr. Talbott for further cross-examination.

Mr. Talbott.

[fol. 513] E. M. Talbott was recalled and testified further as follows:

Cross-examination.

By Mr. Matson:

Q. Mr. Talbott, you have been here during the cross-examination of Mr. Crossan?

A. I have.

Q. And you have heard the questions asked of him. Can you give us any explanation of the difference between $850.70 which represents 94 cars multiplied by $9.05——

Mr. Donadio: I object to Mr. Matson using his calculations. I have no objection to his asking this witness just how he got his figures, and then he can make his own de-

ductions as to whether his computations are right and the witness' wrong.

Exam. Brown: Mr. Matson, proceed on an assumed state of facts and ask this witness any question you wish. I think this witness can take care of himself all right. Go ahead.

By Mr. Matson:

Q. Mr. Talbott, the testimony of Mr. Crossan was that each gang consists of one checker, who is paid $1.58 per car, 3 truckers who are paid $1.47 each per car, and 2 pilers who are paid $1.53 per car. Do you verify my calculation that that amounts to $9.05 per car?

A. Correct.

Q. If we take the total number of cars which you have shown on your exhibit as 94, and multiply that by $9.05, does [fol. 514] that not amount to $850.70?

A. Do you want me to multiply it?

Q. Yes, it will only take a couple of seconds.

A. I don't see much use, for if you don't mind, I will explain how we get the figures and where you are wrong in your calculations.

Q. My calculation is perfectly——

A. I mean, arrive at your conclusion, then.

Exam. Brown: Verify or concede that calculation.

Mr. Donadio: If you think it is wrong——

The Witness: I think we can save time if I explain the procedure.

Exam. Brown: First of all, will you verify that calculation.

The Witness: What was the calculation?

Q. 94 times $9.05.

A. $850.70.

Q. That is right?

A. Yes.

Exam. Brown: Go ahead and ask your question.

Q. Can you tell us why there should be such a spread between that $850.70 and the amount shown at the top of your exhibit of $1,615.46? Is that accountable for entirely by the extra boxes in the cars?

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A. It is not.

[fol. 515] Q. What is the explanation?

A. Well, the standard gang totaled $9.05. We pay a lot more than that for unloading a car with this traffic. In other words, if we unloaded a half car at a time we pay $18.10. We pay them two times $9.05. In this thing nearly every gang has extra men in it. In other words, if we have an extra piler in the gang we would pay that gang $9.05 plus $1.53. And nearly every gang has extra men in it, so from an actual cost standpoint instead of $9.05 I have cars that cost $22.65. You take a standard car at $9.05, plus two or three extra men in the car, the $9.05 is only a basic piece-work rate and doesn't mean anything.

Q. How often does it happen that you pay twice as much to have a car unloaded?

A. I have before me a sample of one—of 17 cars. There are two of them in there that are twice as much, but there are some that are $13 and $15. They are all way over $9.05.

Q. That is for the amount assignable to checkers, truckers and pilers?

A. Absolutely.

Q. Now, if those cars consisted of standard loads of 406 boxes of lemons, for example, would it be possible to unload the car with the standard gang of six men?

A. It is not the practice, because they have more men there each night. The men are called out and they have to [fol. 516] put them to work, and we have to absorb the cost.

Q. You mean if you have 8 or 10 extra men around the depot you put them to work because you have to pay them anyway?

A. You have to pay them anyway, and you have to put them to work, and as I understand that situation is all controlled by the labor situation in Philadelphia.

Q. And all these men are on the railroad payroll?

A. On the railroad payroll. We pay on a weekly basis, a special payroll.

Q. And if six men can unload the car and you have nine men there, you put nine men to work?

A. We put to work what we have to put to work. The men are there and we have to pay them for it.

Q. Is that what is known as a "feather-bedding practice"?

A. Well, I will let you name it.

Q. I am still looking at this $850.70 as compared to $1,615.46. It seems to me to be quite a discrepancy. Is it your testimony that you have explained all of that big spread?

A. Yes, I have.

Mr. Matson: That is all.

Exam. Brown: Mr. Dougherty, would you like to pursue that line of questioning that you started with the prior witness?

Mr. Dougherty: No.

Exam. Brown: You are willing to let it stand as it is. All right.

[fol. 517] Is there any redirect?

Redirect examination.

By Mr. Donadio:

Q. Mr. Talbott, this $1,615.46 which Mr. Matson claims is inconsistent with his own computation, that represents the actual payroll, does it not, of the period shown on your exhibit?

A. Yes.

Q. Do you have that broken down into payments per car, or the amount allocated to each car?

A. Not on the payroll. We had to go back to the timesheets and the freight bills to get that. The payroll only shows the amount paid each individual man.

Q. From that, then, you calculated just what each car cost?

A. That is right.

Q. On that basis?

A. From that and from the timesheets supporting the payroll.

Q. Now, the statement of yours that men have to be put to work because their—because they are there; is that based on union regulations or union requirements?

A. I understand it is. I don't know exactly all the regu-

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lations, but I understand when we call the men out we have to put them to work.

Exam. Brown: Or pay them?

The Witness: Or pay them.

Mr. Donadio: That is all.

[fol. 518] Recross examination.

By Mr. Matson:

Q. Does this Column 4 on the bottom of your exhibit reflect the charges on the payroll for the respective types of cars unloaded?

A. Well, the payrolls are based on $9.05 a car. That is, they are based on the rate for each man. A piler, for instance, gets $1.53 a car. If he works on 20 cars he gets 20 times that much money.

Q. I notice the last amount there is $9.05 for unloading potatoes.

A. That was unloading by day car, by the regular number of men. That is the only car I have before me.

Q. Have you taken these other figures, the $1,329.77 and the $276.64—were those items taken from the records relating to the respective types of commodities shown in your exhibit?

A. They were.

Q. If you call out men to perform this work and they are not put to work, are they paid the same amount of money as if they do work? Do you have a standby rate of pay as distinguished from a working rate of pay?

A. No, we have to pay them. We might as well put them to work if we have to pay them.

Q. In other words, they get just exactly as much money if they work or if they do not work?

A. Yes.

[fol. 519] Q. How many cars will one gang unload in a night?

A. Well, I didn't make my figures on that basis. I took it on a weekly basis.

Q. They certainly unload more than one car.

A. A night?

Q. Yes.

A. Oh, I would think they would.

Q. Now, if you call a man out to work, does that mean that he is going to work a whole night, or just work on one car, or what does it mean?

A. The agent handles the operation there, and I don't believe he is putting men on the payroll that is not necessary to comply with the labor regulations in Philadelphia, and I wouldn't know the answer to that question, but I am sure he is not paying out more money than he has to.

Q. You mean that is a question that can be answered better by Mr. Crossan?

A. Well, I don't know the answer to it.

Mr. Matson: That is all.

Mr. Donadio: We can have Mr. Crossan answer it if you want the answer. We are going to get all the answers you want if they are pertinent.

Exam. Brown: Have you completed your recross of this witness?

Mr. Matson: Yes.

[fol. 520] Mr. Donadio: I have nothing further.

(Witness excused.)

Mr. Matson: May we have the answer to that question given by Mr. Crossan.

Charles E. Crossan was recalled and testified further as follows:

Cross-examination.

By Mr. Matson:

Q. What I would like to know now, Mr. Crossan, is related to the practice of calling these laborers out to go to work. Suppose you call a piler. Does that mean that he is going to be guaranteed a full night's work, or the work of unloading one car, or what does it mean?

A. It means he is going to unload the number of cars that are there for him to unload—that gang.

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Q. I understand under certain circumstances you have more men than you actually do need.

A. We have those men on the payroll.

Q. What is the guarantee for a man who is called under those circumstances?

A. The number of cars that that gang gets that he is in.

Q. In other words, when you call him he is definitely assigned to a gang, and any car unloaded by that gang he participates in it and is paid for that?

A. That's right.

Exam. Brown: Let us assume an extreme proposition, [fol. 521] whereby that gang does not unload any cars. Then does not that gang get paid something?

The Witness: Only what they unload. That is all they get paid for.

Exam. Brown: If they unloaded no cars whatever they would not get paid?

The Witness: We wouldn't make a call if we didn't have any cars to unload.

Exam. Brown: But sometimes you have more men than you need and you have made calls?

The Witness: Well, they are on the payroll. I have got to use them.

Exam. Brown: I understand that, but the inference was a moment ago that you wouldn't call this gang there unless you needed them, but the answer prior to that was that you would have a number down there that you would not need.

The Witness: I have never had any unloading where they didn't get two or three cars a night since I have been there.

Exam. Brown: Do you have any particular guarantee to a man or to a gang?

The Witness: No, sir.

Exam. Brown: Just what they actually do?

The Witness: That is right.

Exam. Brown: If a man sits on the sideline all evening he gets what the gang does?

[fol. 522] The Witness: That is right.

Exam. Brown: Whether he participates in it or not?

The Witness: That is right.

Exam. Brown: Are there any further questions of this witness?

(Witness excused.)

Exam. Brown: Is there any further evidence from the respondents?

Mr. Smith: Mr. Examiner, the record will show that Mr. Hart, who was one of the Erie witnesses, was requested to assemble and produce certain information, breaking down the receipts of freight at the Erie piers at New York for three periods; the first half of 1946, the second half of 1946, and the first half of 1947.

Mr. Hart has complied with this request and has prepared a one-page statement headed "Number of Cars Unloaded, Duane Street Stations, New York, New York."

I now offer this statement in evidence as Exhibit 37. There is one correction that should be made on the exhibit. The middle column should read "July to December 1946," instead of "June to December 1946."

Exam. Brown: Exhibit 37 is received in evidence.

(Respondent's Exhibit No. 37, Witness Hart, received in evidence.)

Mr. Smith: The record will also show, Mr. Examiner, [fols. 523-530b] that Mr. Hodkinson was requested to produce certain information. I am informed that he hasn't got it all ready yet, but probably will have it tomorrow.

Exam. Brown: In the event Mr. Hodkinson is not able to have that ready tomorrow, I will permit the respondents ten days in which to file that information, furnishing copies to all parties.

Mr. Smith: Thank you, sir.

Exam. Brown: Is that the respondents' case?

Mr. Smith: Yes, sir, that completes the respondents' case.

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[fol. 531] PROCEEDINGS OF AUGUST 1, 1947

Exam. Brown: Are we ready to proceed?
Mr. Wells: I will call Mr. O'Rourke.

JOHN A. O'ROURKE was sworn and testified as follows:

Direct examination.

By Mr. Wells:

Q. Will you please state your name and residence.

A. My name is John A. O'Rourke. My address is 45 West Central Avenue, Orlando, Florida.

Q. Whom do you represent?

A. I am employed as secretary-manager of the Growers and Shippers League of Florida.

The Growers and Shippers League is an organization of growers and shippers of citrus fruit and fresh vegetables in Florida, and the duty of the League is the handling of rate, traffic and transportation matters for its membership.

We are also the authorized traffic agency of the Florida Citrus Commission, located at Lakeland, Florida. We are, therefore, appearing here for the membership of the League and the Florida Citrus Commission.

I have been handling rate and traffic matters with the carriers and before the Interstate Com*mission* Commission for more than forty years. I am a registered practitioner before the Commission.

[fol. 532] Q. The Florida Citrus Commission is a State regulatory body; is it not?

A. That is correct, yes, sir.

Q. Are you familiar with the proceeding here involved?

A. I have made a careful study of the proposal in this case, and we filed a protest for the suspension and investigation of the proposal here under investigation.

Q. Mr. O'Rourke, in general, does the freight rate on fresh citrus and fresh vegetables from Florida to New York and Philadelphia include the services in the unloading and delivery of those commodities?

A. They do.

Mr. Smith: I object to the form of the question, Mr. Examiner. The respondents will concede that the railroads receive no revenue for the unloading service. The only money they get is the so-called rate. That fact is clear, and I don't think there need be any characterization of the situation by this witness.

Exam. Brown: The question is whether or not the rate includes the unloading services. Is that right?

Mr. Wells: Yes.

Exam. Brown: That is a highly argumentative question. This witness is a traffic man with considerable experience. I will permit him to state his idea of the matter and solely as his opinion.

[fol. 533] A. (continuing) The tariffs so provide.

By Mr. Wells:

Q. Mr. O'Rourke, in Mr. Hodkinson's Exhibit No. 4, he shows a transcontinental group A—destination group A. For clarity, will you state whether or not that includes the entire destination blanket on citrus from California.

Exam. Brown: I think you had better clarify your question. What do you mean by destination blanket?

Mr. Wells: I am referring to the territory east of Chicago to which the same rate applies regardless of destination.

A. There is a break in the citrus rates from California east and west of Chicago, Illinois, and this line on Exhibit 4, from Dover to the Buffalo-Pittsburgh territory, which is considerably east of the Chicago line.

Exam. Brown: You haven't made your answer clear. I don't know what you mean by Buffalo-Pittsburgh in connection with transcontinental Group A.

The Witness: The heavy black line on Exhibit 4 is drawn east of Buffalo through Pittsburgh. The rate break from the transcontinental territory is east and west of Chicago, Illinois.

Exam. Brown: Your answer is still not clear to me.

By Mr. Wells:

Q. Were you referring to Exhibit No. 4 and the black line which is shown as the western boundary of the transcontinental Group A?

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[fol. 534] A. That is correct, yes, sir.

Q. And your statement with regard to the destination group on citrus from California is that the same rate applies to the entire territory east of Chicago?

A. That is my understanding; yes, sir.

Exam. Brown: Where is the southern end of that line from Chicago?

The Witness: It is not shown on this Exhibit 4. It only runs down to the northern part of Virginia.

By Mr. Wells:

Q. In general, so far as the citrus destination group is concerned, it covers the entire eastern part of the United States, doesn't it?

A. By various alphabetical letters from A to K—no, down to M.

Q. But referring to the Examiner's question, you said east of Chicago. Was the territory in which the rate was blanketed over the entire area, and that area is the entire eastern part of the United States, both southern territory and eastern territory?

A. That is correct.

Exam. Brown: Is it your testimony that this destination group covers practically all of the official territory, Chicago and south and east thereof? Am I to understand that is what you are driving at now?

The Witness: That is correct.

[fol. 535] Exam. Brown: And it also covers southern territory, practically all of the southern territory, perhaps, with the exception of the Florida peninsula?

The Witness: That is correct.

Exam. Brown: Is that your testimony? Is that what you mean?

The Witness: Yes.

Exam. Brown: You don't take issue with the fact that Exhibit No. 4 shows transcontinental Group A—that that is a correct outline of Group A?

The Witness: That is Group A, yes.

Exam. Brown: Your testimony is that the citrus blanket

from California, not only covers Group A, but Groups A to M inclusive?

The Witness: A to K-1 inclusive.

Exam. Brown: K-1. Is that the Florida peninsula?

The Witness: Yes.

Exam. Brown: Then your answer to me needs modification, wherein I said it might possibly exclude points in the Florida peninsula. K-1 is the Florida peninsula. So you intend to testify with respect to K-1——

The Witness: The rates to K-1 are slightly higher.

Exam. Brown: But the rates to K are the same as the rates to Group A?

The Witness: That is correct.

[fol. 536] Exam. Brown: Now, so far as New York and Philadelphia are concerned, the transcontinental Group A take the same rate to the Pacific Coast; is that right?

The Witness: That is right.

Exam. Brown: All right, Mr. Wells.

By Mr. Wells:

Q. Mr. O'Rourke, will you proceed with the explanation of your Exhibit No. 38.

A. I wish to present for identification an exhibit of thirty pages, which I desire to file in this case. These exhibits were prepared by me or under my direct supervision and are being filed in an effort to assist the Examiner and the Commission in arriving at a conclusion in the matter.

Q. Will you proceed.

A. This Exhibit No. 38 consists of thirty pages, not including the index, and I would like to make some brief comments on various pages as to their purpose.

The State of Florida produces vast quantities of citrus fruit and fresh vegetables, and page 1 of the exhibit shows this production over a period of 16 years, from the 1931-32 season to the present 1946-47 season and reflect a constantly increasing production of these perishable commodities. I will say here the Growers and Shippers League represents the entire citrus movement and approximately 80 percent of the vegetable movement, aggregating 150,000 cars annually.

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Exam. Brown: What do you mean by "represents"?

[fol. 537] The Witness: My representation here represents the entire citrus interests in the State of Florida, and 80 percent of the vegetable production of the State of Florida.

Exam. Brown: In other words, you represent parties who ship the entire citrus movement, and 80 percent of the vegetables?

The Witness: That is correct.

A. (continuing) This page 1 shows the total Florida production has increased from 116,133 cars in the 1931-32 season to 286,427 cars in 1945-46. In 1946-47 the United States Department of Agriculture's estimate for citrus was 200,310 cars of citrus, but the total vegetable figures are not as yet available.

By Mr. Wells:

Q. In general, Mr. O'Rourke, the vegetable production in the 1946-47 season was less than the 1945-46 on account of a freeze in February?

A. It was considerably less, yes, and the freeze was one of the contributing factors.

Exam. Brown: Are these carload shipments here? The 116,133 cars; were those the actual shipments?

The Witness: No, sir. Those were the production.

Exam. Brown: No, but you refer to 116,133 cars. Were there shipments totaling 116,133 cars?

The Witness: No, sir.

Exam. Brown: Tell us what you mean by cars.

[fol. 538] The Witness: The total production. That is how many cars were produced in the state. That is how many were grown. Not all of them are shipped.

Exam. Brown: All right. Then I think it would be appropriate to tell us how much each car would contain under that estimate.

By Mr. Wells:

Q. Mr. O'Rourke, the figures on page 1 of your exhibit are the figures from the United States Department of Agriculture reports, using the carlot equivalent to obtain the car numbers shown on that page; is that correct?

A. That is correct, yes, sir. That is the way those estimates are made up by the Department of Agriculture.

Q. Now, do the next succeeding pages of your exhibit relate to shipments?

A. They do, sir.

Exam. Brown: That still leaves this item up in the air. 116,133 as compared with 286,427. You say that this figure covers production, not necessarily shipments?

The Witness: That is correct. I am trying to show you here that we produce a great deal of fruits and vegetables, so much citrus and so much vegetables. That is the production of the State of Florida, part of which is shipped out and will be shown by subsequent exhibits.

By Mr. Wells:

Q. In other words, so far as citrus is concerned, a very considerable proportion is canned and shipped as canned [fol. 539] juice and canned citrus?

A. Practically 50 percent of the citrus in Florida is canned and shipped out.

Exam. Brown: Do you know what this unit carload means?

The Witness: It means just exactly what I am saying. The carloads of citrus that are produced in the State of Florida.

Exam. Brown: Let us assume that in all of these carloads the value of the unit used for the carloads nominally would be 30,000 pounds in the case of vegetables. Is that same unit used for the 1931-32 season that was used for the 1945-46?

The Witness: I would say yes.

Exam. Brown: Do you know?

The Witness: From following the reports from year to year, that is my impression.

Mr. Wells: Mr. Examiner, may I refer at this point to Exhibit No. 13, introduced by Witness Hodkinson, which gives the table used by the United States Department of Agriculture in converting truck and boat receipts to carlot equivalents, and I think Mr. O'Rourke will verify that the

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same conversion figure is used by the Department of Agriculture in estimating the total production.

By Mr. Wells:

Q. Is that right?

A. That is correct. The same unit is used for estimating carloads.

[fol. 540] Exam. Brown: We can refer to this Exhibit 13, then, and perhaps assume that the carloads referred to in Witness O'Rourke's exhibit are derived from the equivalents referred to in Exhibit 13?

Mr. Wells: That is my understanding, yes, sir.

Exam. Brown: Obviously we don't know what the Department means when it says carloads. It might mean 30,000, it might mean 50,000.

Mr. Wells: It is my understanding the same conversion figure is used in all the Department reports.

Exam. Brown: It is understood, then, that page 1 of this exhibit does not indicate the carload shipments?

Mr. Wells: That is correct.

Exam. Brown: All right, sir.

By Mr. Wells:

Q. What does page 2 of your exhibit show?

A. Quite a volume of this traffic goes to New York and Philadelphia and page 2 of the exhibit shows this movement to New York of citrus and vegetables for 16 years, or from the 1931-32 season through the 1946-47 season.

Page 2 reflects the actual movement in carloads by all modes of transportation, rail, boat, and truck and this percentage of the total hauled by the various modes of transportation.

I will draw particular attention to the citrus movement by rail and by boat for the period 1931-32 through 1934-35. [fol. 541] This citrus traffic from Florida is and has been highly competitive, as between the rail lines and the boat lines, and while there was a relative consistency in the total carloads each season to New York during this period, it will be seen that in the 1931-32 season the rail lines handled 9,069 or 69.6 percent and the boat lines handled

3,977 cars or 30.4 percent. In the next four seasons, that is to the 1934-35 season the rail lines had dropped to 1,425 cars or 9 percent and the boat lines had increased to 14,565 cars or 91 percent of the total movement from Florida, although the total movement was approximately 3,000 more cars than in 1931-32.

In explanation of this, I will say that even a slight differential in the freight rates can and does control this traffic to either the rail or the boat route, and during this period the rail line rate was 5 cents per box higher than the boat line rate, and this 5 cents per box actually controlled the traffic to an extent the boat lines, who in 1931-32 handled 30.4 percent, increased their tonnage to 91 percent of the total, and if I remember correctly, diverted a total of between 5 to 6 million dollars on this Florida citrus traffic from the rail line carriers.

Since that time, 1935-36 season, there has been a rate parity between the rail and the boat lines and with the rate parity situation prevailing up to 1940-41 the boat lines [fol. 542] still handled 60.8 percent and the rail lines had only been able to get back to 38.1 percent of the total cars handled that year. Since 1941-42 to 1945-46 the rail lines handled the traffic almost 100 percent up to this season, when the one boat line operating from January to June 1947 handled 14.1 percent this season.

Q. Mr. O'Rourke, on page 2 do you have any special comment in connection with the vegetable figures prior to the 1939-40 season?

A. In making that exhibit there were so many of the records not available, and I will have to say that from 1931 up to 1939 those are the records that were available to me, and did not represent the total movement to New York.

Q. Of vegetables?

A. Vegetables.

Exam. Brown: When you are talking about carloads of citrus, and also carloads of vegetables, what sort of a carload are you using there?

The Witness: On citrus, from 1931-32 up to 1940-41, it is represented by the tariff minimum. From 1941-42 to 1946-47 the loading is represented by the ODT require-

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ments, which are considerably heavier than the tariff provisions.

Exam. Brown: In other words, the statistics for 1931 and 1932 are not comparable with the corresponding statistics for 1945-46 due to the difference in loading require-
[fol. 543] ments, is that not right?

The Witness: To that extent, yes, sir. To the number of carloads, no, sir.

Exam. Brown: In other words, if you compare 1931-32 with 1945-46, the actual fact would be an increase in the total weight of the shipment?

The Witness: Quite considerably, yes, sir.

Exam. Brown: Have you any idea what the percentage would be?

The Witness: I will give it to you a little farther on in my exhibits here.

Exam. Brown: Is the same thing true of vegetables?

The Witness: The same thing is true of vegetables from the 1931-32 season up to 1941-42.

Exam. Brown: Is it different with respect to vegetables?

The Witness: Yes, sir.

Exam. Brown: It was 1940-41 as to citrus?

The Witness: Well, 1941-42.

Exam. Brown: Which is it now?

The Witness: It went up in 1942.

Exam. Brown: In other words, so far as citrus is concerned, you used a carload minimum up to and including the 1941-42 season?

The Witness: Yes, sir.

Not including it. It broke in December 1942. That is,
[fol. 544] right in the first part of our shipping season.

Exam. Brown: All right.

The Witness: The same thing on vegetables. The same date.

By Mr. Wells:

Q. What does page 3 of your exhibit show?

A. Page 3 shows the total movement of citrus fruits and vegetables from Florida to New York and Philadelphia for 16 years, and I believe this page is self-explanatory.

Q. Do you have any explanation of page 4?

A. Page 4 of the exhibit shows the movement from

Florida to Philadelphia for 16 year period, or the seasons 1931-32 to 1946-47. The same situation is reflected here, as I explained on page 2, to New York, except to a slightly lesser extent, in that the boat lines increased their traffic from 8.9 percent in 1931-32 to 81 percent in 1934-35, while the rail lines during this period dropped from 91.1 percent in 1931-32 to 18.7 percent of the total movement in 1934-35.

There has been no boat service to Philadelphia since the 1941-42 season.

Q. What about page 5?

A. Page 5 needs no particular comment, but shows the rail unloads at New York and Philadelphia for the 16 year period shown.

New York and Philadelphia are the largest single markets for Florida citrus and vegetables, therefore I thought it [fol. 545] helpful to show the percentage of the total movement that finds its destination at these two cities. Page 6 shows this information on citrus to New York and Philadelphia, and page 7 on vegetables, both commodities being shown for a period of 16 years or from the 1931-32 season to the 1946-47 season.

Q. Mr. O'Rourke, with reference to page 7, with the same comment that you made a few moments ago as to vegetables prior to the 1939-40 season, would that comment apply?

A. Yes, sir.

Q. That is, those figures are not complete?

A. Those figures are not complete, at the top, for the reason that I have no records, no complete records up to the 1938-39 season.

Exam. Brown: Isn't it a fact that there are no authoritative records available from any source?

The Witness: Do you mean as to unloads?

Exam. Brown: I mean as to the earlier seasons. Total shipments, for example, and the shipments moved by boat.

The Witness: On vegetables the segregations are very difficult to locate, yes, sir.

Exam. Brown: I said there is not authoritative information as to those seasons. It wasn't until later that they began to make the segregations; is that right?

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The Witness: That is my impression, although I don't know when they began to make the entire information available.

[fol. 546] Exam. Brown: In any event, the information is not available for those earlier years?

The Witness: That is correct.

By Mr. Wells:

Q. Will you turn next to page 8 of your exhibit.

A. At pages 8 and 9, we have reproduced the present and proposed or suspended unloading provisions and regulations at New York, Piers 27, 28 and 29.

The present provisions are published as Item 4645 and Rule A-201, and the proposed or suspended provisions under Item 4645-A, Rule A-201, of Agent Curlett's Tariff 116, ICC A-856, and the proposed or suspended charges of $1.50, $1.75 or $2.00 per ton of 2,000 pounds, Item 4670, Rule A-204, in this same Tariff.

I call special attention to the specific provisions of both the present Item 4645, Rule A-201, and the proposed Item 4645-A, Rule A-201, that carload freight delivered over carriers piers or platforms will be unloaded from car by the carriers, making reference to Note B, of the Item and the Note B provision, that "no instructions will be accepted from shipper, owner or consignees to withhold unloading by carrier."

The only difference in the present and proposed Items is the inclusion of fresh fruit, fresh vegetables, cantaloupes and melons, as an exception to the free unloading, and the new Item 4670 publishing the charge for unloading.

[fol. 547] Under the Note B, of Item 4645-A, a shipper, owner, or consignee has absolutely no control over his property, as the Rule A-201 provides the freight will be unloaded by the carrier, and under Note B, of this rule, the shipper, owner or consignee can not order otherwise, but must pay the $1.50, $1.75 or $2.00 per ton as the case may be for the carrier to complete the transportation haul and delivery of the goods, as a carrier does not fulfill his obligation to deliver the property under Section 1.(3) of the Act which defines "transportation" to include all services in

connection with the receipt and delivery of property transported.

Mr. Smith: If the Examiner please, with reference to the immediately preceding paragraph of the witness' testimony, he apparently states opinions and perhaps legal conclusions, and I assume that they will be accepted merely as expressions of his opinion.

Exam. Brown: This witness called attention to specific tariff items, and in connection with those tariff items he states his interpretation, as I understand it, of the items.

Mr. Smith: That is my understanding.

Exam. Brown: That evidence will be considered to that effect.

By Mr. Wells:

Q. Mr. O'Rourke, you referred specifically to Piers 27, 28 and 29 in New York City. Where is Florida's citrus fruit delivered in New York City?

[fol. 548] A. On Piers 27, 28 or 29 of the Pennsylvania Railroad Company when moving via that line.

Q. Can you give us any information as to the volume or percentage of Florida citrus delivered in New York that does move by the Pennsylvania delivery?

A. I don't believe I have that specific figure, but the greatest majority of it to New York moves over the Pennsylvania piers.

Exam. Brown: Isn't it a fact that it will run over 90 percent?

The Witness: I would say the greater portion of it, yes, sir.

Exam. Brown: It comes up from Florida over the Coastline or Seaboard or carriers of that type, up to Norfolk, and then across to Cape Charles; is that the route?

The Witness: No, sir. It comes up through the Potomac Yards of the Pennsylvania Railroad.

Exam. Brown: Is the traffic normally handled that way?

The Witness: Yes, sir.

Exam. Brown: It is my understanding that most of that Pennsylvania traffic came up through the Cape Charles ferry route.

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The Witness: No, sir. It comes up through the Potomac Yards on special schedules.

Exam. Brown: Very little of it, then, goes to Cape Charles?

[fol. 549] The Witness: I don't know of any of it that goes that way at all.

By Mr. Wells:

Q. Will you next refer to the Philadelphia situation.

A. Pages 10 and 11, reflect the same situation at Philadelphia, Pennsylvania, as to the unloading provisions and regulations as published in Agent Curlett's Freight Tariff 90-K, ICC A-841, the present provisions being reflected in Item 1270, and the proposed and suspended provisions and regulations in Item 1270-A.

Incidentally, the exception of fresh fruit, fresh vegetables, cantaloupes and melons from the free unloading by the carriers and their proposal to assess these loading charges, which is a substantial increase in the rates and charges is not referenced marked as an increase in the Item 1270-A of this tariff.

Q. Will you next turn to Page 12.

A. In my testimony regarding the movement of citrus fruit from Florida to New York on Page 2 of this exhibit, I stated that a differential of five cents was sufficient to control the movement by rail or boat. I, therefore, thought it would be helpful to produce a chronological history of the rates on citrus to reflect the effort of the rail lines since the rate parity was established.

This parity of 66½ cents per 100 pounds was in effect [fol. 550] on July 31, 1936 from Lake Wales, Florida, to New York and Philadelphia.

I am only giving Lake Wales as an illustrative point within the State of Florida. Practically the entire adjustment is built around that particular rate.

Exam. Brown: That is, so far as citrus fruit is concerned?

The Witness: As far as citrus fruit is concerned.

A. (continuing) During 1938, under Ex Parte 123, a five percent increase was allowed on citrus fruit and under this

authority on March 28, 1938, the 66½ cents rate was increased by the rail lines to 70 cents. It developed the boat lines did not increase their rates on citrus under the Ex Parte 123 authority, and on May 23, 1938, the rail lines reduced their rate of 66½ cents to retain the parity with the boat lines.

As I have previously stated there was no competitive boat service after January 1941 to January 1947, therefore the Ex Parte 148 increase of 3 percent was published on March 18, 1942, and on June 30, 1942 the rail lines went back and picked up the Ex Parte 123 increase of 5 percent and published a rate of 73 cents.

The various adjustments under the Ex Parte 148 and Ex Parte 162 increases were published on May 15, 1943, July 1, 1946, and January 1, 1947, increasing these rates to 82.19 cents per 100 pounds on oranges and 90.53 cents on grapefruit.

[fol. 551] On the next adjustment, after the boat line resumed operation on January 12, 1947, was made by the rail lines, when the rate on oranges was reduced to 72 cents and the rate on grapefruit to 80.7 cents per 100 pounds, then increased on February 1, 1947 to 80.6 cents on oranges and 90.3 cents on grapefruit to retain the rate parity which reflected an 8 cent per box increase made by the boat line as of that date, February 1, 1947.

Exam. Brown: Your testimony is "boat line" or "boat lines"?

The Witness: Boat line, in the last analysis.

Exam. Brown: You are using that in the singular sense rather than in the plural? In other words, your testimony for the last two or three minutes has been "line" or "lines"? You haven't drawn any distinction. Is there more than one line?

The Witness: Previous to 1941 there were five lines. Today there is one line operating for the last year.

Exam. Brown: What is that line?

The Witness: The Refrigerated Steamship Company.

Exam. Brown: Where are its quarters?

The Witness: Jacksonville, Florida, and Fort Pierce—between those two Florida points and New York.

Exam. Brown: Do they serve any intermediate stations?

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The Witness: No, sir.

[fol. 552] Exam. Brown: Or any intermediate ports?

The Witness: No, sir.

Exam. Brown: It does not serve Philadelphia?

The Witness: No, sir.

Exam. Brown: That boat line has been operating since when?

The Witness: From January to June—January 1947 to June 1947.

Exam. Brown: It is not operating at the present time?

The Witness: No, sir.

Exam. Brown: Why?

The Witness: It ceased operations. They only operate during the citrus season.

Exam. Brown: Has that operation been continuous for the past several years? Or is it a new operation? It wasn't in effect during the war, was it?

The Witness: No, sir. There was no service during the war. It was in effect—I think it has been in effect since 1934 or '35. It had been a continuous operation up to 1941, and then resumed operation on January 12, 1947.

Exam. Brown: In other words, in your testimony where you say "lines" you mean "line"? "Boat line"?

The Witness: Yes, sir, as of this year, 1947.

By Mr. Wells:

Q. Will you continue.

A. I call particular attention to the carload minimum weights on this page, for although the Interstate Commerce [fol. 553] Commission established a minimum weight of 40,000 pounds on oranges and 36,000 pounds on grapefruit in I&S 4786, "Package Rates on Citrus Fruit," 251 ICC 591, which became effective November 14, 1942, under the ODT carloading requirements which became effective in December 1942, we have been compelled to load oranges to a minimum of 48,825 pounds and grapefruit to a minimum of 43,575 pounds. It is understood, therefore, this additional loading of 8,825 pounds per car on oranges and 7,575 pounds per car on grapefruit represents an increase of 22.13 percent on oranges and 21 per cent on grapefruit in the

loading per car, and likewise 22.13 per cent and 21 percent respectively increase in the per car charges.

Exam. Brown: When you say an increase in the loading, you mean an increase in the required loading? In other words, the minimum requirements?

The Witness: That is correct.

Exam. Brown: Rather than actual loading. In other words, the loading didn't average 40,000 pounds on oranges and 36,000 pounds on grapefruit, did it? It was a little higher than that?

The Witness: They must be loaded to 48,825.

Exam. Brown: I am talking about the minimum required by the Interstate Commerce Commission, which is 40,000, on oranges, and 36,000 pounds on grapefruit. The actual load-
[fol. 554] ing ran a little higher than that, did it not?

The Witness: Yes, sir.

Exam. Brown: The actual loading in some instances went over the ODT requirements, did it not?

The Witness: The ODT requires you to load the maximum. The maximum is their minimum.

Exam. Brown: Well, in the case of oranges it was 48,825. You loaded heavier than that on some oranges, didn't you?

The Witness: Oh, yes, sir. When you get a larger car you can load more than that.

Exam. Brown: And the grapefruit is 43,575. You have loaded heavier than that?

The Witness: Yes, sir.

Exam. Brown: So let it be understood in connection with your statement that when you say there was an increase of 22.13 percent on oranges and 21 percent on grapefruit in the loading per car, all you mean there is the required loading per car?

The Witness: Those are the minimum requirements, yes, sir.

By Mr. Wells:

Q. Mr. O'Rourke, prior to the ODT minimum, was the usual load of oranges from Florida 40,000 pounds or greater?

A. It was 40,000 pounds. We load the minimum, the tariff minimum as long as we are allowed to so load. That is prac-

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tically a unit of the trade, or a unit of sale—40,000 [fol. 555] pounds.

Q. There was never any general practice of loading in excess of the tariff minimums until the ODT requirements went into effect?

A. That is correct, yes.

Exam. Brown: What was the average loading prior to November 13, 1942?

The Witness: 40,000 pounds on oranges and 36,000 pounds on grapefruit.

Exam. Brown: I said the average loading.

The Witness: I don't know the average. I have it, but I haven't it with me.

Exam. Brown: Is it stated in Commission's decision I&S 4786?

Mr. Wells: Yes, sir.

Exam. Brown: We will let that decision speak for itself then.

By Mr. Wells:

Q. Will you proceed with your explanation.

A. The rail lines in its proposal here under consideration seems to rely on the extraordinary services performed and the terminal expenses involved in their requirement to effect delivery of fresh citrus and fresh vegetables, as though it were some new situation or some new development requiring special consideration.

As far back as I can remember there has been no particu- [fol. 556] lar change in the physical requirements of making deliveries of citrus fruit and fresh vegetables at New York and Philadelphia. In this situation I thought it well to show these same expedited schedules, this same extraordinary service, and these same terminal expenses were brought particularly to the attention of the Commission in a number of cases.

I, therefore, prepared pages 13 to 21 inclusive to show the position of the rail carriers in presenting these same matters, by various excerpts taken from briefs and exceptions filed for account of these same carriers, as follows:——

Mr. Smith: Just a minute, Mr. Examiner. The witness

has just stated that he is going to refer to briefs and exceptions filed by the railroads in other cases. I object to that kind of testimony. It hasn't any relevancy or materiality to the issue in this case.

Exam. Brown: It may or may not have relevancy or materiality. I don't know what they are. I will have to look at them and see. The statements made by the carriers—certainly it won't be expected to deny their correctness or that they made those assertions. As far as the relevancy is concerned, let's take them up individually.

Mr. Smith: He is simply talking about briefs and exceptions.

Exam. Brown: Well, they were presumably filed by the [fol. 557] rail lines. If the carriers made statements in those briefs or exceptions, I don't believe it would be appropriate at this time to deny the fact that those statements were made, or that those statements were accurate. Whether they are pertinent or not, it is necessary to determine and know what *what* those statements are.

Mr. Miller: Mr. Examiner, I have this motion to make in so far as this witness' testimony is concerned. I think he should be warned that he is not to be permitted to make any comments as to what these statements may mean. Now, that is entirely aside from whether or not these portions of his exhibits are admissible. I do not think he should be permitted to make any interpretation as to what these comments from the carriers may have indicated. At best, they should stand on their own footing.

Exam. Brown: Let's get ahead and pick them up as we come to them.

By Mr. Wells:

Q. Will you continue.

A. Page 13, filed by Charles R. Wobber, Attorney for Trunk Line defendants in ICC Docket 16939, dated April 4, 1931.

Page 14, filed by Frank W. Gwathmey, attorney for defendant carriers in Docket 16939 on November 18, 1926.

Page 15 and 16, filed by Charles R. Wobber, attorney for Truck Line defendants in Docket 16939, dated April 16, 1927.

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Pages 17, 18, 19 and 20 and 21 filed by Charles R. [fol. 558] Wobber, attorney for Trunk Line defendants in ICC Docket 16939, dated November 19, 1926.

From a perusal of the expressions in these briefs and exceptions the fact is developed that during 1926 and 1927, which is 21 years ago, the same physical situation prevailed as to the delivery requirements, the special handling and expedited service at New York and Philadelphia, and being presented at that time to support the transportation rate, which was to include the delivery of the property over the piers and wharves.

These same physical circumstances are now being presented by the respondents to justify an additional charge to complete the original transportation haul which includes delivery of the goods at destination.

Exam. Brown: With respect to the objection just made, or the statement just made by counsel, it is understood that the two last paragraphs that you just testified to, that those statements in those paragraphs are a summary of what these abstracts contain.

The Witness: That is correct, yes, sir.

Exam. Brown: The last paragraph is more or less in the nature of argument, and is partly factual, too, that "the same physical circumstances now being presented by the respondents to justify an additional charge," and so forth.

I am going to permit this evidence to stand, to be [fol. 559] considered in connection with the statement and objection made by the attorneys for the respondents.

By Mr. Wells:

Q. Will you explain page 22 of your exhibit.

A. Pages 22 and 23 of the exhibit was prepared to particularly show the trend of the per car charges on citrus fruit from Florida to New York and Philadelphia, Pennsylvania, on basis of the current rates in effect during each season.

From 1936 to 1943 the rate of 66½ cents and the per car charge of $239.40 were constant, but since that time, as shown on page 23, the rate has increased to 80.6 cents on oranges and 90.3 cents on grapefruit, and the per car

charge is to $393.53, and $393.48 on oranges and grapefruit respectively.

This represents an increase in the rates of 21.3 percent on oranges and 35.8 percent on grapefruit, and an increase of $154.13 per car, which reflects 64.38 percent increase in the per car revenue.

Q. Mr. O'Rourke, what was the carload minimum effective on oranges and grapefruit from Florida in Docket 16939, 144 ICC 663, decided in 1928?

Exam. Brown: You mean the minimum prescribed?
Mr. Wells: Yes.

A. 32,400 pounds.

Q. Do you recall the rate prescribed in that case from Lake Wales to New York?

[fol. 560] A. No, sir, I don't remember the rate at that time.

Exam. Brown: Can you tell us whether the per car revenue of $393.53 is more or less than the maximum per car revenue prescribed by the Commission in that proceeding?

The Witness: Yes, sir. The revenue under the $393.53 and $393.48 at this time is considerably in excess of the maximum provided by the Commission in the 16939 case.

Exam. Brown: Traffic Lake Wales to New York City is represented?

The Witness: That is correct, yes.

By Mr. Wells:

Q. What does page 24 of your exhibit show?

A. Page 24 of the exhibit was prepared to reflect the per car revenue and per car mile earnings on citrus fruit from Florida, using Lake Wales, Florida, as a representative shipping point to New York and Philadelphia, Pennsylvania, for eleven years, from 1936-37 to 1946-47 inclusive.

The revenue per car and the car mile earnings were constant from 1936 to 1942 at $239.40 per car and a car mile earning of 20.41 cents to New York and 22.11 cents to Philadelphia, but the increases in the per car charge to the 1946-47 season has reached to $393.53 on oranges and $393.48 on a car of grapefruit, which now earns 33.55 cents

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per car mile to New York and 36.33 cents per car mile to Philadelphia.

Under the proposal here it would further increase the per car charge to $430.15 at New York and $426.16 at Philadel-
[fol. 561] phia, with a car mile earning of 36.67 cents and 39.35 cents to New York and Philadelphia respectively.

Q. Refer now to page 25.

A. Page 25 was prepared to show the level and progression of the rate on citrus fruit from Florida for varying and progressing distances, also the per car revenue and per car mile earnings, beginning at Charleston, South Carolina, a distance of 435 miles to Boston, Massachusetts, 1402 miles.

Pages 26, 27 and 28 were prepared to show the level and progression of the rates on various vegetables from Florida, using Belleglade, Florida as a representative shipping point to various points, beginning with Charleston, South Carolina, 536 miles, to *to* New York for 1268 miles, also showing the per car charge and the per car mile revenue under the present rates, and at Philadelphia and New York at the proposed basis.

The proposal will, in my opinion, unduly disrupt the regular progression of the rate and reflects an unreasonable basis at both Philadelphia and New York on each of the commodities shown.

Q. What are the last pages of your exhibit?

A. Pages 29 and 30 of the exhibit compares the rates from Florida, Texas and California, using Homestead, Florida, Harlingen, Texas, and Los Angeles, California, as representative shipping points in the various shipping areas to
[fol. 562] Boston, New York, Philadelphia and Baltimore.

The purpose of this exhibit is to reflect to some extent the reasonableness of the present rates from Florida, as reflected in the per car charge and the car mile revenue from the three producing territories.

Q. Mr. O'Rourke, have you had any connection in the last several years with the refrigerated car supply?

A. It has been one of my chief duties for the past four years to see that Florida receives sufficient refrigerated cars for its requirements.

Q. Is there today an adequate supply of refrigerated cars?

A. There has not been for the past four years an adequate supply of refrigerated cars to move our products from Florida, and we have been at some periods in dire distress for refrigerated cars.

Q. Do you know what the situation is as to the building of new refrigerated cars and the prospective supply that will be available for the coming season?

Mr. Bongartz: I object to that. The witness is not qualified to go into that.

Exam. Brown: This witness testified that one of his chief duties for several years has been to keep in touch with the refrigerated car supply. He can tell us, if he knows, what the facts are in that connection. So far as the future is concerned, perhaps he doesn't know, perhaps he knows [fol. 563] what plans are being made. We will let him testify accordingly.

A. I am a member of the new refrigerator car committee, have been for the past four years.

Mr. Bongartz: What committee is that?

The Witness: The United Fresh Fruit & Vegetable National Committee.

Mr. Bongartz: That is an association? That is not a railroad committee, is it?

The Witness: No, sir. It has frequent conferences with the railroad committee in connection with the construction of new refrigerator cars.

I have forgotten the question, Mr. Wells.

By Mr. Wells:

Q. What is the prospective supply of refrigerator cars that will be available for the current season, if you know?

A. I can only give you the censensus of the opinion of the committee, and that is that we will be short, very short of refrigerator cars for the next two years. That the building program, even under normal building requirements, would take at least two years to reach a normal supply of refrigerator cars to take care of current business.

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Q. Practically all of Florida's citrus and vegetables, and I am speaking of the fresh products, are shipped in refrigerator cars?

A. The greatest percent of them are shipped in refrig- [fol. 564] erator cars. The only times that we use ventilated cars is to southeastern territory, or territory south of the Ohio and Potomac Rivers.

Exam. Brown: Do you use ventilated cars for potatoes in Florida?

The Witness: To quite an extent, yes, sir, although it is coming now to using refrigerator cars for potatoes, under a new washing program to meet competition from other territories. They are just beginning to wash them now, and after being washed they require refrigerated cars.

Exam. Brown: You mean refrigerating car equipment or refrigerate the cars under ice?

The Witness: Both.

Exam. Brown: When you refer to your products you don't mean citrus alone, you refer to the citrus and fresh vegetables?

The Witness: Citrus and fresh vegetables.

Exam. Brown: Your testimony is that for the majority of these vegetables, that is celery and beans and vegetables of that character, that they are moved in refrigerator cars and perhaps under ice; is that right?

The Witness: Yes, that is correct.

Exam. Brown: That is true particularly to the eastern Seaboard cities, of which Philadelphia and New York are the ones we are now considering?

The Witness: It is entirely true at those particular [fol. 565] points.

Mr. Wells: I offer Exhibit No. 38 in evidence.

Mr. Smith: Before it is received, Mr. Examiner, I would like to point out that Exhibit 38 contains quite a few quotations from tariffs, and names quite a few rates with tariff references. I have no reason for thinking these quotations and rates are inaccurate in any respect, but to check them would take quite a bit of time, and I would like to suggest that respondents be given the right on brief, if there is no objection, to make any material corrections in

the tariff quotations and the rates by referring to the tariffs duly on file with the Commission.

Exam. Brown: You will be given that right. Other than that observation, you have no comment with respect to the offer of Exhibit 38?

Mr. Smith: I have none, no, sir.

Mr. Miller: Mr. Examiner, I object to pages 13 and 21 of the exhibit. First, on the ground that the references there, as I understand them, are in large part references to the reasonableness of the line haul charges, which I think are wholly immaterial in this case. To the extent that the portions quoted on pages 17, 18, 19, 20, and 21 are intended to indicate facts, they have no bearing on this case because the factual situation is now entirely different.

With respect to page 14, the quotations there are from a [fol. 566] brief filed on behalf of carriers not parties to this proceeding.

With respect to pages 22 through 30, I understand that information to be submitted on the issue of the line haul charge and I therefore object to that as immaterial.

Exam. Brown: I don't understand the last objection.

Mr. Miller: As I understand these pages of the exhibit, they go to the reasonableness of the line haul charges, and that that is their only purpose in this proceeding. I think that issue is not in issue here.

Exam. Brown: That is a rather argumentative question, whether line haul rates, although concedingly not in issue, it is possible they might play a considerable part in the determination of the issue.

Mr. Hoffman: Is counsel making that statement which he has just made in behalf of all carriers?

Mr. Miller: Yes.

Mr. Hoffman: Very well.

Exam. Brown: All carriers other than those represented by counsel?

Mr. Smith: No, sir. I suscribe to what Counsel Miller has stated for the record.

Mr. Miller: You mean all carriers parties to this proceeding?

Mr. Hoffman: Yes.

[fol. 567] Mr. Miller: Oh, yes. Definitely.

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Exam. Brown: The remarks of Counsel Miller are noted of record.

This exhibit will be received and will be considered in connection with such remarks. For the purpose of the record, the objections are overruled.

(Protestants' Exhibit No. 38, Witness O'Rourke, received in evidence.)

Mr. Wells: The witness is available for cross-examination.

Mr. Winn: Mr. Examiner, I think it would be appropriate at this time for me to enter my appearance for the Port of New York Authority. Arthur L. Winn, Investment Building, Washington, D. C. I am a member of the Commission bar.

Exam. Brown: Mr. Brown is not present and you are taking his place?

Mr. Winn: Mr. Brown is unavoidably away.

Exam. Brown: Is there any cross-examination?

Mr. Smith: I have no questions, sir.

Cross-examination.

By Mr. Miller:

Q. Mr. O'Rourke, will you turn to Page 12 of your exhibit. Down at the bottom of the page you have a note, "(a) Applicable on oranges, Contai*l*er No. 5004." Can you tell me what kind of a container that is?

A. Wirebound, 1-3/5 bushels bulk.

Q. Is that different from the so-called Bruce Box?

[fol. 568] A. That is the Bruce Box, so-called today. It is not in reality a Bruce Box. A Bruce Box is a two-bushel box, but the reference to a Bruce Box is now centered on the 5004 package.

Q. Am I correct in the understanding that the carload minimum weights in actual practice work out to a number of boxes?

A. 525 boxes, yes, sir.

Q. And 525 boxes is the minimum weight under the ODT requirement; is that correct?

A. The minimum carloading, yes, sir.

Q. And the normal carloading is 420 boxes; is that correct?

A. Well, whatever would make 40,000 pounds at 93 pounds per box.

Mr. Miller: That is all.

Cross-examination.

By Mr. Donadio:

Q. Mr. O'Rourke, will you refer to pages 5 and 6 which show the rail unloads at New York of citrus fruits—New York and Philadelphia. On page 5 you show a total of 19,459 in the 1946-47 season, and on page 6 you show 21,929. What accounts for the difference? Were they not taken from the same records?

Mr. Wells: Pardon me. I think the exhibit is self-explanatory. One says "Rail unloads" and the other is "Total Shipments."

Q. Do you adopt counsel's statement that the difference is [fol. 569] due to the fact that Page 5 relates to unloads and page 6 relates to shipments, implying that the difference was unloaded by some other form of transportation?

A. That is correct, yes, and that is stated in the heading of pages 5 and 6.

Q. I know what the heading is, but I was trying to find out what accounted for the difference.

A. That accounts for the difference.

Q. Now, what other form of transportation unloaded the difference?

A. The Refrigerated Steamship Line handled 14.1 percent of the total movements to New York.

Q. You mean as far as the difference shown on those two pages of the exhibit is concerned, the Refrigerated Steamship Line was accountable for the difference?

A. Well, in the total shipments there may be some via truck, there are some by express, and there are some by boat, in addition to the majority movement by rail.

Q. You don't include the Express shipments in the category of railroad unloads?

A. No, sir.

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Q. Page 4 of your exhibit shows the carloads delivered at New York—or rather, limited to Philadelphia. It shows 63 carloads by truck?

A. That is correct.

[fol. 570] Q. In the season 1946-'47?

A. That is correct.

Q. There was none by boat during that period?

A. Not to Philadelphia, no, sir.

Mr. Donadio: Mr. Examiner, I don't know whether anything has been said about what I am about to say, and that is, may we have the privilege of checking the underlying data and the various authorities which have been shown for these figures, for the purpose of making any comments or corrections that we deem advisable on brief?

Exam. Brown: I think it would be appropriate, if you wish to call attention to any substantial amounts of errors, to present it in exhibit form. If the errors, if any, are only a few, you may do that on brief. I will give you 10 days in which to file a supplemental exhibit pointing to any discrepancies in Exhibit 38.

Mr. Donadio: That will be very satisfactory.

Exam. Brown: If that exhibit is not filed within 10 days, it will be understood you will include any such comments in your brief. I don't expect that you will refer to any substantial number of them unless you do file an exhibit.

Mr. Donadio: That will be entirely satisfactory.

Mr. Smith: Am I correct that your last remark applies to underlying statistical data, and does not apply to tariff references and rates?

[fol. 571] Exam. Brown: That is right.

Mr. Smith: Thank, you sir.

By Mr. Donadio:

Q. Mr. O'Rourke, will you turn to page 25 of your exhibit 38. I am not sure whether I understood your testimony as to what that exhibit proposes to show, particularly so far as the rate column is concerned? What are those, the present rates?

A. Yes, sir.

Mr. Wells: Except for the ones labeled "Proposed."

By Mr. Donadio:

Q. That applies to present rates, except, as your counsel says, those which have the prefix "Proposed"?

A. That is correct, yes, sir.

Q. Are you familiar with the situation at Baltimore? Do you know if there is an auction terminal there?

A. I know there is one there, yes, sir.

Q. Do you know that the shipper unloads all shipments of fruits and vegetables at Baltimore?

A. I don't know it, no sir. I have never been over that terminal.

Q. Are you familiar with the situation at Washington? Do you know that there is no fruit auction, fruit or vegetable auction terminal in Washington?

A. No, I don't know it.

Q. Do you know that the shipper unloads all shipments, or, rather, the consignee unloads all shipments of fruits and [fol. 572] vegetables in Washington on team track?

A. I will go even farther than that, and say that he unloads it anywhere you put it on the team track.

Exam. Brown: That includes Philadelphia and New York?

The Witness: Yes, sir.

By Mr. Donadio:

Q. Are you familiar with the tariffs at Baltimore and Boston which provide for an unloading charge in instances where the railroad is asked to perform the unloading service?

A. Not of those two particular tariffs. I know where you have private track or team track delivery——

Q. No. I am—well, go ahead, finish your answer.

A. The answer to your question is no.

Q. Now, you spoke in your direct testimony of the inadequacy of refrigerator cars. Were the refrigerated cars, in your experience, adequate when substantial movements of citrus fruits and other fruits and vegetables were made from Florida by boat?

A. Were refrigerated cars available at that time—is that the question?

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Q. I think I used the words, "were they adequate"?
A. Yes, they were adequate at that time.

Mr. Donadio: That is all.
Mr. Wells: What time do you mean?
The Witness: Before 1941.
[fol. 573] Mr. Wells: That was the time when there were five ship lines operating between the Florida ports and the North Atlantic ports?
The Witness: That is correct, yes, sir.

By Mr. Donadio.

Q. What about the period of 1946-47? I think one of your exhibits shows the movement of some 2100 carloads by boat.
A. Even with that relief, we are in dire circumstances for the use of refrigerator cars, or the supply of refrigerator cars.

Q. Is it your testimony, then, that no matter what the volume of the water movement is, that the refrigerator cars will not be sufficient to move your crops?
A. Well, I wouldn't go that far. I think you can put in sufficient water lines if you had the boats to put them in to relieve the situation to some extent. But there is such an inadequacy of refrigerated cars at this time that it will take a great deal of boat movement to relieve it to any extent.

Q. Do you have any judgment as to the number that you are short of, the number of cars that you are short?
A. Well, that would be according to your requirements at a specific time. I have been short as many as 400 carloads in a day.

Q. Does that depend on the volume of the crop?
[fol. 574] A. Yes, sir, that has a good deal to do with it, although we have been having increasing crops from year to year.

Q. Does the sufficiency of the cars which are available to you depend on any other consideration, other than crops?
A. I don't know as I understand that question.

Q. Is there any other element or factor that enters into

the question of whether you are going to have enough cars to load your products?

A. If we had anything like a normal crop, and we expect we will have, the preliminary reports show that we will, we will be badly short of refrigerator cars this year, and for the next two years, including this year and next year, until the building program catches up to the normal requirements.

Q. Does the demand have anything to do with the sufficiency of the cars available?

A. The demand for what?

Q. For the products that are produced?

A. We ship them out and the demand apparently is there.

Q. Do you always have a sufficient demand to take all of your crop?

A. The answer to this is no, for the reason that even this year there are more than four million boxes of citrus fruit left on the trees, and each year—well, I will take celery this year—there was, I don't know how many acres—a great many acres, and a great many carloads were plowed under [fol. 575] this year on account of the lack of demand for celery.

Q. Is there another factor that enters into the proposition of whether you have enough cars, such as the quantity that is stored, put in storage?

A. We don't put any in storage.

Q. Don't you put any citrus fruit in storage?

A. No, sir.

Q. How about the canning of citrus fruits?

A. Well, they canned approximately 50 per cent of it last year, and canned approximately 50 per cent of the total production this year.

Q. Does not the amount of fruit that is turned over to the canning factories also enter into the question of whether or not you are going to have enough refrigerated cars?

A. No, sir, that wouldn't be an element in it. I presume there could arise a situation where, if you didn't get enough cars, you would run more of it to the canneries.

Q. The point I am trying to make, Mr. O'Rourke, is that there is a pretty substantial fluctuation in the quantity of fruit that you want to ship out of Florida which affects

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the quantity of the cars that are made available to you. Is that not so?

A. Yes, sir, that is so.

Mr. Donadio: That is all.

Exam. Brown: I am wondering as to the purpose of this [fols. 576-578] equipment testimony. Just what effect has it on this case?

Mr. Wells: Mr. Examiner, I submit that one effect that it has is the testimony that has been given by the carriers themselves, that the turn-around and release of empty equipment, and the greater utilization of the equipment that is available, results from the practice that they have followed as to the method of delivery in New York and Philadelphia, and also it has a bearing on the requirement practically of continued increased loading, which gives the carriers greater revenue than they could obtain under the tariff minimum, which is directly integrated with the measure of the rate.

Exam. Brown: Is there any further cross examination?

Mr. Miller: I have just one comment on Mr. Wells' statement, that I definitely do not agree with his summation of the testimony submitted by the respondents.

Exam. Brown: The record will speak for itself in that respect.

Mr. Loos: Mr. Examiner may I make a comment on that point?

It is my view that the release, the more prompt release of the cars by reason of the method of handling on the New York piers is an advantage to the carriers, which is to that extent an offset to these costs that they incur in handling it by those methods.

[fol. 579] Redirect examination.

By Mr. Wells.

Q. Mr. O'Rourke, you were asked on cross examination about the refrigerated car situation as it applied to Florida. Is that peculiar to Florida, or does it exist generally throughout the country?

A. It is just generally throughout the country. The

situation is such that there is a shortage of refrigerated cars in some areas at all times of the year.

Q. If there were a return now to loading only to the tariff carload minimums, would that increase or accentuate the shortage that exists?

A. Terribly so; yes, sir. Taking the country as a whole, we would not be able to transport the perishables that require transportation if we were to go back to the tariff [fol. 580] minimums today with the car situation as it is.

Mr. Wells: That is all.

(Witness excused.)

Exam. Brown: Call your next witness.

Mr. Seibert: I will call Mr. Maxton.

J. L. Maxton was sworn and testified as follows:

Direct examination.

By Mr. Seibert:

Q. Discuss your qualifications as a witness in this hearing.

A. My name is J. L. Maxton, graduate in Agricultural Economics at V.P.I., Blacksburg, Virginia, and Cornell University in Marketing, Farm Management and General Economics. For the past 20 years, an employee of Virginia Polytechnic Institute as a teacher, research and extension worker in marketing and Agricultural Economics subjects, except for interruptions for completion of advanced education and for military service.

I am appearing on behalf of the farming industry of the State of Virginia and also at the request of the Virginia Farm Bureau Federation and the Virginia Horticultural Society.

Q. What is the general situation of farm people in Virginia at this time?

A. Farm people are in the grip of inflation with land values approximately 100 per cent higher than in 1940, with farm labor at an index of 399 in contrast to an index of 100

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[fol. 581] for the 1910-14 base period, with frequent calls being made on the Government for assistance in support of prices, although prices in general are well above both 1910-14 and 1935-39 price averages.

Exhibits 39 and 40 show data on farm real estate our most valuable agricultural asset. War has increased farm owner's equities although much of the increase is inflationary. Balance sheets struck during booms show a seemingly liquid position which, however, after deflation would show this liquidity disappeared and a high volume of debt left.

Farmers in the United States still had $5,081,000,000 farm mortgage debts, $3,256,000,000 in addition debts as open accounts, $414,000,000 in non-recourse notes to the Commodity Credit Corporation, and $2,842,000,000 of loans extended to farmers by banks and other institutions in 1946.

Exhibit 41 shows the farm mortgage debt outstanding in Virginia from 1930 to 1945. Although this debt appears more favorable in 1945 than formerly, many individual farmers would soon be in a precarious financial position if prices of farm products should decline and remain low for an extended period while some farmers have been paying off their debts others have been buying farms at high prices and giving large mortgages as partial payments.

It has been the policy of the Federal Government to assist farmers in purchasing farms and building up their soils. [fol. 582] To carry out these purposes funds were appropriated by Congress. Gross payments to farmers in Virginia for assistance in carrying out soil-building practices under the Agricultural Conservation Program increased from $991,000 in 1936 to $5,793,638 in 1946.

Q. Have you statistical data showing the economic trends affecting agriculture over a period of years and the situation at present?

A. Exhibit 42 shows the economic trends affecting agriculture from 1910 to April of 1947 inclusive as index numbers for such factors as prices received by farmers for livestock and products, prices received by farmers for crops, prices paid by farmers for commodities bought, interest and taxes, farm wage rates, and the parity ratio.

In the period from 1910 to 1947, the parity ratio has only been favorable to farmers in the years 1910, 1914, 1917, 1918, 1919, 1942, 1943, 1944, 1945, and 1946, or 10 years out of 37, which is 27 per cent of the time.

In other words, for 73 per cent of the time, or 27 years of this period, farmers had to buy supplies and equipment for their farms and sell the products from their farms at a price disadvantage.

The fact that this is not the situation today in no way discounts what the situation has been and may be expected to be in the future.

[fol. 583] The prices of things farmers buy have increased. Exhibit 42 also shows the index of prices paid by farmers to have increased from 128 for the period 1935-39 to 230 for April of 1947. Prices paid for commodities alone in this same period increased 94 per cent. Farm wage rates in the United States increased 238 per cent from 1935-39 to April of 1947.

Exhibit 43 shows the prices for fruits and vegetables to be generally lower this year than in 1946. The trend of farm prices this year is generally lower as crops are harvested than for the same period in 1946.

As soon as the Federal Government discontinues its present program of feeding the peoples in many countries in the world surplusses of foods may be expected to develop and farm prices in general as well as farm land values should decline.

Exhibit 44 shows the monthly wage rates in Virginia without board from 1910 to 1946 have increased 310 per cent with a 161 per cent increase since 1939. Daily farm wage rates have increased from $1.05 in 1933 to $4.12 in 1946, or 292 per cent. These wage rates are not included in determining parity.

Exhibit 45 shows data for fruits and vegetables, fresh and processed, retail costs, average annual purchases by a family of 3 consumers, farm value of equivalent quantities sold by producers, marketing margins and farmers share of [fol. 584] retail costs. In 1946 the farmer averaged receiving 43 per cent of the retail costs for all fruits and vegetables, fresh and processed. In 1946 the farmer averaged receiving 46 per cent of the retail costs for fresh

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fruits and vegetables only, 55 per cent for apples, 43 per cent for fresh vegetables only, 48 per cent for green beans, 48 per cent for spinach and 54 per cent for potatoes. On July 17 the Government was purchasing potatoes in Virginia at a support price of $2.60 per 100 pound bag.

Exhibit 46 shows the retail price per pound for selected fruits and vegetables in New York City at the middle of each month during 1946 to April of 1947.

Exhibit 47 shows average wholesale prices at New York City for important fruits and vegetables produced in Virginia for equivalent U.S.#1 quality by weeks during parts of 1946 and 1947. Virginia harvests apples in August, September and October, at which time the bulk of the crop is sold. Prices in this period in 1946 ranged from $1.60 to $3.50 per bushel of U.S.#1, size 2½ inch. Snap beans sold in 1946 during June, July, August and September brought from $2.18 to $3.75 per bushel. On July 18, 1947 our snap bean markets declined to 60 cents a bushel. Kale sold in the winter of 1946 and spring of 1947 brought from 62 cents to $1.04 per bushel. Peaches sold in 1946 brought from $2.85 to $3.82 per bushel. Potatoes from the inter-
[fol. 585] mediate crop brought from $2.32 to $2.92 per 100 pound sack, spinach in the spring of 1947 brought from 82 cents to $1.42 per bushel. Sweet potatoes at harvest time in 1946, when about 75 per cent are sold, brought from $1.86 to $3.98 per bushel.

Exhibit 48 shows the average farm prices received for truck crops during the 1946 season for Virginia. Spinach averaged 70 cents, kale 85 cents and snap beans from $1.50 to $1.95 and sweet potatoes $2 per bushel.

Q. Have you data on rail and motor truck rates on certain produce from Virginia to Philadelphia and New York City?

A. Yes. Exhibit 49 shows the rail rates from Norfolk and Bayview, Virginia, to New York City and the motor truck rates from Norfolk to New York City.

A mathematical calculation, using the minimum carlot weight, new freight rate per 100 pounds and usual refrigeration charge on snap beans results in a rail freight charge

of 33 cents per bushel to New York City as compared to 35 cents for motor truck transportation.

Apparently, the charges for rail shipments are already so high that the business has in a large measure been lost to contract motor truck haulers.

Now it is proposed to make the rail charges still higher by the amounts of new unloading charges at New York City and Philadelphia. We would like to work with the rail carriers but cannot agree on a policy which selects the farm [fol. 586] group to pay the bill.

It is my belief that new and additional unloading charges can only result in a loss of still more business to the motor truck contract carriers, and it is hoped that the Commission will deny the rail carriers' request.

Whereas much truck-hauled produce goes direct from fields and packing sheds to store doors in New York City and Philadelphia rail-hauled produce not sold at auction is subjected to additional charges for cartage of 5 cents a package from car door on the car float or truck door on the street to the dealers' store.

The additional commissions of wholesalers and jobbers of about 10 per cent each are added usually before the produce is in the same position as that arriving by motor truck.

Exhibit 50 shows present rail and motor truck rates on apples and peaches from certain Virginia points to New York City and Philadelphia.

On apples the freight rate from Winchester to New York City at present rail transportation costs with minimum weight, refrigeration and usual load amounts to 31 cents per bushel as compared to a 25 cents per bushel rate for motor truck transported apples.

Exhibits 51 and 52 show the rail and motor truck unloads and receipts at New York City and Philadelphia for selected fruits and vegetables from Virginia 1941-46 inclusive.

[fol. 587] The past rail rate policy resulted in a situation in which only 27 per cent of this traffic moved by rail from Virginia to New York City in 1946. Only 12 per cent of this traffic moved by rail from Virginia to Philadelphia.

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Additional rail unloading charges can only aggravate this situation.

Exhibits 53 and 54 show the rail unloads by freight of selected fruits and vegetables at New York City and Philadelphia in 1946, the usual number of packages per car, the net and estimated gross weight per package and per carload, the extra charge proposed for unloading, the average extra charge per carload and the extra cost had these proposed unloading charges applied in 1946. This would have amounted to $22,493.84 for rail unloads at New York City and if motor truck operators had taken advantage of this full charge in terms of increased rates the cost would have been an additional $62,491.

At Philadelphia rail unloads in 1946 would have cost an additional $5,716.96 and similar advances by motor truck operators $41,245.

The total additional charges to Virginia producers thus could have been $131,946.80 to these two cities only.

Virginia's producers in general are not in a position to bear additional charges for transportation.

Exhibit 55 shows the Virginia farm operator's family [fol. 588] level of living compared with certain other states in the United States for 1940 and 1945. Taking all states as an index of 100 in 1945, Virginia had an index of 72 for farm operator's family level of living.

What we are striving for in Virginia is a higher standard of living. Any additional unloading charges for fruits and vegetables which charges on such perishables would be passed back to producers would tend to lower our farm living standards, which are already low as compared with farm families in the United States generally. Our farmers are in no position to pay additional charges. On behalf of the farmers whom I represent, we feel the new additional unloading charges should not be permitted.

Q. Dr. Maxton, what is the interest of the farming industry in these increased unloading charges at New York and Philadelphia?

A. Well, our farming industry handling these fresh fruits and vegetables is such that any increased charges on perishables tend to be reflected back to them, and they pay

the bill, therefore they are interested in opposing any increased charges.

Q. How is that reflected back?

A. Well, a perishable is something that won't keep. It has to be sold or it will deteriorate very rapidly. Therefore, you can't hold it and sell it later. You have got to sell [fol. 589] it — will go bad on you and you will lose out on it entirely.

Q. In a shipment from Virginia to New York for unloading at New York at one of the piers, how are those prices reflected back to the producer, if they are?

A. Well, as a rule, unless the goods are sold in Virginia, it is consigned into the market up here, and after it goes through the usual handling, either at auction or through some wholesaler, all the charges, including transportation, and so forth, are deducted, and the balance is transmitted back to the shipper.

Q. The shipper or producer gets the difference between the price he received in New York and whatever charges and costs are deducted therefrom?

A. That is correct.

Mr. Seibert: That is all.

I would like to offer these exhibits in evidence.

Mr. Smith: Before they are received, Mr. Examiner, can the same understanding with respect to checking tariff references which was made with respect to Exhibit 38, apply to Dr. Maxton's exhibits?

Mr. Donadio: And also may we have the same understanding with respect to these exhibits that we had with respect to Mr. O'Rourke's exhibits, that is, checking statistical matters, the source of which is shown on the exhibits?

Exam. Brown: We are going a little farther here as far [fol. 590] as statistics are concerned. That might open the exhibits wide open.

Mr. Donadio: Well, you have a lot of figures here taken from various Governmental periodicals and documents. We are not going to have time before this case is concluded to check these figures.

Mr. Miller: I believe the understanding in that respect, Mr. Examiner, was that any substantial changes which we wish to submit should be made within 10 days.

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Exam. Brown: That is right.

Mr. Seibert: As an exhibit.

Mr. Miller: Yes.

Mr. Donadio: There is a little question about some of the figures which are physically taken from the report. There may be some differences which would arise because of calculations made, or interpretations made by the witness from the figures which are shown in the various documents and periodicals referred to.

Exam. Brown: This Exhibit 38 was drawn up in a much different manner than these other exhibits.

Mr. Donadio: Take Exhibit 51, Mr. Examiner, and 52. I just refer to those as illustrative of the point I am trying to make. "Source: Supplement No. 29, Freight Traffic No. 90-K, United States Department of Agriculture, Unloads of Fresh Fruits and Vegetables at Philadelphia." [fol. 591] Now, we would like to check that document to see whether or not the data which has been taken from that checks.

Exam. Brown: The only purpose of your request is to make corrections in this exhibit if necessary?

Mr. Donadio: Yes, sir. As I pointed out, Mr. Examiner, to the extent which any of these figures shown are not actually physically taken from the documents but are based on other calculations.

Exam. Brown: That is another way of checking the accuracy of this exhibit against the source of the material?

Mr. Donadio: That is right.

Exam. Brown: I will permit you to do that in connection with these exhibits in your briefs only. I am not going to let you file any extensive exhibit.

Mr. Donadio: That is perfectly agreeable.

Exam. Brown: If we go too far in that respect, we will have so many exhibits we will have another case to handle.

Mr. Donadio: That is perfectly agreeable.

Exam. Brown: I will let you do that in your briefs only.

Mr. Donadio: If you want to put the same limitation as far as Mr. O'Rourke's exhibit is concerned, I am satisfied with that ruling.

Exam. Brown: I made my ruling on that and I will let it stand.

Is there any objection to these exhibits?

[fol. 592] Hearing none, they will be received in evidence as Protestants' Exhibits 39 to 55, inclusive.

(Protestants' Exhibits Nos. 39 to 55, inclusive, Witness Maxton, received in evidence.)

Mr. Seibert: That is all.

Cross examination.

By Mr. Smith:

Q. Dr. Maxton, suppose your view- were that the charges involved in this case would ultimately be borne by the consumer rather than by the producer; would you still be opposed to them?

A. I would, because our Extension Division is supposed to work both with producers and consumers, and we have to look out for the interests of both.

Q. Then your position is based on reasons other than your views that the producer would bear the charges?

A. No, I wouldn't say so. The finding has to be made first.

Q. In other words, stating it another way, you are opposed to the charges whether the producer or the consumer would bear them?

A. I would rather put it this way: that our experience in the past with perishables has been this, that we produce them, and they have either got to bring freight charges plus or else we plow them under, and we are talking here about perishables, fruits and vegetables, and therefore our experi-[fol. 593] ence in the past has been that we either must sell them or we plow them under.

Q. I think you could answer the question. It was simple. My question was: you would be opposed to these charges whether the producer or the consumer bore them ultimately; is that right?

A. I would like to repeat my first reply. I am supposed to work with both consumer and producer, and if the burden is jointly shared by them, or is on one or the other, I still would oppose them.

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Q. I will take that as your answer.

Mr. Smith: That is all.

Cross examination.

By Mr. Miller:

Q. In case the charges are ultimately borne by the producer, can you explain to me how that happens?

A. We have on occasions shipped produce into this market which didn't bring freight rates and received a bill back for the freight rates. That was evidence to me that the producer bore the charges.

Q. Is that your only explanation?

A. That is my explanation at this time.

Q. It is correct, is it not, that producers of farm products, farmers generally, are now enjoying greater prosperity than they have at any time during the past 25 years?

A. It depends on which farmers you are talking about.

[fol. 594] Q. Speaking generally.

A. For instance, I would like to answer your question by telling you about some bean farmers out in southwest Virginia two weeks ago when the price of beans declined to 60 cents a bushel.

Q. I am not interested in any particular section of the farming population. My question was whether or not it is true that, speaking generally, country-wide, it is correct, is it not, that they are enjoying greater prosperity than at any time during the last 25 years?

A. I believe it would be difficult to answer that question the way you put it, because you have many farmers who are better off than they were, and you have many others who are not better off, because their costs have also risen along with their returns, and that answer can't be given in general terms.

Mr. Miller: That is all.

Cross examination.

By Mr. Donadio:

Q. Mr. Maxton, the situation that you mentioned in answer to Mr. Miller's question, that there had been occa-

sions where the shipper was charged with freight charges, that occurs where the products are shipped on consignment; is that right?

A. Usually.

Q. Well, it is only in those cases, is that right?

[fol. 595] Exam. Brown: Do you know what the term "on consignment" means?

The Witness: Yes. When a product is loaded and shipped into the market and the shipper is the owner of that product until it is sold in the market, and he receives back the return after all expenses are deducted.

By Mr. Donadio:

Q. That is what you term "commission sales," is it not—or "commission shipments"? Isn't that generally the term applied to those types of shipments?

A. That would probably be true.

Q. Now, are the products to which your testimony refers all sold on a commission basis, or a consignment basis?

A. No. There are many products sold cash track, many sold on a f.o.b. basis, or various bases, through brokers, and so forth.

Q. Is there a substantial volume of crops sold at the field, or at the point of production?

A. It varies. I would like to answer your specifically, but I can't. When supply is very heavy much is consigned. When the supply is in relationship to the demand, there are more cash sales—cash track.

Exam. Brown: You mean f.o.b. origin?

The Witness: Yes.

Exam. Brown: The truckers might pick it up at the farm?

The Witness: Yes.

[fol. 596] Exam. Brown: That is what you mean?

The Witness: Yes.

By Mr. Donadio:

Q. Chain stores buy large quantities right at the point of origin, do they not?

A. Yes, they do.

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Q. Is it your understanding, Mr. Maxton, that Philadelphia and New York are the only points of destination in the North, in Official Territory, where the railroads unload carload shipments of fresh fruits and vegetables without charge to the shipper or consignee?

A. I am afraid I am not experienced in that line of questioning. I can't answer that.

Q. Your testimony, however, relates to the New York and Philadelphia situation, does it not?

A. That is correct.

Q. As involved in this proceeding?

A. That is correct.

Q. There are substantial shipments made from your territory to other large cities and towns in northern United States in Official Territory? Do you know what Official Territory embraces?

A. Reasonably so, yes.

Q. North of the Ohio River?

A. And a line through Richmond, yes.

Q. Will you answer my question, Mr. Maxton?

[fol. 597] A. What is the question, again?

Q. The substance of the question was whether there were substantial shipments of the products from your territory to other cities, large cities and towns, in Official Territory other than New York and Philadelphia, about which I understand you testified on your direct examination.

A. That is correct.

Exam. Brown: What is correct?

The Witness: That there are large shipments in other cities in Official Territory, other than to New York and Philadelphia.

Exam. Brown: From where?

The Witness: From Virginia.

Mr. Donadio: That is all I have.

Exam. Brown: Is there any redirect?

Mr. Seibert: No redirect.

(Witness excused.)

Exam. Brown: Call the next witness.

[fol. 598] Mr. Winn: I will call Mr. Kraemer.

PHILIP G. KRAEMER was sworn and testified as follows:

Direct examination.

By Mr. Winn:

Q. Give your name, occupation and transportation experience?

A. My name is Philip G. Kraemer. I am employed by The Port of New York Authority in the capacity of Assistant Traffic Manager, and my transportation experience covers a period of six (6) years. During this period, two (2) years were spent as a rate clerk for a railroad, and the last four (4) years in the employ of The Port of New York Authority in the capacity of rate clerk and Assistant Traffic Manager.

Q. In whose behalf are you appearing as a witness in this proceeding?

A. I am appearing on behalf of The Port of New York Authority.

Q. What are the corporate status and functions of The Port of New York Authority?

A. The Port of New York Authority is a municipal corporate instrumentality of the states of New York and New Jersey created with the approval of Congress for the effectuation of a statutory plan for the development of the Port of New York District, requiring, among other things, protection of the Port area and the commerce of the Port. [fol. 599] The compact and Congressional consent will be found in Public Resolution No. 17, 67th Congress, S.J. Res. 88.

Q. Are you familiar with the matters under consideration in this proceeding?

A. I am.

Q. What is the position and interest of The Port Authority in this proceeding?

A. The carriers' proposal would subject an important segment of the commerce of the Port of New York to an unfair and discriminatory charge.

Mr. Smith: I object to that. It states a conclusion.

Mr. ———: Well, the witness is expressing conclusions.

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I think it is quite fair, Mr. Examiner, for the witness to express his conclusions and his views.

Exam. Brown: Let him finish the answer to that question, and then I will rule.

A. The obligation of the respondent carriers is to make freight delivered at their stations available to the consignee. Freight delivered on carfloats alongside pier stations, as is the case with the fruits and vegetables involved herein, does not make the lading accessible to the consignee. Therefore the carriers remove the fruits and vegetables from the car and place them on the pier floor where they are accessible. This service is part of the carriers' obligation and an attempt to assess an extra charge for it constitutes a [fol. 600] discrimination and an unreasonable charge.

Mr. Winn: Mr. Examiner, the answer to that question covers facts. It does also in the first sentence and in the last sentence state the conclusions of the witness which are his opinions as to what is unfair, what is fair, what is discriminatory, and what is unreasonable. Those are words of opinion and viewpoint.

Exam. Brown: Argument is unnecessary here. Just state your objection and let it go at that.

To the extent that this answer is argumentative, it seems that it is the position of The Port of New York Authority. It will be accepted in that respect, only as the position of that Authority.

The statements in this answer to the extent that they are factual will be considered in evidence in this case.

Is that satisfactory?

Mr. Miller: May I make one further comment. With respect to the sentence beginning, "Therefore the carriers remove the fruits and vegetables," I submit this witness is certainly not competent to determine why the carriers conform to their present practice.

Exam. Brown: I don't know whether your witness is qualified or not. He has had experience of six years. You can bring out that experience on cross-examination if you wish. As far as I am concerned, I am willing to accept his [fol. 601] experience in connection with The Port of New

York Authority as being sufficient to make a statement of that kind.

Mr. Donadio: Well, the conclusions that he expresses by the word "Therefore," is based on the previous sentence, that "It is the obligation of the respondent carriers to make freight delivered at their stations available to the consignee."

Mr. Winn: We want to be agreeable. We withdraw the word "Therefore."

Mr. Donadio: That doesn't clear the situation. It is still a conclusion, and I think the Examiner's remarks take care of it.

Exam. Brown: You think what?

Mr. Donadio: I think your remarks that any statements which are conclusions are only taken as the position of the Port of New York Authority and are not to be considered as evidence, take care of it, if I understand your ruling.

Exam. Brown: The statement, "The carriers remove the fruits and vegetables from the car and place them on the pier floor where they are accessible," is a statement of fact and will be so considered.

If you wish me to make a ruling with respect to each one of these sentences, I will be glad to do so.

Mr. Smith: I am not requesting it, Mr. Examiner.

Mr. Miller: That is perfectly satisfactory.

[fol. 602] Exam. Brown: I think the ruling is clear, and if it is not clear, you tell me now and I will make it clear.

Mr. Donadio: It is perfectly clear.

By Mr. Winn:

Q. Mr. Kraemer, are you familiar in a general way with the carriers' practice in according delivery of perishables in the New York District?

A. Yes.

Q. Has the Port Authority made a study of the volume of traffic here in issue and its importance?

A. Yes, our study developed that in the year 1946 there were shipped to the New York Port District approximately 118,000 carloads of fresh fruit and vegetables, of which approximately 75,000 carloads were delivered at pier stations of the railroads at which the unloading of the traffic

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under the ordinary requirements of the classification rules is impracticable. Fruits and vegetables for these pier stations are moved via carfloats from the railheads on the New Jersey shore to the carriers' New York piers in the vicinity of Washington Market, where the freight is unloaded and placed on the piers by the carriers. These piers have no track facilities on which cars can be placed, and contents made accessible to consignees' vehicles. Some 43,000 cars of the total of approximately 118,000 were delivered at team tracks and private sidings in Manhattan, the Bronx and the waterfront of New Jersey.

[fol. 603] Q. Under these suspended tariff items does the consignee or owner of the cars have a choice in performing the unloading of cars arriving at pier stations?

A. No, the tariff of the respondents states in the affirmative that the cars will be unloaded by the carriers and subject to a charge ranging from seven and one-half cents to ten cents per 100 pounds.

Q. Must the carriers do the unloading at these piers?

A. Yes, because it is physically impossible for the shipper to place a street truck at the car door.

Q. In your study of these pier deliveries, has it appeared that the present practice is of benefit to the carriers in any manner?

A. We think so, inasmuch as the same space on carriers' pier stations is in many cases used for the delivery of at least two cars and often as many as three cars in one 24-hour period.

Q. Is there competition between the consignees or owners of the traffic under consideration delivered at pier stations, on the one hand, and the consignee or owners of like traffic delivered at private sidings or team tracks in the New York District?

A. Definitely so.

Q. Do the proposals under suspension provide for the assessment of an unloading charge at such private sidings [fol. 604] or team tracks?

A. They do not.

Q. What are the resulting facts with reference to difference in treatment of competing shippers or receivers of this freight?

A. Under such circumstances the consignees of fruits and vegetables at pier stations are faced with a discriminatory charge that will amount to approximately $2,000,000 per year. This discrimination applies not only to competitors located in Manhattan but also to competitors located in other parts of the Port District as well as at other competing cities.

Q. Is an unloading charge generally assessed at pier stations in New York?

A. No, it is the practice of the carriers to unload all types of carload and less-carload freight onto the pier floor because of the impracticability of otherwise making the freight available to the consignees when delivery is made by carfloat.

Q. Do you have an exhibit which portrays the pier station facilities at which the respondents propose to assess the suspended charges?

A. Yes, and now offer in evidence my Exhibit No. 56 consisting of five pages which shows the station location, railroads serving it and in most cases there are no track connections, and therefore cars must be handled between these [fol. 605] stations and floats which are placed alongside the pier for unloading. Such cars on floats placed alongside the piers are not physically accessible to the consignee or owner of the freight.

Mr. Winn: Mr. Examiner, at this time I offer Exhibit 56 in evidence.

Exam. Brown: Is there any objection?

Mr. Smith: No objection.

Exam. Brown: It is received.

(Protestants' Exhibit No. 56, Witness Kraemer, received in evidence.)

Mr. Smith: No cross-examination, sir.

Mr. Miller: No questions.

Mr. Donadio: I have no questions.

(Witness excused.)

Exam. Brown: Call the next witness.

Mr. Augello: Mr. Examiner, Mr. Hodkinson was coming back with some information, if you will recall, about the

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segregation of the 45,000 cars that were unloaded on team-tracks. I think that we ought to have that information before any more of our witnesses go on.

Exam. Brown: If he is ready to put that on, we will recall him for that purpose.

We will have a short recess.

(A short recess was taken.)

[fol. 606] Exam. Brown: Mr. Hodkinson is recalled.

E. A. Hodkinson was recalled and testified further as follows:

Direct examination.

By Mr. Smith:

Q. Mr. Hodkinson, do you recall that you were requested to give some information supplemental to your Exhibit No. 3?

A. I do.

Q. Kindly proceed by giving that information.

A. In my Exhibit No. 3 I showed the total rail receipts excluding express shipments as taken from the Department of Agriculture unloads of fresh fruits and vegetables at New York City, the annual report for 1946. I explained that those figures included the unloads at all stations in New York City, Brooklyn, Jersey City, Hoboken, Kearny, New Jersey, and some other nearby points on Long Island.

The Exhibit No. 3 shows that there were 45,744 cars unloaded by consignees. I was asked to break that down to show specifically how many of those cars were unloaded on Manhattan Island.

The number unloaded on Manhattan Island was 16,511, which left, 29,233 cars unloaded at the outlying points included in the New York City report, which are Brooklyn, Jersey City, Hoboken, Kearny, and some nearby points on Long Island, which would include Long Island City.

[fol. 607] Mr. Smith: Thank you, Mr. Hodkinson.

Cross examination.

By Mr. Augello:

Q. Mr. Hodkinson, can you give us the number of cars that were unloaded at Jersey City.

A. Not right away. You simply asked me how many were unloaded at Manhattan Island. That was all I was asked to furnish. We would have to make a separate study to collate all the figures of the various lines——

Q. I believe you are mistaken. We asked you to give us the exact number at each point.

A. Well, I misunderstood you then, because I simply thought that if you had the amount on Manhattan Island it followed that all the other points were stations outside of Manhattan Island in which you were not particularly interested. You told me your principal concern was the unloads on Manhattan Island. That is my understanding of our conversation.

Q. Can you give us an idea of the 29,233 cars that were unloaded outside of Manhattan Island? What percentage of that number would be unloaded at Jersey City?

A. I couldn't, not now.

Exam. Brown: Could you give us a rough estimate now?

The Witness: No, I am sorry. I couldn't, Mr. Examiner. I have those figures downtown, but I forget what the total is.

By Mr. Augello:

Q. Could you get those on the telephone for us, Mr. Hodkinson, and give them to us this afternoon?

[fol. 608] A. I probably could run downtown during the noon recess and get them.

Q. If you will do that we will appreciate it, because I am sure we requested that you give us the exact number of cars of fruits and vegetables unloaded at all points where team-track deliveries were made.

A. I didn't understand that request, otherwise I should have started the machinery rolling to get the information.

Exam. Brown: Why not file that as a late exhibit in 10 days?

Mr. Smith: That is agreeable with the respondents.

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Mr. Augello: It is all right with us.

Mr. Smith: As I understand it, what is asked for is the number of cars included in the 29,233 which were unloaded at Jersey City. Is that correct?

Mr. Augello: That is right.

Mr. Smith: We will file that in 10 days.

Exam. Brown: Jersey City only? Tell us exactly so that there will be no further question.

Mr. Augello: Jersey City, Weehawken——

Exam. Brown: You can tell us where all these 29,233 cars went, can't you?

The Witness: Not offhand.

Exam. Brown: I mean in a post-filed exhibit, without trouble?

[fol. 609] The Witness: We have to go through each road that is interested. Simply go all through their records. This is new material for them.

Exam. Brown: Let's take the principal points then.

Mr. Augello: I think, Mr. Examiner, if they are going to give it to us, we ought to have it for the entire 29,233 cars.

Mr. Miller: Mr. Augello, before taking this down to all the small points on Long Island, couldn't you specify the majority points in which you are interested, and then lump the remainder? I mean, it seems to me you are asking for a lot of work that is of no interest to you or anybody else.

Mr. Augello: I think it is of interest to all of us to find out just how many were unloaded at team-tracks of the total.

Exam. Brown: We will discuss this off the record.

(Discussion off the record.)

Mr. Augello: Mr. Hodkinson, if you will furnish the exact cars unloaded at Jersey City, Brooklyn, and Maspeth, Long Island, that will be sufficient.

Exam. Brown: That is, the total number of cars to these points?

Mr. Augello: That is right, of fruits and vegetables.

Exam. Brown: I will give you 10 days in which to file that information, to be considered as a part of the record, copies to all counsel.

[fol. 610] Mr. Smith: That will be done.

Mr. Wells: I am wondering if 16,511 unloaded at Manhattan points should not be shown by stations. I think that was the request.

Mr. Miller: As I understood the situation, there were various proposals about what figures should be submitted, and the final proposal was that we should submit simply a total figure for all non-pier stations on Manhattan. I think that is correct, and that is certainly the conception on which Mr. Hodkinson was working.

Mr. Wells: I made a written memorandum on which I think I said by stations.

By Mr. Wells:

Q. Do you know whether or not any of those 16,511 cars were watermelons?

A. None of them was watermelons.

By Mr. Winn:

Q. Mr. Hodkinson, of this 16,511 cars unloaded on Manhattan Island at points other than piers, how many were at private sidings, and what proportion were at true public team-tracks?

A. The 16,511 cars were all at team-tracks.

Q. All public team-track?

A. Yes.

Q. They do not include unloads at private sidings?

A. No, sir.

Q. Is the same thing true of the 29,233 figure which you [fol. 611] gave for other points than Manhattan?

A. No. That includes both team-track and private siding deliveries.

Q. Can you tell us the proportion as between private sidings and public team-tracks in this 29,233 figure?

A. I cannot.

Q. Have you any idea at all?

A. No, I have no idea.

Q. Do you have information from which you could learn that?

A. No, not without making a specific study, and asking each road to go through all its records for each car it

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handled and find out the nature of the delivery that was made.

Q. Well now, if we put the 16,511 cars which are Manhattan unloads on team-track with the pier delivered cars, we get a total of 45,744 cars, is that right?

A. If you do what, Mr. Winn?

Q. If we add together the 16,511 public track deliveries and the pier deliveries, we get the figure of 45,744.

A. Oh, no, you don't. If you put the pier deliveries and the team-track deliveries together you get 72,743 plus 16,511.

Q. And the difference there is private sidings?

A. No. Your question was, by adding the 16,511 cars, which were the team-track deliveries on Manhattan Island, to the pier deliveries on Manhattan Island, you get 45,744 cars. You are misreading the exhibit.

[fol. 612] Q. You have to add the 16,511, which is Manhattan team-track, with the 29,233, which is outlying team-track and private sidings?

A. That balances your 45,744. Or, working in another way, if you deduct 16,511 from the figure of 45,744, you have 29,233 cars left, and those are the cars unloaded by the consignees, either on team-tracks or private sidings, at these outlying points.

Q. But from what you have said, I don't quite see where we have in these figures private sidings on Manhattan. Are there any such?

A. I can't think of any in connection with these fruits and vegetables.

Mr. Winn: Thank you.

Exam. Brown: That is all, Mr. Hodkinson.

(Witness excused.)

Mr. Matson: I will call Mr. Pease.

May it please the Examiner, before Mr. Pease commences his testimony, may I state that the appearance of the Secretary of Agriculture in this proceeding is pursuant to the authorization and direction of Congress as set forth in Section 201 of the Agricultural Adjustment Act of 1938, and Section 203 (j) of the Agricultural Marketing Act of

1946, both to be found in volume VII of the United States Code, respectively, in Sections 1291 and 1622.
[fol. 613] In the latter statute it is stated to be the intent of Congress, as set forth in Section 202, to adopt all means of aiding the agricultural community, and include in such means, "An integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids, and services and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced, and the price spread between the producer and consumer may be narrowed, that dietary and nutritional standards may be improved, that new and wider markets for American agricultural products may be developed both in the United States and in other countries, with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner."

J. L. Pease was sworn and testified as follows:

Direct examination.

By Mr. Matson:

Q. Will you state your name for the record, Mr. Pease?
A. J. L. Pease.
Q. What is your occupation?
A. Transportation specialist for the Transportation Rates & Services Division, Marketing Facilities Branch, Production & Marketing Administration, United States De-
[fol. 614] partment of Agriculture, Washington, D. C.
Q. Do you have a statement to make on behalf of the Secretary of Agriculture?
A. I do, yes, sir.
Q. Will you please proceed with your statement?
A. The Secretary of Agriculture under Section 201 of the Agricultural Adjustment Act of 1938, is authorized and obligated to investigate and, if considered necessary, appear in proceedings involving the rates, charges, tariffs, and practices relating to the transportation of farm products.

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This proceeding, which involves a proposal by the railroads serving New York and Philadelphia to add several millions of dollars annually to the transportation costs of a large segment of agriculture by the imposition of unloading charges, is therefore of concern to the Department. These proposed unloading charges must be derived either through addition to the production costs of the producers and shippers, or through an additional levy against the consumers of fresh fruits and vegetables.

In preparation for this hearing, an exhibit consisting of 11 pages which I will designate for identification as Exhibit No. 57 was prepared under my direction.

Pages 2 and 3 show alphabetically the number of carloads of fresh fruits and vegetables which arrived at New York City, during 1946 and 1939. This information is taken [fol. 615] from the annual reports of the Market News Service of the U. S. Department of Agriculture. They include all arrivals in the New York switching area and cover all stations in New York City proper, Brooklyn, Jersey City, Hoboken, Kearny, and some nearby points on Long Island. From the information available to us, it was not possible to segregate the pier deliveries, as such, although we are informed that such deliveries constitute the greater percentage of the arrivals and unloads shown.

Columns 2 and 7 indicate the average loading per car for the designated commodities as shown by Interstate Commerce Commission statistics. Columns 3 and 8 show the unloading charges per ton which are under suspension in this proceeding. Columns 4 and 9 are mathematical computations made by multiplying the average loading per car by the proposed per ton unloading charge, which indicates the amount per carload which the carriers intend to assess under the suspended charges. Columns 5 and 10 are the numbers of carloads of those commodities unloaded at New York during the years designated, and columns 6 and 11 show the total additional costs for the years used as examples; that is, $3,253,561.65 in 1946, and $2,288,000.25 in 1939.

Pages 4 and 5 are segregations of the same commodities, by groups, as they are published in tariffs under suspension, and the total additional expense to the fruit and vegetable

[fol. 616] industry on each group under the proposed charges.

Pages 6, 7, 8, and 9, show the same information for the Philadelphia market, and it will be noted that the additional costs at Philadelphia for the delivery of fresh fruits and vegetables under the proposed charges would have been $1,119,835.41 in 1946, and $811,188.37 in 1939.

We call attention to those amounts to indicate to the Commission that a minute examination of the issues here involved should be made before such amounts are added to the marketing costs of fresh fruits and vegetables at these two cities.

Page 10 is an analysis of the various railroad deliveries on Manhattan Island. Under each railroad which serves Manhattan I have shown the station, the method by which each station is reached, and so far as is possible, the team-track facilities available at each.

This information was taken from the New York Lighterage Tariff, Agent Curlott's ICC A-85. The purpose of this exhibit is to indicate the inability of the railroad serving Manhattan Island to give team-track delivery to all the carloads of fresh fruits and vegetables unloaded in New York currently. For instance, 1946 reports show a total of 75,000 freight cars unloaded. On the basis of 254 market days per year, carriers would have to place every morning in excess of 300 new carloads of fresh fruits and vegetables. [fol. 617] Obviously, with hold-over cars of those commodities, plus other freight assigned for team-track delivery, the congestion and delay to railroad equipment would be terrific.

The history of the New York market indicates that the practice by the railroads of unloading carloads of fresh fruits and vegetables at their New York pier terminals is the result of their feeling that such delivery is cheaper and more expeditious than the construction of tunnels under the river and the acquisition of space for team-tracks on the New York side.

In Philadelphia the practice of unloading by railroads without charge is the result of competition by the carriers serving that market and the eagerness of each of those carriers to obtain and maintain a lion's share of the ton-

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nage. That this practice grew up with the construction of competing deliveries in Philadelphia as the result of that eagerness to obtain all the traffic on the part of each railroad, should not run against the interests of the shippers and producers of fresh vegetables at this late date.

Returning to the New York situation, which is a peculiar one insofar as deliveries are concerned, may we call the attention of the Commission to the fact that under the present arrangement, the piers which are used for fruit and vegetable traffic arriving at New York City are used three times daily. In other words, after the fruit and vegetable [fol. 618] market is over in the early hours of the morning, the piers are available and are often used at least twice more each day. This would certainly not happen, in our opinion, under team-track deliveries. The savings in space and in car days we believe, if they might be computed, would to a large extent, if not completely, offset any additional unloading costs by which carriers seek to justify these unloading charges.

Under the Interstate Commerce Act, Part I, Section I, (3) (a), transportation is described as follows: "The term 'transportation' as used in this part shall include . . . all instrumentalities and facilities of shipment or carriage . . . and all services in connection with . . . delivery . . . of property." Transportation of carload freight is acknowledged to include the placement of such freight at destination where it is accessible to the consignee. This is done either by placement on consignee's private siding or on carrier's team-track. As we have indicated before, such facilities are extremely rare in the City of New York insofar as accommodations for fresh fruits and vegetables are concerned.

In the proceeding, Discontinuance of Inland Stations in New York City 173-ICC-727, the Commission said that carriers are obligated under the law to make a practical delivery or afford the facility for the practical loading of freight. Pier delivery by lighter or float is not a practical delivery insofar as the consignee is concerned, because of railroad [fol. 619] restrictions against consignees or their agents entering such lighters or floats. Furthermore, should these restrictions be withdrawn and consignee unloading from floats be permitted, it is hard to imagine unloading forces

of six or eight consignees working on six or eight cars on one float at one time. The expeditious unloading and consequent speedy release of floats and cars under the present carrier unloading system, undoubtedly saves many thousands of dollars per year in delay.

In Hanna Furnace Corporation vs. U. S. 53 Fed. Sup. 341, 343, it was found that transportation includes delivery, which is to be completed by carrier. Conditions in various plants differ and each case must be determined upon the facts established regarding it in determining where the transportation ends. We believe that insofar as both New York and Philadelphia are concerned, under the practices established by the carriers in the past, transportation of fresh fruits and vegetables does not end at these two cities until the commodities have been unloaded by carriers into consignees' carriages or on designated railroad piers, and that this service of unloading is a part of the line haul rates.

The Commission itself has established a precedent along this line in its decision Unloading Lumber to New York Harbor 256-ICC-463-468, decided November 3, 1943. In this proceeding the Commission said, "The unloading here con- [fol. 620] sidered is required in order to make delivery at respondent's lighterage stations in New York harbor." In New York Harbor Facilities Application 100-ICC-383, the Commission said that "lighterage and car floatage in New York harbor are equivalent to necessary extensions of the rail lines of the various railroads . . . the nature and the incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with a line haul service. It follows that respondents may not now segregate the component of that service, making a separate charge therefor, without an adequate showing that the charge for through service is reasonable." This statement of the Commission has been reproduced and is included as page 11 of my Exhibit No. 57.

On January 1, 1947, the Commission by its decision in Ex Parte 162 permitted the railroads to increase their line haul rates on fresh vegetables by 15 per cent, and on fresh fruits by 20 per cent, both subject to a maximum increase of 13 cents per cwt. On July 3, 1947, the same railroads petitioned the Commission for additional increases amounting

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to 25 per cent within Eastern territory, 15 per cent within Southern and Western territory, 25 per cent intraterritorially between Southern and Western territories on one hand, and Eastern territory on the other hand, all increases subject to maxima of 13 cents per 100 pounds.

If the increases granted in Ex Parte 162 on these com-
[fol. 621] modities were not sufficient to properly compensate carriers for their expenses, in our opinion the place for further complaint as to the level of these rates is not through action such as led to this proceeding, but through pleadings in the forthcoming general increase case now designated as Ex Parte 166.

Q. Do you have any further statement to make, Mr. Pease?

A. I think before we get away from this, there is one other thing to be made on this exhibit, Mr. Examiner. At the bottom of page 5, it shows a grand total there of $1,727,636.17 for 1946, and $1,200,983.42 for 1939. Those should be eliminated, for they are only the totals of this page, and do not include the preceding page which is added in.

Exam. Brown: Are there any other similar changes to be made?

The Witness: The same change is to be made on page 9 opposite "Grand total."

Exam. Brown: That is, the deletion of the totals?

The Witness: The deletion of the grand totals, money and cars both. Those are simply the totals of this one page.

Exam. Brown: Is there any objection to this exhibit? I assume it is to be offered in evidence.

Mr. Loos: Before it is offered, may I ask one question about it?

Exam. Brown: Very well.

[fol. 622] By Mr. Loos:

Q. Mr. Pease, will you give the total of column No. 5, "Number of carloads unloaded," as shown on pages 2 and 3 of your exhibit? Will you give the total of that column?

A. Well, I assume it is 118,497, which is the total shown in the government market report for 1946, but it was not even totaled on the work sheet.

Mr. Loos: I call attention, Mr. Examiner, to the fact that that is the same total as shown in Mr. Hodkinson's Exhibit No. 3.

By Mr. Matson:

Q. Mr. Pease, I hand you a copy of the decision of the Interstate Commerce Commission in Fruits and Vegetables to Duane Street, New York, 66 ICC 135. Will you read into the record the sentence appearing on page 139?

Mr. Smith: I object to that, Mr. Examiner. The respondents have not read into the record a lot of law in this case, and I don't see why the protestants should have that privilege.

Exam. Brown: Is that the only excerpt you intend to read in?

Mr. Matson: Yes, sir.

Exam. Brown: Ordinarily we would let it speak for itself, but since it is not long, I will let you read it.

A. On page 139, in the Interstate Commerce Commission's report in I & S Docket No. 1420 entitled "Fruits and [fol. 623] Vegetables to Duane Street, New York," the following sentence appears:

"As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane Street under the line haul rates. Since 1920 a charge based on actual cost ranging from $2 to $8 per car has been made for the assorting service under an agreement between respondent and representatives of the trade, and no objection is made by protestants to the publication of these charges in tariff form."

By Mr. Matson:

Q. What is the caption above the paragraph from which you just read the excerpt?

A. "Terminal Charges."

Mr. Matson: That is all I have.

Exam. Brown: Before you proceed with any further questions, I would like to have an answer to the question I asked, as to whether or not there is any objection to this

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exhibit, also whether this exhibit is to be offered. I think you missed that, Mr. Matson. First of all, I will ask if there is any objection to Exhibit 57?

Mr. Smith: No objection.

Mr. Donadio: No objection.

Mr. Bongartz: No objection.

Mr. Matson: Exhibit 57 is offered in evidence.

Exam. Brown: It is received.

[fol. 624] (Protestants' Exhibit No. 57, Witness Pease, received in evidence.)

Exam. Brown: Is there any further direct examination of this witness?

Direct examination.

By Mr. Augello:

Q. Mr. Pease, have you been on the New York Piers 21, 22, 27, 28, and 29 in recent years?

A. Not on Pier 22. I have been on the others.

Q. You have been on all the others?

A. Yes, sir.

Q. You are familiar with the operations of the unloading by the railroads at those piers?

A. Fairly well so, I believe.

Q. Would you say that the operations there are as efficient as they could possibly be?

Mr. Smith: The purpose of the question is obscure, but I object to it because I don't think this witness is an efficiency expert.

Exam. Brown: This witness has not shown he is qualified to answer such a question. If you can qualify him I will be glad to entertain the idea of permitting him to answer the question.

By Mr. Augello:

Q. You were traffic manager for a good many years, I understand, for a shipper of fruits and vegetables, is that so?

[fol. 625] A. That is right.

Q. How many years?
A. 12 years.

Exam. Brown: Where?
The Witness: California, on the Pacific Coast.

By Mr. Augello:

Q. During your employment with this shipper of fruits and vegetables, did you visit the New York and Philadelphia markets?
A. Yes, sir.
Q. So that you are familiar with the conditions on the New York piers?
A. Yes, sir.
Q. Would you say from your observations that the unloading on the part of the railroads on the New York piers was an efficient operation?
Mr. Smith: I object. I still don't think he is qualified.
Exam. Brown: We will let the witness answer based on his personal opinion which is to be considered in the light of the experience as stated.
Mr. Miller: I have a further objection on the ground that the issue is wholly immaterial to this case. Whether or not the carriers are efficient in unloading the fruits and vegetables, I submit, Mr. Examiner, is not in issue here.
Exam. Brown: The last objection is overruled. Is there [fol. 626] any other objection?
All right. Your answer is going to be your opinion now, in the light of your experience as stated in the record.
Is that ruling clear to all of you?
Mr. Smith: Yes, sir.
Exam. Brown: Proceed.

By Mr. Augello:

Q. What do you think of the operation on the Pennsylvania Railroad and Erie piers?

Exam. Brown: Wait a minute. We have a question.
Mr. Donadio: I am assuming he is referring to piers that Mr. Pease is familiar with.
Mr. Augello: He has already stated the piers he is familiar with.

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Exam. Brown: Answer the question and state what piers you are talking about.

A. Well, in my observation on Piers 19, 21, and the Pennsylvania piers—I have forgotten the numbers—27, 28, and 29, they are at times what I would call a well organized madhouse. Unless a person is entirely familiar with what is going on down there he is completely at sea. There may be some ways to improve their operations down there. I suspect if there are ways, they would have already done it. But personally, I don't see how they could be improved upon except perhaps by more mechanization. That is only my opinion.

By Mr. Augello:

Q. Do you know from your own experience or from [fol. 627] your own observations that the carriers on those piers use the same space two and three times during a 24-hour period?

A. Yes, I know they use them at least twice. I have never seen a three-time operation.

Q. Doesn't that release refrigerator cars?

A. Oh, yes, very definitely.

Exam. Brown: What do you mean—doesn't that release refrigerator cars?

Mr. Augello: Within that period of one to four hours.

Exam. Brown: Is the answer based on that premise?

The Witness: Yes.

Exam. Brown: Obviously, it releases refrigerator cars. That answers itself. If there is anything else back of that question I want to know what it is. When you say releases refrigerator cars, that answers itself. You know it releases them.

By Mr. Augello:

Q. It releases refrigerator cars more promptly than they would be released on team-track?

Mr. Smith: I object to the question.

Exam. Brown: The witness may answer if he knows.

A. On a team-track the consignee is entitled to 48 hours free time under demurrage. By pier delivery, the car being

immediately unloaded by the railroad company on the pier, the car is released immediately.

[fol. 628] By Mr. Augello:

Q. Because it is taken out immediately?

A. That is right, within a few short hours from the time it leaves Jersey City.

Exam. Brown: Your answer as to team-track is based solely on the tariff provision, is that right?

The Witness: On the tariff authority for the free time, and from observation.

Exam. Brown: You don't know exactly what the exact practice is or might be under that tariff provision?

The Witness: No, sir, not in New York.

Exam. Brown: Or Philadelphia, for that matter?

The Witness: Or Philadelphia.

By Mr. Augello:

Q. But you do know that the cars that are unloaded by the railroads on the New York piers, of fruits and vegetables, are unloaded immediately when they arrive at the piers?

A. That is right.

Q. Whereas cars on team-tracks very often stay on team-tracks for 48 hours before they are unloaded?

Exam. Brown: This witness said he didn't know what the conditions are at New York. Tell us generally what his experience has been with respect to unloading on team-tracks. So far as New York is concerned he doesn't know, and he so stated.

By Mr. Augello:

Q. During your employment of 12 years with Sawdey [fol. 629] & Hunt in California, did you have cars of fruits and vegetables on team-tracks into New York at any time?

A. Not that I recall.

Q. How about Philadelphia?

A. Yes, we had cars on team-tracks at Philadelphia.

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Q. Can you give us an idea of how long those cars laid on team-tracks before they were unloaded?

A. Not very well. I was pretty far from them. But I know we used to pay lots of demurrage bills.

Q. If you paid demurrage on the cars, that meant the cars were held longer than 48 hours?

A. Yes.

Exam. Brown: When was this period of employment?
The Witness: 1926 until 1938.
Mr. Augello: That is all.
Exam. Brown: Is that all, Mr. Matson?
Mr. Matson: That is all on direct.
Exam. Brown: Cross-examination.
Mr. Smith: No questions.
Mr. Miller: No questions.

Cross-examination.

By Mr. Donadio:

Q. Mr. Pease, this matter of the difference in the detention of cars at team-track as compared with deliveries made at the pier stations, is it not a fact that the same 48 hours free time is available to the consignee when [fol. 630] a car which is subsequently unloaded at pier stations is in the yards?

A. That is true. I understand that is true, yes, sir.

Q. And the same length of time, or the same successive periods of detention may take place while the cars are standing in the yard?

A. That is right.

Q. The same cars that are subsequently taken to the pier station?

A. Yes, sir.

Q. So it is no different on that score whether the cars are ultimately unloaded at pier stations or whether they are unloaded at the team-track?

A. No, insofar as any detention on the Jersey side would be concerned, that is correct.

Q. Or on any side?

A. Or on any side.

Mr. Donadio: That is all.
Exam. Brown: Is there any redirect?

Redirect examination.

By Mr. Matson:

Q. Mr. Pease, if a car comes into Jersey and is ultimately unloaded on team-track in Manhattan, does the consignee have the same privilege, according to the carrier, with respect to free time in Jersey as he does with respect to a car which is unloaded at a pier in Manhat-
[fol. 631] tan? In other words, does the 48 hours free time apply in Jersey on both those cases?

A. I think that is true, yes.

Q. If the car is floated over to a pier on Manhattan, it goes right back to Jersey, is that right?

A. That is right.

Q. If a car is brought over to Manhattan and placed on a team-track, there is an additional 48 hours permitted under the tariff before that car needs to be released without the payment of demurrage, is that right?

Mr. Donadio: I am afraid you are confusing this witness on it. I am afraid that counsel is confusing the witness in respect to double free time. One free time on Jersey and another free time at team-tracks on Manhattan Island.

Do you understand the question to relate to a double free time?

The Witness: Yes, I understand that is what it related to. I am not so sure I can answer, because I don't recall exactly the provisions of I.C.C. service order 112 which has to do with cars moved from one location to another in the same switching limit. I believe under the demurrage tariff an additional two days free time may be allowed on team-track, and it seems to me that service order 112 prohibits that.

By Mr. Matson:

Q. At any rate, after the car gets to Manhattan Island and it is placed on the team-track, the consignee has

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[fol. 632] 48 hours under the demurrage tariff to unload the car?

A. I believe so.

Q. If the car comes over and is unloaded at the pier, the car goes right back to Jersey on the float?

A. That is right.

Mr. Matson: That is all.

Mr. Donadio: I don't think the record is clear, Mr. Examiner. I would like to ask some questions.

Recross examination.

By Mr. Donadio:

Q. The 48 hours free time which is available to a consignee at the team-track on Manhattan Island is the only free time which is available to the consignee, is that not correct? Is it your understanding that when the car is placed on the team-track on Manhattan Island, and the consignee is given notice, that that is when the demurrage begins to run?

A. I am not so sure, Mr. Donadio, whether there are allowed 48 hours free time in Jersey before ordering, and an additional 48 hours on team-track. I can't answer that.

Mr. Donadio: I don't know how the Examiner wants this situation cleared up, but I think there is no question from the carriers' standpoint that the only 48 hours free time that is available to the consignee is that which dates from the notice given to the consignee that the car [fol. 633] has been placed on a team-track on Manhattan Island, and he has no other free time available to him at Jersey City.

Mr. Smith: I am informed, Mr. Examiner, that the various provisions are in the tariff which I believe I put into the record by reference, so the matter can be easily straightened out by reference to the tariff.

Exam. Brown: I suggest the most appropriate way to handle this is to consider the tariff provisions as being the ones that control the free time, and that those provisions are accurate and correct. I don't see any reason to go into further cross-examination or direct examination in this respect so far as this witness is concerned.

Are there any further questions?

Mr. Matson: No further questions.

(Witness excused.)

Mr. Hoffman: I will call Mr. Angier.

HAROLD H. ANGIER was sworn and testified as follows:

Direct examination.

By Mr. Hoffman:

Q. Mr. Angier, you have prepared a statement, have you not?

A. That is correct.

Q. You may proceed and read it.

A. I, Harold H. Angier, General Manager of the California Grape & Tree Fruit Association, 415 Pacific South-
[fol. 634] west Building, Fresno, California, present this statement in behalf of the grower and shipper members of the California Grape & Tree Fruit Association and the California Growers & Shippers Protective League of San Francisco, California, the combined organization representing 90% of the California tree fruits and grapes (approximately 45,000 refrigerator carloads) shipper in interstate commerce annually.

Prior to May of this year I have been for the past 20 years, a grower and shipper of grapes, plums, pears, nectarines, and cherries, producing and shipping annually in interstate and foreign commerce, up to 75 carloads exclusive of about 1,500 tons of fruit that was crushed, dried, or processed. I still have a part ownership in a large grape vineyard. In addition to these qualifications I have participated in a number of important industry marketing programs. I was a member of the Board of Directors of "Growers Grape Products Association" and chairman of the Executive Committee of Grape Proration, Zone No. 2, which administered the 1938 surplus grape prorate program. Until this year I have been a member of the Control Committee and the Plum Commodity Committee of the California Tree Fruit Marketing Agree-

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ment. From 1944 through 1946 I was a Director of the California Fruit Exchange, a non-profit marketing association for California deciduous tree fruits and grapes. During the war I was a member of the National Advisory [fol. 635] Committee for Apricots, Fresh Prunes, and Plums, to the Office of Price Administration and the War Food Administration of the U.S. Department of Agriculture. I am presently a member of the Statewide Agricultural Committee of the California State Chamber of Commerce.

The tree fruit and grape auction markets in New York and Philadelphia are extremely important markets for California tree fruits and grapes as shown by the attached "Exhibit 58" and "Exhibit 59" captioned, "A Statement Showing the Number of Cars of Tree Fruits and Grapes Shipped From California to New York During the Years 1936 Through 1946 and to Philadelphia During the Years 1939 through 1946." These data were compiled by the U. S. Department of Agriculture and show an average shipment into New York for the eleven year period of 8,812 cars per year with a maximum in 1937 of 10,931 cars and a minimum in 1943 of 6,261. In Philadelphia the average shipments from California for eight years were 2,225 cars with a maximum in 1946 of 2,449 cars and a minimum in 1943 of 1,811 cars. Thus the average total number of carloads moving into the markets of New York and Philadelphia is 11,037 carloads. This figure, when compared with the average annual total interstate movements of these fruits, shows that 24% of the total annual movements moves into these two markets. The reduced deliveries during the war years in both New York and Philadelphia were brought [fol. 636] about by price ceiling regulations which worked to the disadvantage of these auction markets. Now that the war is over and conditions are returning to normal, there is every reason to believe that the volume of traffic will return to normal if a favorable competitive condition is maintained.

The extreme competition of southern peaches and other eastern fruits that move to market on a short haul by truck and rail at materially lower rates, as well as the

importations that come into these markets by water are the principal factors that determine the market for California tree fruits and grapes.

The greater proportion of California tree fruits and grapes moving in carlots to these markets are sold at auction where 1¾% of the gross sales price is charged by the auction companies for the service rendered and with the exception of a small proportion of the sales made, the entire cost of freight and protective charges is a deduction from the gross sales proceeds receivable by the California grower. It is all-important to note that California deciduous fruits and grapes are sold on a consignment delivered basis in these two markets. Consequently, the California grower undertakes the responsibility and expenses of delivering these fruits to these market centers. From the gross sales price received, therefore, transportation and other charges incidental thereto are deducted from the gross proceeds and the [fol. 637] grower receives the net return. Under these circumstances the levying of an extra unloading charge at these terminals will reflect as a direct deduction from the net to the grower. Due to the fact that California is so distant from these markets, transportation charges are a major factor in the determination of whether California growers can move their fruit crops to market in competition with other fruits carrying much lower transportation charges.

During the war years a sellers market resulted in extensive plantings in California. For example, grape production in 1947 will approximate 3 million tons as compared with an average harvested production of 2,121,100 tons for the period 1927-1929 and 1,610,000 for the period 1930-32 and 2,314,700 for the period 1939-41.

Exam. Brown: What is the authority for these latter statistics?

The Witness: University of California, College of California, Agricultural Experiment Station, Berkeley, California, Deciduous Fruit Statistics.

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By Mr. Hoffman:

Q. Will you proceed?

A. Because of the increased production referred to, great difficulties will be encountered in finding outlets for these fruits which will yield at least production and harvesting costs to the grower.

I feel it is only fair and reasonable to assume that with [fol. 638] the increased volume of California tree fruits and grapes to be marketed in the future, coupled with a return to somewhat normal economic conditions, every possible market outlet in this country will be utilized to the maximum. This condition will undoubtedly begin to show in the week ending August 2nd when the marketing of Southern peaches should reach its peak. The drying up of foreign export business because of the lack of dollar exchange will have an important bearing on aggravating this condition.

It must be remembered that because of the long haul of California fruit to market, transportation charges amounted generally to one-third of the total gross sales price received by growers during the normal pre-war years, which relative condition will soon exist again. If the interstate fresh market outlet yields insufficient net returns to California outlets such as canning, freezing, drying, and crushing, instead of the interstate fresh outlet. If returns from all outlets are insufficient to pay the greatly increased production and harvesting costs, then a part of these fruits will not be marketed at all, which, of course, will ultimately reflect itself in decreased production over a period of years.

In my opinion the application of the proposed extra unloading charges at Philadelphia and New York will also cause shippers to sell in other markets when supplies are limited at the beginning and end of the shipping season [fol. 639] for a commodity. When supplies are plentiful and every market outlet must be utilized, the additional unloading charge will be borne entirely by the grower. Under these circumstances the only possible net result will be a decline in the volume of tree fruits and grapes that will move into these two very important metropolitan markets.

Mr. Hoffman: We now offer in evidence Exhibits 58 and 59.

Exam. Brown: Is there any objection?

Mr. Smith: No objection.

Exam. Brown: Those exhibits are received.

(Protestants' Exhibits 58 and 59, Witness Angier, received in evidence.)

Exam. Brown: Is there anything further on direct?

Mr. Hoffman: Nothing further on direct.

Mr. Smith: No questions.

Mr. Miller: No questions.

Cross-examination.

By Mr. Donadio:

Q. Mr. Angier, you gave a percentage of 24 as representing the movement to New York and Philadelphia.

A. That is right.

Q. That leaves 76 per cent to other destinations?

A. That is correct.

Q. Of that 76 per cent, what proportion moves to other points in Official Territory?

[fol. 640] A. In what territory?

Q. Official territory. When I speak of Official Territory I am speaking of the territory east of the Mississippi and north of the Potomac.

A. I couldn't answer that for you. I am not a traffic expert and know nothing about the movement of various territories. It would depend entirely on what list of commodities you were speaking of.

Q. To what points does the balance of the 100 per cent movement move to? You say 24 per cent to New York and Philadelphia, and you have 76 per cent left. To what points does that balance move?

A. The majority of it moves east of the Mississippi River.

Q. To what points? Do you have any particular points in mind?

A. No, no particular points in mind. Well, Chicago.

Q. Any cities of substantial size to which a substantial amount is moved?

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A. The larger cities in the East.

Q. Do you have very much of a movement to Baltimore?

A. Some, yes.

Q. Substantial or not?

A. Compared with what market?

Q. Well, compared to New York and Philadelphia.

A. Not as much.

[fol. 641] Q. Can you give the percentage?

A. No, I don't know the figure.

Q. Can you give the approximate number of carloads that move into Baltimore?

A. No, I can't.

Mr. Hoffman: You understand that the witness gave his figures on direct examination based upon compilations by the Department of Agriculture, and he limited his statement to that rather than from his own experience.

By Mr. Donadio:

Q. Did you examine the statistical data from which you got the 24 per cent?

A. Yes.

Q. Is that broken down as to cities and towns?

A. Well, in this particular case it was just New York that we examined.

Q. That is a separate report showing New York and Philadelphia?

A. The only data that I had was the data that is here, and that is all there was.

Q. Can you identify the document from which the 24 per cent was taken?

A. Well, it is from the United States Department of Agriculture data that was compiled in the office of the Growers & Shippers Protective League.

Q. You can't identify it a little bit more explicitly?

[fol. 642] A. No.

Q. Has there been a movement to other cities and towns where auctions are maintained, where this fruit is sold at auction the same as at Philadelphia and New York?

A. I don't understand the question.

(Question read by the reporter.)

A. What movement?

By Mr. Donadio:

Q. The movement of these California fruits and vegetables about which you are testifying.

A. Oh, yes, certainly.

Q. And those movements have also been made on a consignment basis, the same as at New York and Philadelphia?

A. There are several auction markets in the East.

Q. You understand that New York and Philadelphia are the two points in Official Territory where the railroads perform the unloading service?

A. I understand that that is the case.

Q. Who assumes the cost and expense of the unloading service at the other cities and towns?

A. Well, if the railroad doesn't it must be the consignee.

Q. Do they charge it back to the producers——

A. Well, that depends.

Q. ——as you say will be done if the charge is imposed at New York and Philadelphia?

A. That depends on the basis of sale.

[fol. 643] Q. Well, we are talking about this consignment business.

A. Well, in a case of consignment, any consignment business when the account sale is rendered to the producer, all of the charges of getting the fruit to market, including transportation, protective service, commission, and all of that, are all a deduction from the account sale.

Q. Now, in view of that explanation, will you answer my question. Who assumes the cost and expense of the unloading service at other points where the consignee, or where somebody else other than the railroad, performs the service, the unloading service?

A. Well, the grower does if it is out of his account sale.

Q. The grower stands all that expense?

A. That is right.

Exam. Brown: If it is out of his account sale?

The Witness: If it is out of his account sale.

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By Mr. Donadio:

Q. Isn't it an account sale just as much at these other points as it would be at New York or Philadelphia, at which you say if the unloading charge is imposed it will be charged to the producer or grower?

A. Well, in the case of a consignment sale the buyer gives no consideration to the costs of delivery of the produce to the market. That means nothing to him whatsoever. He is only interested in what he can buy the produce for and turn it over at a profit to him.

[fol. 644] Q. Well, isn't it a fact that in all cases, whether it is New York, Philadelphia, or whether it is Pittsburgh, Baltimore, or some other place, that the shipper or the producer would be charged in addition to the freight charges all other expenses, including unloading?

A. No.

Q. In consignment sales to auction companies?

A. Well, there is no unloading charge.

Q. What is that?

A. The grower pays no unloading charge.

Q. Wouldn't he assume that?

A. No.

Q. Isn't it your testimony that if this unloading charge is imposed at New York and Philadelphia that the grower will have to pay it?

A. That is right.

Q. Doesn't he assume that at other cities?

Mr. Hoffman: I object to further cross-examination.

Mr. Donadio: I am trying to get an answer to my question.

Exam. Brown: Wait a minute. Let counsel complete his statement of his objection.

Mr. Hoffman: I object to any further examination with respect to cities other than New York and Philadelphia, with respect to the assumption of any unloading charges by the carrier or the consignee, as not being proper cross-[fol. 645] examination, and being outside of the scope of his direct examination. The witness has not qualified himself as a railroad expert or a tariff expert with respect to

charges. The testimony can be proper with respect to who bears the charges.

Mr. Donadio: As I understand his direct testimony, it is to the effect that if the charges for unloading at Philadelphia and New York are imposed, that it is going to reduce receipts of producers because the producers, his clients, will have to bear that expense. What I am trying to show, frankly, is that at other points where shipments are made under the same circumstances and conditions, where the railroad has never unloaded the cars, but that the unloading has been performed by the consignee or somebody with whom he makes an arrangement for the unloading, that the receiver or his clients have been assuming that expense. We have no different situation at New York and Philadelphia if these charges are imposed than he now has at other points where for years and years he has been responsible, or has been charged for the unloading services.

That is the purport of my question, and as soon as I get an answer one way or the other, I will quit.

Exam. Brown: There are a great many questions and answers along this line to which no objection was made. I thought there might be an objection, but there wasn't. [fol. 646] I think in view of the fact that we have a great bit of this in the record now, and also because of the fact that it is indirectly connected with the direct examination, I will permit this witness to answer your question along that line, on the assumption that you are almost finished.

The Witness: Now, will you restate the question?

Exam. Brown: Restate your question, Mr. Donadio.

By Mr. Donadio:

Q. Isn't it a fact, Mr. Angier, that at other points than New York and Philadelphia that the producers, your clients, have been standing all expense of freight charges and unloading on consignment shipments to auction companies?

Mr. Hoffman: If you know. If you don't know, you may so state.

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A. I don't know of any instance in any other market where the producer has had deducted an unloading charge from his account sale.

By Mr. Donadio:

Q. Do you know who bears that expense?

A. No, I don't.

Q. Do you know whether it is included in the commission that the auction company charges for the sale of fruits and vegetables, whatever they may be?

A. No.

Mr. Donadio: That is all.

Exam. Brown: Do you know whether or not there is any unloading charge at these other points? I mean in the [fol. 647] sense that a shipper must pay a specified amount for the purpose of having his vegetables unloaded, not to the railroad, but to somebody else?

The Witness: I don't know of any.

Exam. Brown: Do you know anything about that?

The Witness: No.

Mr. Donadio: You don't imply in your question that at these other points where the railroad doesn't do the unloading that the consignee doesn't assume the expense of unloading?

Exam. Brown: I want to know if there is any expense of unloading, and the witness says he does not know.

Mr. Donadio: I think it is perfectly obvious that if the railroad doesn't do it somebody has to do it and——

Exam. Brown: There is nothing obvious to me unless it is in the record.

Is there any further cross-examination?

Mr. Donadio: That is all.

Exam. Brown: Is there any redirect?

Mr. Hoffman: That is all.

(Witness excused.)

Exam. Brown: We will recess until 1:50.

(A recess was taken until 1:50 p.m.)

[fol. 648] AFTERNOON SESSION

Exam. Brown: Call your next witness.
Mr. Hoffman: I will call Mr. Montgomery.

JOHN A. MONTGOMERY was sworn and testified as follows:

Direct examination.

By Mr. Hoffman:

Q. Mr. Montgomery, you have prepared a statement in connection with this matter.
A. I have.
Q. Will you proceed to read your statement?
A. My name is John A. Montgomery. I am making this statement in behalf of California Growers and Shippers Protective League, San Francisco, and California Grape and Tree Fruit Association, Fresno, California, both of which organizations jointly filed a petition with the Interstate Commerce Commission protesting Supplement No. 32 to Tariff I.C.C. No. A-856 and Supplement No. 29 to Tariff I.C.C. No. A-848.

The membership of these two old established organizations is comprised of substantially all growers and shippers of California fresh deciduous tree fruits and grapes, moving interstate from California to destinations east.

I have been connected with the California deciduous fresh fruit industry continuously for the past 38 years and for the past 35 years have been engaged in traffic work, and during the past years have been and now am engaged as a trans-[fol. 649] portation consultant with respect to the interstate movement of these fruits. I have been Manager of the California Growers and Shippers Protective League since 1938.

In the course of the years during which I have been engaged in the industry, I have had experience in and have gained a knowledge of past and present Railroad Tariffs, Regulations and Rules applicable to the interstate movement of California fresh deciduous fruits and grapes and the shipment, transportation and practices of the industry

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relating to such fruits. I am familiar with the tariffs and methods of transportation relating to the interstate movement of these fruits from California to Manhattan, New York and Philadelphia.

The California deciduous fruit and grape industry ships approximately 45,000 cars annually. In 1946, 8,178 cars of these fruits, or approximately 18 per cent of the average annual shipments, were shipped to Manhattan and sold through the New York auction markets. Except for a negligible number of cars, all these cars moved into Manhattan via the Erie Railroad and were delivered at Duane Street Station, Piers 20 and 21, operated by the Erie Railroad.

At least 85 per cent of the deciduous fruits and grape shipments delivered at Duane Street Station are delivered to the Erie Railroad by the Indiana Harbor Belt Line at Hammond, Indiana, and are moved by the Erie in solid trainloads to Croxton Yards, New Jersey, and from that [fol. 650] point delivered by the Erie to Duane Street Station. The balance of such shipments not received by Erie at Hammond, are delivered to Erie at Huntington, Indiana, Lima, Ohio, and other junctions west of Group A and consist largely of cars reconsigned in transit which may not move via Hammond.

The customary routing of these fruits from California to Manhattan is on the following lines, delivery being made by connecting carriers to Erie at Hammond:

SP—UP-C&NW/ or IC/ or CM ST P&P-IHB—Erie
WP—UP-C&NW/ or IC/ or CM ST P&P-IHB—Erie
WP—D&RGW MO PAC. ALTON IHB—ERIE
WP—D&RGW CB&Q-IHB ERIE
AT&SF—IHB—ERIE

Tariff No. I.C.C. 1508, Agent L. E. Kipp, T.C.F.B. No. 44-K provides for joint rates from California to Manhattan for the movement of these fruits. All the carriers previously mentioned and including the Erie, together with other carriers participating in the joint movement, are parties signatory to and have concurred in this joint tariff. No charge for unloading at Duane Street Station has been made in the past or is presently made with respect to these fruits moving under this joint tariff. There have not been or are

there now any provisions in applicable tariffs for an unloading charge. Shippers and carriers at all times have regarded this unloading service as being included in and as [fol. 651] a component part of the joint line haul rate and according to the practices and customs of the industry and carriers, has been treated accordingly.

In "Investigation and Suspension Docket No. 1420—Fruits and Vegetables to Duane Street Station, New York, 66 I.C.C. 135," the Commission stated terminal charges at Duane Street Station, including unloading, were included within the joint line haul rate.

Item 335 Trunk Line Bureau Tariff No. 116-C I.C.C. No. A-856, applicable to the delivery of these fruits at Duane Street Station under joint tariff rate, expressly provides: "Terminal deductions:

1. On shipments from and to connecting lines deduct (except as shown in Paragraph 2 below) 4.4 cents per 100 pounds, minimum $8.80 per car before prorating and add to Erie Railroad Company or New Jersey & New York Railroad Company's proportion for station facilities and services and for floating or lightering from and to Long Dock, Jersey City, N. J.
2. Deduct 3.3 cents per 100 pounds, minimum $6.60 per car, on all traffic to, from or via points shown in Note 7."

The stations mentioned in Note 7 are Midwestern junc- [fol. 652] tions through which all shipments from California must move, and therefore with respect to such movement Note 7 above is applicable to deliveries at Duane Street Station.

This provision does not mean the shipper or consignee should make this deduction. Shippers or consignees of these fruits in the past have paid and presently pay in full freight charges under the joint tariff and no more or less, and never have or now make any deduction referred to in this provision of the tariff.

I am informed and believe and according to information acquired by me in my contacts with the carriers, this provision of the tariff means and in practice has been interpreted as requiring the sum specified to be deducted by

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carriers from the joint tariff charges for payment to the Erie, in the case of deciduous fruits and grapes, for terminal charges rendered by Erie, including unloading and in addition to other divisional payments of the joint rate to be made to Erie.

The average minimum weight per car of deciduous fruits and grapes delivered at Duane Street Station is 32,771 pounds. Accordingly, the amount payable to Erie as delivering carrier at the rate of 3.3 cents per 100 pounds at Manhattan under the deduction previously referred to, on the basis of 8,178 cars delivered in 1946, is $88,441.17.

Under the provisions of the existing tariff, consignees [fol. 653] of deciduous fruits and grapes for delivery by Erie at Duane Street Station, are not offered the privilege of unloading shipments. The existing facilities of Erie in Manhattan are not adequate to permit unloading by individual consignees of such shipments in accordance with individual purposes and requests of such consignees. Under existing rules and practices, the Erie will not make delivery of such fruit in excess of its terminal facilities at Duane Street Station.

The unloading of these shipments of deciduous fruits and grapes by Erie at Duane Street Station and the concentration of unloading at that point, permits a systematic and sustained operation with no loss of time in delivery and return of cars and expedites the transportation and movement of said cars on the lines of the Erie, with resulting reduction in transportation costs to the Erie.

Supplement No. 32 to Tariff I.C.C. No. A-856 proposed and now suspended has been filed only by carriers making delivery at Manhattan and, particularly, Erie Railroad. Other carriers who are parties signatory to the joint rate tariff applicable to the movement of deciduous fruits and grapes into Manhattan have not joined or concurred in the filing of said tariff.

Item No. 4670 (new) Supplement No. 32 of the proposed tariff provides for a charge of $1.75 per ton for unloading [fol. 654] deciduous fruits at Duane Street Station, payable directly to Erie Railroad.

Under the proposed tariff, this proposed charge for unloading is in addition to payment receivable by Erie, arising

by reason of the deduction for terminal charges provided in Tariff No. 116-C, Item 335 previously referred to, which remains unchanged.

The proposed amendment to the tariff previously referred to is applicable only to fresh fruits and vegetables. Other commodities under the same tariff, but not subject to the amendment and unloaded under similar circumstances, will continue to be unloaded by the carriers without charge to consignee or consignor.

As previously stated, the average minimum weight of cars of deciduous fruits and grapes delivered at Duane Street Station is 32,771 pounds, therefore the average charges per car for unloading would be $28.67, ranging from $24.07 for a carload of the lowest minimum weight to as much as $35.00 to $40.00 per car carrying higher weights.

The average freight charges per car as computed by me in exhibit submitted herewith, under the joint line haul tariff, for a car of deciduous fruits and grapes of average weight moving from California to Manhattan, is $538.00. Accordingly, the proposed unloading charges would be 5.3 per cent of the joint line haul freight charges and, therefore, [fol. 655] amount to an increase of the joint line haul rate in the amount of 5.3 per cent. This percentage increase is to be compared with 8.6 per cent allowed the carriers of deciduous fruits and grapes under Ex Parte 162.

We have previously stated that approximately 18 per cent of 45,000 cars of California deciduous fruits and grapes moving interstate are delivered at Manhattan, of which all but a negligible number are delivered via Erie at Duane Street Station.

The minimum gross weight of deciduous fruits and grapes delivered in 1946 at Duane Street Station, and based upon the delivery of 8,178 cars, with an average minimum weight per car of 32,771 pounds in 1946, is 268,350,000 pounds. At the rate of $1.75 per ton as proposed the total amount of unloading charges therefor would be the sum of $234,503.09.

In Erie Railroad Co. v. Alabama and Vicksburg Railroad Co., et al., 98 I.C.C. 268, the Commission held in a divisional rate case that 27.5 per cent was a proper and reasonable allocation of the joint rate to carriers moving deciduous fresh fruits and grapes east of Chicago and 72.5 per cent

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was a proper allocation to carriers moving said Fruits from California on lines west of Chicago.

Assuming that such divisional allocation of rates is presently in force, which I have been informed and believe it is, then the revenue accruing to the lines moving such [fol. 656] fruits east of Chicago by reason of such division and based on the movement in 1946 of 8,178 cars delivered at Duane Street Station, is $1,185,622.82. This figure is arrived at by computing the weighted average per car, which, as previously stated, is 32,771 pounds, and the average freight rate charge of $1.6417 per hundred pounds.

As previously stated, the Erie Railroad moves 85 per cent of this traffic in deciduous fresh fruits and grapes delivered at New York from a point on the Erie at Hammond, Indiana, and therefore receives an estimated 85 per cent of this sum for this long haul.

The balance of the traffic is received by Erie in the usual case at points on the Erie located at Huntington, Indiana, and Lima, Ohio.

In addition, as delivering carrier, Erie, under the provisions of Trunk Line Tariff Bureau Tariff No. 116-C I.C.C. No. 856—Item 335, and by way of deduction from joint line haul freight charges and before the division previously referred to is made, receives 3.3 cents per hundred for terminal charges. The total estimated amount of this terminal charge, as previously stated, and based on 1946 figures, is $88,441.17. Under the proposed amendment to the Tariff, the Erie would receive an additional $234,503.09.

I am submitting at this point tables prepared by me entitled "Statement Showing Number of Cars of California [fol. 657] Deciduous Fruit and Grapes delivered at Duane Street Station, During 1946, Total Transportation Costs, Including Proposed Unloading Charges, and Distribution of Revenue to Delivering Carriers," and a similar statement applicable to Philadelphia.

In these tables I have set forth in detail the information on which statements made by me are based, and also have set forth the sources of my information.

In connection with this compilation, attention is called to the fact that all calculations made are based upon the minimum carload weights provided for the several varieties

of fresh fruit and grapes in carriers tariffs. By reason of the O.D.T. requirements, and as an actual practice, carloadings will materially exceed these minima, resulting in carrier revenue much greater than as shown herein.

The same observations and conclusions stated by me are equally applicable to the interstate movement of California fresh deciduous fruits and grapes to Philadelphia, except, of course, that the volume of the movement delivered at Philadelphia is smaller than that delivered at New York; and except that I have no information regarding the division of revenue accruing to the carriers.

Mr. Hoffman: I now offer, in connection with Mr. Montgomery's statement, the exhibit marked No. 60, entitled, "Statement Showing Number of Cars California Deciduous Fruits and Grapes Delivered at Duane Street Station," [fol. 658] and another exhibit marked Exhibit No. 61, entitled, "Statement Showing Number of Cars of California Deciduous Fruits and Grapes Delivered at Philadelphia."

Exam. Brown: Is there any objection to those exhibits?

Mr. Smith: If the Examiner please, it appears that Exhibit No. 60 is computed on the assumption that the unloading charges, if collected by the destination carriers, would be split with the carriers west of Chicago. That, of course, is not the fact, as the record shows. It certainly would not be split with the carriers west of Chicago unless there were provision to that effect, and there is no such provision.

Mr. Hoffman: The exhibit indicates that this delivery charge will be paid to the delivering carrier, and thereafter the division of the line haul rate will take place.

By Mr. Hoffman:

Q. Is that correct, Mr. Montgomery?

A. Yes.

Q. If you wish to explain that, you can.

A. It mentions the total number of cars, minimum weight, total gross weight, the prevailing freight rate, total freight charges, refrigeration charges per car, total refrigeration charges, transportation tax, total costs today, proposed cost of unloading, transportation tax on unloading, total additional cost, total transportation costs, and column 15

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applies to the revenue being derived by carriers on [fol. 659] Item 335 of Tariff 116-C, and the 27.5 per cent in column 16 is based upon information in I.C.C. Reports, Volume 98, Pages 268 through 283. Column 17, total amount accruing to carriers east of Chicago, is made up of the total of columns 15 and 16.

Mr. Smith: The only point to my statement was, I wanted to have it clearly understood, if it weren't so already, that the respondents herein are not going to split the unloading charges with any other carriers. That is the only point to my statement.

Mr. Hoffman: The exhibit introduced, and in accordance with the testimony of Mr. Montgomery just now, which was a bit difficult to hear, it indicates that column 16, entitled, "27.5 per cent of Revenue to Carriers East of Chicago," does not include the item of delivery charges or unloading charges here in issue. It does not include Item No. 11.

Exam. Brown: With that explanation, is the exhibit objectionable in any other respect?

Mr. Smith: No, sir.

Exam. Brown: You mean it is not objectionable?

Mr. Miller: I might make this comment: that both the exhibits here and the testimony are definitely contrary to the position which we have taken, and which the Examiner has heretofore overruled, to the effect that line haul charges have no relevancy to this proceeding.

[fol. 660] I have not made any objection to the testimony and I do not make an objection now to this exhibit, with that understanding, that the objection, if made, would be promptly overruled in any case.

Exam. Brown: These exhibits will be received, and they will be considered in connection with the discussion which has been had with respect to these exhibits.

(Protestants' Exhibits 60 and 61, respectively, Witness Montgomery, received in evidence.)

Exam. Brown: Is there any further direct?

Mr. Hoffman: No, sir.

Exam. Brown: Is there any cross?

Cross examination.

By Mr. Miller:

Q. Could you give me any estimate, Mr. Montgomery, as to the total value of the carloads of fresh fruits and vegetables covered by either your Exhibit 60 or 61?

A. According to value on the market here?

Q. Yes.

A. I am not familiar with that.

Mr. Miller: That is all.

(Witness excused.)

Exam. Brown: Call the next witness.

Mr. Loos: I will call Mr. Neill.

[fol. 661] ROBERT C. NEILL was sworn and testified as follows:

Direct examination.

By Mr. Loos:

Q. Mr. Neill, will you give your name and occupation?

A. My name is Robert C. Neill. Business address, 707 West 5th Street, Los Angeles, California. I am the Traffic Manager of the California Fruit Growers Exchange and Chairman of the Traffic Committee of the California Citrus League.

Q. How long have you been Traffic Manager of the California Fruit Growers Exchange?

A. I was employed in the Traffic Department of the Exchange in February 1926, and became Traffic Manager January 1, 1941.

Q. Prior to your employment by the California Fruit Growers Exchange, what, if any, traffic employment have you had?

A. I had about 15 or 20 years of railroad and industrial traffic experience.

Mr. Donadio: I am perfectly willing to admit Mr. Neill's traffic experience and qualifications.

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Mr. Miller: I concur.

Exam. Brown: I understand the same is true of other attorneys for the respondents.

Mr. Donadio: That is correct.

By Mr. Loos:

Q. What is the California Fruit Growers Exchange.

[fol. 662] A. The California Fruit Growers Exchange is a non-profit-making, cooperative organization owned by about 15,000 citrus growers in California and Arizona. These growers produce about 75 per cent of the citrus fruit grown in that area.

Q. Are you also testifying on behalf of the California Citrus League?

A. Yes, I am.

Q. What is that organization?

A. The California Citrus League is a voluntary association of citrus shippers and marketing organizations that concerns itself with problems that are common in the citrus industry, with the exception of marketing.

Q. What proportion of the California and Arizona citrus fruit is marketed by the members of the California Citrus League?

A. Well, I would say it was between 90 and 95 per cent.

Q. What is the trend in the volume of production of California and Arizona citrus fruit?

A. The trend has been upward for a good many years. Since 1922 or '23 I would say it has increased almost 100 per cent. Back in those years we were shipping around 60,000 cars, and the production last year was around 117,000.

Q. Are you now producing in California and Arizona more citrus fruit than you are able to sell as fresh fruit?

[fol. 663] A. Yes, we are.

Q. What is done with the fruit that is not shipped in fresh form?

A. Well, it is sold to processers, or processed by plants owned by the California Fruit Growers Exchange.

Q. Would you be able to ship more citrus fruit from California and Arizona in fresh form if markets were available?

A. Yes, I think we would.

Q. Have you prepared a statement of the history of the orange and lemon rates from California and Arizona to eastern territory?

A. Yes, I have.

Q. Is that Exhibit No. 62?

A. Yes.

Q. Have you any comments to make with respect to Exhibit No. 62?

A. No; I think that exhibit is self-explanatory.

Q. Are shipments of California and Arizona citrus fruits made to New York and Philadelphia?

A. Yes, regularly.

Q. What is the relative importance of those two markets?

A. I would say that New York was probably the most important market for California Fruit Growers Exchange for citrus in this country, and Philadelphia is likewise a very important market.

[fol. 664] Q. Will you describe briefly the places at which your citrus fruit is unloaded in New York and Philadelphia?

A. Yes. In the New York market, all California Fruit Growers Exchange citrus sold for domestic use is unloaded and sold at the Duane Street Piers of the Erie Railroad, most of the fruit being unloaded on Pier 21.

At Philadelphia, all of our fruit is unloaded at the B. & O. and Reading Perishable Terminal.

Q. Have you prepared exhibits showing the quantity of fruit from the shipments of the California Fruit Growers Exchange unloaded at New York and Philadelphia?

A. Yes, I have.

Q. And those exhibits are marked 63 and 64?

A. They are.

Q. Will you comment on those exhibits?

A. I think the only comment necessary probably is to explain the citrus season. I am sure the record has no explanation of the California citrus year, which begins November 1st and ends October 31st. So that the figures in the first column of Exhibit 63 would be from November 1st, 1936 to October 31, 1937.

This statement is made up showing what we refer to as statistical cars, that is, the standard car of 462 boxes.

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That is, the California standard load of oranges, and all of our statistics are kept on that basis.

[fol. 665] Under the present O.D.T. regulations we are required to load at least 561 boxes of oranges per car, but frequently to conserve cars in time of shortages, we put in another tier, and increase that load to 693 boxes.

So that the record will always be uniform. They are kept on a basis of 462 boxes per car.

Q. How about lemons?

A. The normal lemon load now is 406 boxes per car, and under the O.D.T. regulations we are required to load 464 boxes, and for the same purpose, the lemon statistics are kept on a basis of 406 boxes per car.

Q. How about grapefruit?

A. The same as oranges. They are packed in the same container, and the same number of boxes are loaded per car.

Q. What is the effect of the proposed tariffs here under suspension on the charges that you would pay on fruit unloaded at New York and Philadelphia?

A. Well, it would mean an increase in our transportation charge of $1.50 a ton, or 7.5 cents a hundredweight, which would be an increase of 6.375 cents per box on oranges, 6.525 cents per box on lemons, and 5.70 cents per box on grapefruit. That means an increase in our transcontinental charges of 5 per cent, approximately.

Mr. Donadio: What was the first figure?

The Witness: 6.375 on the average of 10,122 cars un-

[fol. 666] loaded in the New York market in the last 10 seasons, which would aggregate 182,932 tons, and this proposed unloading charge, had it been in effect, would have added $274,398 to what we consider already a burdensome transportation cost.

At Philadelphia, where during the same 10-year period we sold an average of 3,098 cars, the aggregate would be 55,690 tons, or an increase in charges of $83,535—a total in both markets of $357,933 per year.

By Mr. Loos:

Q. Who would bear those increased charges?

A. Well, all transportation charges on our citrus fruit is borne by the shipper. Our fruit cannot be sold on a

cost-plus basis. It is sold for whatever price it will bring on a supply and demand basis. So that any increase in the cost of delivering California citrus in the New York and Philadelphia markets would be just an additional burden the grower of citrus fruit would have to bear.

We haven't been able to figure out any way yet that we can add that 6.5 cents a box, approximately, to the selling price in New York or Philadelphia.

Q. What effect, in your opinion, would this increased charge as proposed have on the volume of fruit delivered by your organization to New York and Philadelphia?

A. Well, we think it might drive the business out of those two markets.

Q. Are California citrus fruits marketed in New York [fol. 667] and Philadelphia in competition with any other fruits or food products?

A. Yes, they are.

Q. What are they?

A. Our California citrus fruits are marketed in New York in competition with fruit from Florida—with all fruit from Florida, but especially with the fruit coming up by steamer, on which there is no unloading charge proposed.

It likewise competes with other California citrus fruits being delivered on team tracks, and at private warehouses in the New York and Philadelphia areas.

Q. Give an illustration, if you please, of what you mean by competition with other California fruits delivered at private sidings in the New York area?

A. Well, while the California Fruit Growers Exchange markets about 75 per cent of the fruit, the other 25 per cent, or much of it, finds itself in the New York market and is sold either direct to large buyers, chain stores, and others, or is sold for delivery to team tracks on Manhattan Island and in Jersey City.

Q. Where is the fruit that is sold to the chain stores delivered, if you know?

A. Well, I imagine it would be delivered at their warehouses, wherever they might be in the New York district.

Q. You say you imagine. Do you know that some of [fol. 668] the chain stores do have warehouses and private sidings in the New York area?

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A. Yes, I know that some of them do have.

Q. Is California citrus fruit sold in competition with any other food products, canned products of any nature?

A. Yes. Citrus fruit is sold in competition with citrus fruit juices, canned juices, and vegetable juices, and that business has developed tremendously in the last 10 years. It likewise competes with dried fruit, prunes and apricots, and that sort of thing, and with the canned fruits as well.

Q. Are there any other unloading charges proposed on the food products that you have just been describing?

A. No, we know of none, and those commodities, many of them, are unloaded on the very same piers as the citrus fruits.

Exam. Brown: You don't limit your competition to Florida, do you?

The Witness: Yes. Of course, Florida, we expect, would pay an unloading charge as well as we.

Exam. Brown: The question was: You don't limit your competition to Florida, do you? Don't you have competition from Texas?

The Witness: Yes, sir.

Exam. Brown: Any other points?

The Witness: Texas, Florida—I don't know whether any Louisiana citrus gets to New York or not.

[fol. 669] Exam. Brown: Do you know that Texas fruit does?

The Witness: Yes.

Exam. Brown: What citrus fruits?

The Witness: They, of course, ship principally grapefruit, but their oranges—I don't know whether their oranges get up here or not, but we expect they would pay the unloading charge as well.

Exam. Brown: Do you know whether or not you have competition?

The Witness: Yes we do have.

Exam. Brown: Your competition is primarily grapefruit?

The Witness: That is right.

Exam. Brown: This shipping season you talk about, as I understand your testimony, it is a year round season; is that right?

The Witness: That is right.

Exam. Brown: Is that a growing season, or the shipping season?

The Witness: We ship citrus fruit from California every day of the year, but there is a difference in the variety. The Valencias is the variety in the summer, and that season ends in October, and it is at that time of year that the Navels begin to run, and that is the reason for that split.

Exam. Brown: The Navels begin to move about the 1st of October?

[fol. 670] The Witness: The 1st of November.

Exam. Brown: About the first of November, and they continue all along?

The Witness: They will continue through May.

By Mr. Loos:

Q. When do the Valencias begin?

A. In May, and it usually ends in October.

Q. Is there some overlapping of the varieties at each end of the respective seasons?

A. Yes, there is.

Exam. Brown: How about your storage facilities in California? Do you have any?

The Witness: We have them, but we don't use them. Fruit is picked every day in the year, both oranges and lemons, so they are shipped currently.

By Mr. Loos:

Q. Mature fruit is stored on the trees to some extent?

A. Well, yes. Yes, just to a limited extent.

Q. What about the shipping season for lemons?

A. Lemons are picked every day in the year and are shipped every day in the year. The heaviest picks come in the summer, and that is our heaviest shipping season.

Q. Do you have some storage of lemons?

A. Yes. Not packed lemons, however. They are stored before they are packed, as they come out of the orchard.

Exam. Brown: How about the grapefruit shipping season?

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[fol. 671] The Witness: They ship all the year around, every day in the year.

Exam. Brown: Do you have any storage of those?

The Witness: Grapefruit is shipped every day in the year. Our heavy production comes on in the winter months, and there is no storage of grapefruit, either.

By. Mr. Loos:

Q. Is the summer grapefruit a different variety?

A. Yes, it is.

Q. Did you hear the testimony of Mr. O'Rourke with respect to the past shortages and prospective supply of refrigerator cars?

A. Yes, I did.

Q. Do you agree in general with what he said on that subject?

A. Yes.

Q. Have you any further comments to make on that subject?

A. Well, we think that western growers have perhaps suffered more than some other areas.

Q. From what?

A. Because of the distribution of their cars. Under the National Refrigerator Car Pool which was set up under the I.C.C. Service Order 95, all of the railroad owned cars were thrown into a national pool, and of that pool the transcontinental lines owned nearly 50 per cent of the available cars, and so these cars have been furnished in [fol. 672] other areas for the movement of perishable commodities, and we think that perhaps that has resulted in a fewer number of cars being available in California, on the Pacific Coast. We have had times when we were unable to get more than 30 per cent of our requirement of cars.

Mr. Loos: That is all.

I offer Exhibits 62, 63 and 64, Mr. Examiner.

Exam. Brown: Is there any objection?

Mr. Smith: No objection.

Mr. Miller: Only the usual objection to Exhibit 62. I think the line haul charges are not in issue here.

Exam. Brown: What is that?

Mr. Miller: I have only my usual objection to Exhibit 62, that I think it is immaterial in view of the fact that the level of the line haul charges is not here in issue.

Exam. Brown: The usual ruling.

The exhibits marked 62 to 64, inclusive, are received.

(Protestants' Exhibits Nos. 62, 63, and 64, respectively, Witness *O'*Neill, received in evidence.)

Cross examination.

By Mr. Smith:

Q. I noted your statement on your direct testimony to the effect that California fruits are sold in New York and Philadelphia in competition with certain commodities which you names, such as canned fruit juices.

[fol. 673] The question I want to ask you is: If the respondents established unloading charges at New York and Philadelphia comparable to the unloading charges proposed on fresh fruits and vegetables, would that remove your objections to the tariffs under suspension here?

A. No, it would not.

Mr. Smith: That is all, sir.

Cross examination.

By Mr. Miller:

Q. Mr. *O'*Neill, have you given any consideration to having this fruit sent to and unloaded at team tracks on the Jersey side of the Hudson River?

A. No, we have not.

Mr. Miller: That is all.

Mr. Donadio: No questions.

Exam. Brown: Is there any redirect?

Mr. Loos: No redirect.

(Witness excused.)

Exam. Brown: I wish to make a statement at this time with respect to the question whether or not line haul rates and charges as such are at issue.

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If it has not been my ruling during this hearing, it will be now that I consider the line haul rates and charges as such not in issue in this proceeding, but I consider evidence in respect to them as pertinent.

Call your next witness.

[fol. 674] Mr. Matson: I will call Mr. Sheffield.

C. W. SHEFFIELD was sworn, and testified as follows:

Direct examination.

By Mr. Matson:

Q. Will you state your name for the record, Mr. Sheffield?

A. C. W. Sheffield, Raleigh, North Carolina, Marketing Specialist Division of Markets, North Carolina Department of Agriculture.

Q. What is your background?

A. Finished North Carolina State College in 1926, majored in Agriculture and Marketing, received B.S. Degree. Since that time have worked as Marketing Specialist in Agricultural Products, including fruits and vegetables, which are grown and marketed for the Eastern Seaboard States.

Q. What do you understand to be involved in this proceeding in so far as you are concerned?

A. I understand the northern railroads are attempting to put into effect substantial charges per car for unloading fresh fruits and vegetables in New York City and Philadelphia.

Q. What shipments would you be interested in—what commodities?

A. Peaches, sweet potatoes, potatoes, watermelons, peppers, cucumbers, cabbage, and numerous other commodities that move in smaller quantities.

[fol. 675] Q. Do those commodities all move from North Carolina to the New York and Philadelphia markets?

A. Yes.

Q. Is your interest principally from the standpoint of the producer or the consumer?

A. Our interest is mainly from the standpoint of the grower who produces the commodities that make up their livelihood. This, in turn, means the farmer's crop, and from which he secures his money to pay the cost of producing his crop and hopes to have something left to buy his and the needs of his family.

Q. What effect would the proposed charges here have upon North Carolina farmers?

A. It would reduce the grower's income on fruits and vegetables by the amount of the extra charge, since it would be added to the cost of marketing, and would either divert the shipments from New York City and Philadelphia to other cities, or cause the crops to be left in the fields.

Q. Do you have any further comments to make, Mr. Sheffield?

A. I do not.

Mr. Matson: That is all on direct.
Mr. Smith: No questions.
Mr. Miller: No questions.
Mr. Donadio: No questions.

(Witness excused.)

[fol. 676] Exam. Brown: Call the next witness.
Mr. Augello: I will call Mr. Smith.

Charles W. Smith was sworn and testified as follows:

Direct examination.

By Mr. Augello:

Q. Will you state your name and address?

A. My name is Charles W. Smith, 66 Harrison Street, New York, New York.

Q. For whom do you work?

A. I am Vice-President and Eastern Sales Manager of the DiGiorgio Fruit Corporation, with headquarters at 433 California Street, San Francisco, California.

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Q. Will you please tell us if your firm is a shipper of fruits?

A. The DiGiorgio Fruit Corporation own and operate approximately 29,000 acres which are planted to various tree fruits and vegetables, such as oranges, grapefruit, tangerines, grapes, plums, peaches, nectarines, pomegrantes, persimmons, asparagus, and many other miscellaneous tree fruits.

The Corporation's total shipments aggregate approximately 8,000 cars annually, with a potential production of approximately 10,000 cars.

In addition, we own and operate a winery located at DiGiorgio, California, with a potential annual capacity of 10 million gallons.

[fol. 677] We own and operate two citrus cannery plants in Florida, one located at Winterhaven, Florida, and one located at Fort Pierce, Florida, with an annual capacity of approximately 1,500,000 cases of citrus juices.

Q. Mr. Smith, would you tell us in your own words the effect that this proposed additional charge for unloading will have on your business?

A. In the City of New York we sell approximately 1400 carloads of fresh fruits and vegetables annually. In Philadelphia we sell approximately 300 cars of fruits and produce annually.

If this proposed additional unloading charge were to become effective, it would mean that our present method of selling would be dislocated. We would probably resort to deliveries on team tracks in New Jersey and in lower Manhattan, provided facilities and space were available to those team tracks.

It would also mean that a great deal of our tonnage would be divided and sold in markets other than New York City and Philadelphia, Pennsylvania, because of the assessed unloading charge which we, as growers, would be called upon to bear.

Q. Do you ship any of your citrus fruit from Florida by boat?

A. Practically all of our citrus production from the interior of Florida is shipped by rail. A goodly percentage

of our production of citrus fruit in Florida from the Indian [fol. 678] River section is shipped by boat.

Exam. Brown: By boat to where?

The Witness: By boat to New York, over the R.S.L. Line, which, to my knowledge, is the only boat line operating between Florida points and New York, this past season.

By Mr. Augello:

Q. Does the boat line assess an unloading charge?

A. Not to my knowledge.

Q. Do you have any further statement you would like to make?

A. I would like to say that the DiGiorgio Fruit Corporation prior orders 90 per cent of all the cars of fruit and produce we sell to New York and Philadelphia one day before arrival at the Erie Croxton Yards, or at Harsimus Cove Yard.

Mr. Smith: I beg your pardon. Will you read that?

(The answer was read by the reporter.)

The Witness: I would like to elaborate a little more on that particular statement.

We obtain a passing report from the Erie or the Pennsylvania at around 10 o'clock in the morning, indicating that this particular car of fruit is due to arrive at Croxton Yards or at Harsimus Cove Yard in the late afternoon.

Accordingly, we give an order to the Erie or to the Pennsylvania prior to two o'clock in the afternoon, requesting that that particular car be floated and unloaded for auction sale the following morning.

[fol. 679] By Mr. Augello:

Q. That is what you mean by "prior order"?

A. That is correct.

Q. So that the car does not come to rest at Croxton or Harsimus Cove?

A. It comes to rest for a short time, depending upon the facilities of the Pennsylvania or the Erie. That I can't

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say. But no time is lost in the arrival. We sell our cars on date due, which is 10 days from California, and either 3rd or 4th morning from Florida.

Q. So that 90 per cent of the time all your cars are prior ordered?

A. Yes.

Q. And there is no delay on your part of the cars on the Jersey side, awaiting for your order?

Exam. Brown: I don't understand your question. Read it.

(The pending question read by the reporter.)

Exam. Brown: What do you mean by "delay on your part"?

Mr. Augello: In holding the car waiting for his order to Piers 28, 29, or 21 or 22.

Exam. Brown: In other words, the question connotes the idea that he is not responsible for the delay?

Mr. Augello: In 90 per cent of the cases he does not hold the cars waiting for his orders.

The Witness: I didn't get that myself. I do not hold the cars waiting my orders.

[fol. 680] By Mr. Augello:

Q. At Jersey City, because of your prior ordering of the cars?

A. The car isn't delayed. We tell them on the 10th morning, which is the scheduled day for delivery in New York from California, and the 3rd or 4th morning from Florida, thereby releasing cars and refrigerated equipment back to the carriers for further use by them.

However, there are times when we get bunch delivery from the railroads, which is no fault of our own, and then we naturally spread those cars back to give them an orderly marketing spread. Otherwise, if we want to throw them all on the market on due date, we would no doubt destroy the market, or have very drastic declines in market values.

Q. You mean on available dates, don't you, Mr. Smith? When cars are bunched, that means the railroads have delayed the cars?

Mr. Smith: Just a second. I don't like to have counsel making statements here leading the witness. Let the witness tell what the facts are.

Exam. Brown: Restate your question.

By Mr. Augello:

Q. What do you mean by the word "bunched"?

A. Assume that a car is shipped from California on the 1st day of July. The schedule calls for delivery 10 days later in order to make the 10th morning auction. If they run into floods, or have some wreck on their line, such [fol. 681] as recently happened with the heavy floods in Iowa where cars were rerouted, they do not arrive for 14, 15 or 16 days, and quite often we will receive shipments of July 1, 2, 3, 4 and 5 all on the same date. So you have shipments of four or five days arriving at the same time. That is what I call bunched delivery.

Q. That has been caused by the railroads bunching the cars at one time?

Mr. Smith: Regardless of the cause, sometimes they are bunched.

By Mr. Augello:

Q. And in those cases only, you hold those cars in order to bring them into the auction in an orderly fashion?

A. Yes, sir.

Q. But in 90 per cent of the cases, you order the cars from California on the 9th afternoon?

A. That is right.

Q. So that they come over on the regular 10th morning auction sale?

A. Yes, sir.

Exam. Brown: In other words, in 90 per cent of the cases, at least, there is no bunching?

The Witness: That is correct.

By Mr. Augello:

Q. Have you any other statement, Mr. Smith, you care to make at this time?

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[fol. 682] A. No, I guess not.

Mr. Augello: Your witness.
Mr. Smith: No questions.

Cross examination.

By Mr. Miller:

Q. Can you give me any estimate as to the sales value, annual sales value, of the cars you send to New York and Philadelphia?
A. The annual sales value?
Q. Yes.
A. No, sir, I cannot.
Q. If you received reasonable assurance that there would be adequate team tracks provided for your shipments for unloading on the Jersey side, would that satisfy your objection to the tariffs here under suspension?
A. No, sir, it would not. We sell our fruit at auction 100 per cent in the City of New York and in the City of Philadelphia. If I attempted to sell fruit by the auction system in carload lots in Jersey City, the entire method of distribution would be destroyed and the grower would suffer the consequences.

Mr. Miller: That is all.

Cross examination.

By Mr. Donadio:

Q. Mr. Smith, are the shipments of your fruits and vegetables which move by boat—I think you testified that you can move some by boat from Florida?
[fol. 683] A. Yes, sir.
Q. Are those shipments also sold at auction?
A. Yes, sir.
Q. Where do you take delivery of those shipments?
A. We take delivery on the pier of the United Fruit Company.
Q. Then how do you get it to the auction sales room?
A. You apparently are not familiar with the set up of the R.S.L. Lines. The fruit is displayed on their docks in

a similar manner to the display made by the Erie and the Pennsylvania, and the buyers go down to the R.S.L. docks to inspect this fruit and make their notations in the catalogs, and then go back to the respective auction rooms where the sale is being held, and bid on them.

Q. Where is the sale held?

A. It is held on alternate days between the Pennsylvania sales room and the Erie sales room.

Q. Do you have any boat shipments to Philadelphia?

A. No.

Q. The boat shipments are only to New York?

A. Yes.

Mr. Donadio: That is all.

Mr. Miller: I have one question to clarify the record.

Cross examination.

By Mr. Miller:

Q. Can you tell me what you mean by R.S.L.?

A. Refrigerated Steamship Line.

[fol. 684] Redirect examination.

By Mr. Augello:

Q. Mr. Smith, will you tell us how the buyers get from the Erie or the Pennsylvania piers over to the Refrigerated Steamship Line piers to inspect the fruit?

A. By a very comfortable, modern, uptodate bus that is furnished by the R.S.L.

Q. In other words, they pick them up at the Erie or Pennsylvania piers and bring them over to their own piers?

A. And drive them inside of the pier and let them get out inside of the pier, rather than to get out of the bus outside of the pier in inclement weather.

Q. And then they take them back?

A. And they take them back, yes.

Exam. Brown: I am sure that information will be very useful in disposing of this case.

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By Mr. Augello:

Q. In other words, it doesn't make any difference where the fruit is, it is still auctioned off in the Erie or Pennsylvania auction rooms?

A. That is correct.

Mr. Augello: That is all.

(Witness excused.)

[fol. 685] Mr. Augello: I will call Mr. Nosser.

CHARLES J. NOSSER was sworn and testified as follows:

Direct examination.

By Mr. Augello:

Q. Mr. Nosser, will you state your name and address and the position that you hold with the New York Fruit Auction Corporation?

A. My name is Charles J. Nosser. I am the president of the New York Fruit Auction Corporation, 66 Harrison Street, New York City, New York.

Q. How long have you been in the employ of the New York Fruit Auction Corporation?

A. With the New York Fruit Auction Corporation and its predecessor company since May, 1919.

Q. Will you please state in your own way what this increased unloading charge will mean to your company?

A. In my opinion and considered judgment, this unloading charge may be borne by no one other than the shipper or the producer of the fruit sold at auction. If this unloading charge is assessed at New York, considerable tonnage will necessarily move away from the auction company, from the auction system of selling, and over 800 buyers, wholesalers, and jobbers on Manhattan Island will be forced to seek other locations in order to obtain their supplies, they being at the present time dependent upon the use of the auction company [fol. 686] for supplies. I believe that the length of time for them to obtain situations, and take delivery on team-tracks or on the Jersey side would be a proposition that would

entail two or three or four years, possibly. Meantime, the volume of fruit and vegetables that could be sold at auction to available buyers would be greatly reduced.

Q. In other words, you don't believe that there is sufficient team-track facilities on Manhattan Island to take care of the additional business that would come from the pier deliveries?

A. Mr. Augello, I know that there are not any facilities at the present time on Manhattan Island to take care of the 30,000 cars we handle at auction annually.

Q. Will you explain how you know?

A. By personal survey of the available team-track facilities, and also by conversation with various railroad officials who have advised me that there is not available space for 30,000 cars that we now handle at Duane Street and at the Pennsylvania piers on team-track facilities on Manhattan Island.

Q. Do you think it is possible for team-tracks to be put in on the piers?

A. No, sir, I do not—not sufficient team-track space to handle that tonnage.

Q. So you believe that the present method of handling these cars on the piers is the most efficient method?

[fol. 687] A. I believe it is the only method that the railroads have in order to handle this business. As to the efficiency of it, there is lots to be desired.

Q. You think it could be improved on?

A. I know it could be improved on.

Q. Will you give us some ideas as to just how it could be improved?

A. I would have to stay here all day, Mr. Augello, to tell you, but with the unloading operation crowded, as it is, into certain hours, and with the antiquated equipment, it is, as I remember Mr. Pease of the Department of Agriculture stating this morning—it is the nearest thing to a madhouse, and I think that expresses it very well.

Exam. Brown: If I recall the testimony of Mr. Pease, he also said that he didn't think it could be improved upon. He can set me right on it. In other words, he had no suggestions whatever to make, as I recall. You say that this

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situation could be improved upon. You haven't told us yet how it could be improved.

The Witness: The situation might be improved by the use of some mechanical equipment. There is a difference in the handling of the carlots received on the Pennsylvania as between the Erie. Mechanical equipment.

By Mr. Augello:

Q. Do you think if the Erie Railroad had mechanical equipment they could do a better job?

[fol. 688] Mr. Smith: I object to the question. I know the Erie Railroad, and I am sure all the railroads represented here today, would be very glad to receive competent suggestions as to how any of their operations could be improved, but I don't think this man is competent to testify along such lines. He is not a railroad operating man.

Exam. Brown: He has had considerable experience in connection with the handling, the auction handling of these fruits and vegetables, and during that time it is probably inevitable that he acquired a considerable knowledge and experience in connection with the actual handling of equipment. In any event, so far he hasn't given us any evidence which would lead to the conclusion that this traffic could be handled more efficiently. He has referred to the mechanical handling by the Pennsylvania, but it doesn't necessarily follow that just because they handle it mechanically that that is a better method. He hasn't told us how.

Now, I am not sure this evidence will be particularly helpful in this case, but I will permit him to go ahead and give us some more information on it. I don't wish to spend too much time on it.

Mr. Miller: Mr. Examiner, I wish to submit an objection to this whole line of questioning because I think any testimony which this witness might have as to the efficiency of the operation on the piers is wholly irrelevant in this pro-

[fol. 689] ceeding.

Mr. Augello: I don't think it is irrelevant, because he has been in business for over 30 years. He certainly knows the operation of both railroads that his company does business with.

Exam. Brown: Your statement has nothing to do with respect to the relevancy of the evidence. The objection now is with respect to the relevancy. I am not sure it is relevant. I am inclined to think it isn't. I am going to let you go ahead because I might be wrong.

By Mr. Augello:

Q. Have you any further statement, Mr. Nosser, that you would like to add?

A. As I attempted to say before, it is quite an exhaustive proposition—all the propositions that can be put into this operation, both on the Erie and the Pennsylvania piers. I didn't particularly come prepared to testify to it, Mr. Augello, in detail. It is my opinion that the operation is not up to date.

Exam. Brown: What operation?

The Witness: The operation of unloading and the operation of assorting on the piers.

Exam. Brown: On what piers?

The Witness: Pier 21 and Pier 20 of the Erie Railroad, and Piers 28 and 29 on the Pennsylvania Railroad.

Exam. Brown: In other words, you consider the opera-
[fol. 690] tions of the Pennsylvania also are not up to date?

The Witness: That is correct.

Exam. Brown: Although that is one of the piers where they have mechanical loading, as you testified?

The Witness: That is right.

By Mr. Augello:

Q. What effect—I think I asked you this question before.

Exam. Brown: Don't ask it again then.

By Mr. Augello:

Q. You stated that it would reduce your business considerably if everyone went to team-track delivery?

A. Well, I said it a little differently. I said that I believed that if this unloading charge is assessed, the grower, the producer of necessity will have to pay for it, and that the substantial amount such as is proposed will cause them

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to find other means of selling, causing the cars to be delivered other than through the auction method.

Q. And if that continues, of course, it may mean that the auction company will go out of business?

A. That is correct.

Mr. Augello: That is all.

Mr. Smith: No questions.

Cross-examination.

By Mr. Miller:

Q. Have you ever been in charge of any freight handling operation?

[fol. 691] A. No, sir.

Q. Have you ever made any investigation as to methods of freight handling.

A. Yes, sir, quite a little. We had a proposition of two or three proposed new terminals in the City of New York in the past 25 years, and just recently, as far back as a year and three months ago, the so-called LaGuardia Terminal was proposed in New York, on which I spent approximately six months of intimate study as to all the phases of it, including the unloading, receiving, delivery, and other matters pertaining to fruits and vegetables.

Q. That was an operation from railroad cars?

A. It was an operation of floating the cars over to the New York side, and either delivering those cars on team-tracks on Manhattan Island, or unloading them on a terminal platform on Manhattan Island. It had not been fully decided which would be the better thing to do, to put down team-tracks, or to use the platform receivers. I should say to receive the contents of the cars.

Mr. Smith: May I ask a question off the record?

Exam. Brown: All right.

(Discussion off the record.)

Mr. Miller: I have no further questions.

Mr. Donadio: No questions.

Exam. Brown: Are there any further questions of this [fol. 692] witness?

Mr. Augello: No.

(Witness excused.)

Mr. Augello: I will call Mr. Dougherty.

CHARLES J. DOUGHERTY was sworn and testified as follows:

Direct examination.

By Mr. Augello:

Q. Mr. Dougherty, will you please state your name and address and the official capacity you hold with your company?

A. Charles J. Dougherty, vice president and treasurer, Philadelphia Terminals Auction Company, Delaware Avenue and Wolf Street, Philadelphia, Pennsylvania.

Q. How many years have you been in the fruit business in Philadelphia?

A. I have been in the fruit and vegetable business since 1919.

Q. Will you please give us in your own way the history of the fruit and vegetable business in Philadelphia as to deliveries, where they were made in the past 30 years, and how they moved up to their present location?

A. Well, in my time, there never has been any unloading charges in Philadelphia. There was a time when Philadelphia had a comparable situation to New York insofar as selling at auction. The auction was located on various piers along the Delaware River, and the B & O unloaded from [fol. 693] floats, and the Pennsylvania unloaded stuff from Vine Street Pier.

Exam. Brown: When was that?

The Witness: Prior to 1926—up to 1926.

In 1926 the B & O Railroad built a land terminal quite some distance removed from the produce trade, but it was far more economical because they were not confronted with the rise and fall of the tide, and the trade was offered this new terminal, and the terminal was built and the merchandise unloaded. This terminal was situated at Delaware and

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Wolf Street, approximately three miles removed from the produce market, whereas the pier was no more than a mile removed from the produce market. Now, the produce market in Philadelphia is at Dock Street.

By Mr. Augello:

Q. And the piers were near Dock Street?
A. Yes.
Q. How far?
A. They were within a mile of Dock Street, whereas this new terminal is now three miles. We have always had just as much competition in Philadelphia among the carriers as we have had among the dealers, so when we got a new terminal from the B & O Railroad, we were very fortunate to get a new terminal from the Pennsylvania Railroad the following year. It was the terminal, the picture of which was submitted as evidence. This terminal was opened in July of 1927 at Delaware Avenue and Oregon Avenue, which is the extreme end of Philadelphia, and possibly [fol. 694] three and a half miles removed from the wholesale market in Philadelphia.
Q. When you say the wholesale market of Philadelphia——
A. I refer to Dock Street, which is the wholesale market.
Q. You are referring to Dock Street?
A. Yes. At the time that this terminal was opened, great stress was made as to the unloading facilities which were provided for the trade. This is carried out in the official announcement of the opening of this terminal.

Now, we display the merchandise on both terminals.
Exam. Brown: Both the B & O and the Pennsylvania?
The Witness: Yes. And we rotate our sales. We have auction facilities at both terminals, and we rotate our sales, and that has been the way the business has been conducted in my time in the produce business, as I say, which goes back to 1919.
Mr. Donadio: By rotating——
The Witness: We are at the B & O one day and the Pennsylvania the next, and the merchandise is displayed at both docks. We don't infer which road gives the best service, or

at which it is displayed better. We feel it is displayed well in both places.

By Mr. Augello:

Q. Does the auction method of sales in Philadelphia afford the railroads prompt releasing of refrigerator equipment?

[fol. 695] A. Well, yes. Our cars are released to the carriers before 7 a.m. when the free time starts. In other words, our cars are actually returned to the carriers before they go on the free time, because we give them the orders in the afternoon to unload that night, and we handle approximately 10,000 cars a year.

Q. So that you are in the same position as Mr. Smith, you practically prior order your cars. They arrive on the night trains, they are unloaded during the night, and before 7 o'clock those cars are empty?

A. That is so, yes. They are ordered to arrive. They are catalogued. Their manifest is printed before the car hits Philadelphia.

Q. So within a few hours those cars are in and out of the terminal?

A. That is true.

Now, this unloading charge will most certainly cause a great hardship, not only to our company but the consignees for whom we sell. The auction method of selling—I believe the basic principle of it is unloading whereby the buyer has a true picture of what he is buying. We do not sell by sample at auction. I do not believe it is possible to display the wares of these consignees from any form of team-track which we have in Philadelphia. I know it is practically a physical impossibility to make deliveries from team-tracks [fol. 696] where so many sizes are involved. With the straight loading of a commodity such as grapes, or if these people keep on growing so much stuff that we will have solid cars of one size, why, that would not be such a hard job. But there would have to be some ways and means devised of sampling some from each size, or, if that was impossible, then there would have to be some facilities in connection with the team-track whereby our 300 daily customers

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could be afforded the opportunity of going along the tracks and inspecting this merchandise.

Q. Which is a hard thing to do if you haven't platform facilities?

A. That is true.

Q. Which you now have?

A. That is true.

Q. Do you have any other statement you would like to make at this time?

A. Well, I personally don't believe that this unloading charge is going to give these carriers any increased revenue insofar as the auction operation is concerned. I am positive it is not, because the figures on breakage handled at auction is so small that it really is fantastic when you consider the number of cars you have and the small average claim against the car.

Exam. Brown: What is the claim?

[fol. 697] The Witness: A claim for bad order or broken packages.

Exam. Brown: What does it amount to?

The Witness: In the case of the Pennsylvania Railroad it amounts to $4.23 per car.

Exam. Brown: And the average per year, if you know?

The Witness: Well, assuming that the two roads have equal cars, 5,000, that would amount to in the neighborhood of $21,000, roughly.

Exam. Brown: What would be the average claim payment per car for fruits and vegetables coming into the Philadelphia Terminal on the Pennsylvania Railroad or the Baltimore & Ohio, either one?

The Witness: I wouldn't be familiar with the average coming in by all methods.

Exam. Brown: You testified that the low claim payment was fantastic. I want to know what those claim payments are.

Mr. Donadio: I was just wondering, Mr. Examiner, if the figure that Mr. Dougherty gave related to claim payments or cooperage payment?

The Witness: Claim payments, breakage.

Exam. Brown: When you used the word "fantastic," what did you mean to apply that to?

The Witness: I mean, Mr. Examiner, that I couldn't believe myself until I checked with the Pennsylvania Railroad as to the number of claims, and went over it and checked [fol. 698] back and forth. If I had been asked that question I would have said our average claim would be about $20 per car, without really getting into it.

By Mr. Augello:

Q. And you found out it was only $4 a car?

A. $4.23.

Q. What did you find out about the cars that were handled on Team-tracks? What was their average?

A. I really don't know their average.

Q. Was it more or was it less?

A. I don't know that, but I know that the breakage at team-track deliveries is considerably greater because there is no opportunity to repair and put them in shape as when they are loaded on the platform and put in piles for delivery. I have handled stuff at private sales myself. That was my business before going with the auction company. Now, when the car is unloaded on the platform, a package that has a nail out is set aside and the cooperer comes along and nails it up, and it goes into the pile and delivery is made. Well, that is impossible on the team-track.

Q. What happens there?

A. Well, the packages are thrown aside in the car, and they become a package that needs a nail, they become a B.O. Once you have 15 to 25 different truck drivers in your various cars, and you get a box of grapes with the lid off, they don't want that, so it goes aside.

[fol. 699] Exam. Brown: What does "B.O." mean?

The Witness: Bad order.

Exam. Brown: This figure of $4.23 that you gave, what does that represent?

The Witness: That represents the average amount of the claim that we made on the Pennsylvania Railroad for the months of April, May and June of this year.

Exam. Brown: Who do you mean by "we"?

The Witness: The Philadelphia Terminal Auction Company. I am referring to stuff unloaded there.

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Exam. Brown: That figure only relates to the Pennsylvania?

The Witness: That is right.

By Mr. Augello:

Q. From that average, did the Pennsylvania Railroad receive any salvage?

A. No. That is the average claim. That is the average amount that we claim.

Q. That is the average amount that you received from the Pennsylvania Railroad?

A. That is the average amount that we filed claim for.

Q. Well, in your claims, were there any packages that were rejected and returned to the railroad on which they secured any salvage?

A. No, not on those, because we sell their salvage packages.

Q. Oh, I see; you are the selling agent for the railroad?

[fol. 700] A. Yes.

Exam. Brown: Let me get this straight. You make a claim on the railroad for $4.23. Then you sell the salvage material for the railroad. Is that to be substracted from the $4.23?

The Witness: No. The $4.23 was the net claim for which we filed.

Exam. Brown: That was the net claim?

The Witness: Yes.

Exam. Brown: Was that amount received?

The Witness: Yes, that amount we received.

Exam. Brown: That included sales of salvage material?

The Witness: No, only from those cars sold at auction.

Mr. Augello: That is all.

Exam. Brown: Is there any cross-examination?

Mr. Smith: No questions.

Cross examination.

By Mr. Miller:

Q. Mr. Dougherty, can you tell me what proportion of the Pennsylvania facilities you use at the produce terminal in Philadelphia?

A. The platform which is known as A platform.

Q. You maintain your auction rooms there?

A. Yes.

Q. That has been true since 1927 when the terminal was opened?

A. My company since 1931. They previously had a com-
[fol. 701] pany there from the time it was opened.

Q. Have you ever paid any rent for the use of those facilities?

A. In the past three years, no. Prior to that I don't know.

Q. It is your understanding that the auction company has never paid rent for those facilities, is it not?

A. I don't believe they have, but I can only qualify for the past three years. I don't know why rent would be reduced at this stage.

Q. Can you tell me what percentage of the commodities that you have received in the three-month period you mentioned consisted of citrus fruits?

A. No, I couldn't.

Q. Would you say it was upwards of 75 per cent?

A. No, I should say not.

Q. Upwards of 50 per cent?

A. I would say it was possibly better than 50 per cent, but I certainly don't have the figures on that. The months of May and June is when deciduous fruit moved fairly heavy, and the greater percentage of deciduous fruit arriving is sold by auction, whereby the citrus percentage of what is sold by auction is not as great.

Mr. Miller: That is all.

Mr. Donadio: No questions.

Exam. Brown: Is there any redirect?

[fol. 702] Mr. Augello: No.

(Witness excused.)

Exam. Brown: The next witness.

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JOHN R. VAN ARNUM was sworn and testified as follows:

DIRECT STATEMENT

The Witness: My name is John R. Van Arnum. I am secretary of the National League of Wholesale Fresh Fruits & Vegetable Distributors, headquarters at Washington, D. C., and I am appearing for the other parties that I named at the beginning of the hearing.

I wish to make a statement of qualifications for a definite purpose, and I will say that I have been engaged in traffic work, have practiced before the Commission for about 27 years, and that I have been engaged in every fruit and vegetable case before this Commission of any consequence at least for the last 20 years, so that I am reasonably familiar with the rates and terminal facilities in particular of most of the markets of the country, and particularly those of the East.

I would like to amplify somewhat evidence that has been put in here to the effect that the New York terminal market facilities have been operated along substantially the same lines as they are now for at least 55 years, and I predicate that statement on the fact that one of the early cases before [fol. 703] this Commission involved the rates and delivery of these commodities from the South at the location that is now known as Pier 29, was then known as Pier 29, although there is a new building on the cite.

That case, just for the record, is found in 6 ICC 295, the Truck Farmers Association of Charleston and Vicinity vs. the Northeastern Railroad Company, et al., and the decision was dated in April, 1895.

That case involved a change in rates in effect at the time, which undertook to prohibit the delivery of what were described as the more perishable fruits, which were principally strawberries from the South, to restrict the delivery of those fruits at the then Pier 29, and require their delivery at a location in Jersey City, across the river.

The Commission developed in the course of the hearing that the reason back of the proposal was that the Pennsylvania Railroad had just put into operation within the year or so prior thereto a ferry that terminated at what was Bay Street on the Manhattan side, and it wasn't doing

any business, and the Pennsylvania Railroad apparently felt that if they could change the delivery of some of these perishables to the Jersey side the dealers at the Washington Street market would have to send their trucks on that ferry and bring the produce back loaded and pay a ferry charge both ways, and that is a matter of record before this Commission.

[fol. 704] The Commission found that the delivery of these commodities on the rate published in New York required their delivery at the pier in New York, and so stated, and in its conclusions found that if the Pennsylvania Railroad undertook to restrict any delivery, and at that time the delivery, as of today, included the unloading and with an exception that I will mention, that if they undertook to require the delivery of any of these commodities on the Jersey side they would have to reduce the rates by the amount that it cost the receiver to bring the commodities over from the Jersey shore. That is the way the case ended.

The Commission said there that while delivery was so——

Mr. Smith: May I interpose an objection, Mr. Examiner. I am sure the Commission will be much interested in reading Mr. Van Arnum's brief, which I suppose he will file in this case. It seems to me that would be the time for him to go into a discussion of these cases.

The Witness: I won't insist on that. I will use it in a brief.

Exam. Brown: Ordinarily I would have ruled that that decision would speak for itself. It did speak from an historical standpoint, so I presume that is why the respondents didn't object before they did. That evidence, of course, will stand. The report will speak for itself.

Mr. Miller: May I ask one question at this point. Mr. [fol. 705] Van Arnum, your discussion of the case was limited solely to a discussion of the report? You were not attempting to put in any evidence outside of the report, were you?

The Witness: Not a word, no. I almost quoted from the decision.

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Exam. Brown: You didn't participate in that case, did you?

The Witness: No. However, I did participate in the next one that I am going to mention.

Along in 1931 the Pennsylvania Railroad in particular—I am not dwelling on the Pennsylvania because I have any grudge against them, but it happens that that is in the record—the Pennsylvania Railroad were before this Commission in I & S Docket 3596 in a case called Allowance for Stacking Fresh Fruits and Vegetables at New York. The intervening 38 or so years found the same practices in effect at the piers in New York as prevailed in the earlier date in that the Pennsylvania Railroad continued to make delivery at the piers and unload the freight, but had developed a further privilege or practice of both stacking and assorting the commodities according to the wishes of the consignee, or, if the consignee performed the stacking and assorting through his own help, they made an allowance for it, and there were some tariff complications that brought about this proceeding.

Mr. Smith: Are you discussing another case?

[fol. 706] The Witness: I am discussing I & S 3596, and I would not go into that except that I want to bring something out in connection with it.

Mr. Augello: Did you participate in that case?

The Witness: I did.

Mr. Donadio: Can you give us the citation?

The Witness: I don't have the volume citation. I picked up the original mimeographed report. If you want the citation, Mr. Donadio, it is 66 ICC 135.

Exam. Brown: Decided 1931?

The Witness: Decided December 19, 1931.

Exam. Brown: What is the page number?

The Witness: 135.

Mr. Wells: That is the Duane Street—pardon me.

Mr. Augello: Are you talking about the Duane Street——

The Witness: No I am talking about—I don't have the volume with me. I picked up the mimeographed report.

Exam. Brown: Wait a minute. That citation that gave, is that correct?

The Witness: No, it is not. Here is the one that is correct, Mr. Examiner. 179 ICC 780.

Exam. Brown: That is I & S 3596?

The Witness: That is right.

Exam. Brown: Then we will let that decision speak for itself. You may refer to it on brief.

[fol. 707] The Witness: That is perfectly all right, Mr. Examiner. I wish to say though in connection with the decision that that case—I would like to read a paragraph from a brief. "The Pennsylvania Railroad——"

Exam. Brown: Identify your brief.

The Witness: The brief is that of Mr. Windsor F. Cousins, counsel for the Pennsylvania Railroad.

Exam. Brown: I & S 3596?

The Witness: In his brief, Mr. Cousins said:

"The Pennsylvania Railroad carries a large part of the fruit and vegetables used in New York City. The traffic involved in this proceeding arrives at the end of the rails on the New York side of the Hudson River in refrigerated cars which are carried across the River on carfloats, generally 10 cars at a time, to the piers on the Manhattan side. When the floats have been made fast to the docks, the cars are opened by the railroad and the contents taken out to be stowed on the piers. This is done pursuant to the carriers' obligation to unload carload freight in New York. Transcript 17 and Exhibit No. 2 referred to is the authority for that statement."

Exam. Brown: I & S 3596, both exhibits and transcript number?

The Witness: That is right.

I think, therefore, that the position that we are taking [fol. 708] in assuming that for some 58 years the Commission has had before it on numerous occasions statistics, data, studies, and information that the unloading service was performed as a matter of practical necessity in New York, and this, I will say, applies equally well to Philadelphia, gives us the right to the opinion that the Commission in prescribing or approving the rates for fresh fruits and vegetables in these two markets, taking into account all the services, includes the unloading at these

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two markets insofar as they are performed by the railroad without extra charge, as occurs at numerous other markets.

Mr. Donadio: I suppose, Mr. Examiner, that those final remarks of Mr. Van Arnum will be considered as argument?

Exam. Brown: I assume he is going to include them in his brief where they should be originally.

The Witness: Now, I want to refer to Mr. Hodkinson's Exhibits 20 and 21, and ask that there be added for the five railroads that he used, covering the net railway operating income for the first five months of 1947 as compared to the first five months of 1946, and to offer as authority for those figures the regular monthly bulletin of the Association of American Railroads, from which I assume Mr. Hodkinson took his information, inasmuch as he referred to his authority as the carriers' report.

The Erie Railroad for the first five months of 1946 had [fol. 709] a net railway operating deficit of $549,264. For the first five months of 1947 they had a net railway operating income of $4,698,735.

Mr. Smith: I don't want to interrupt, but may I say a word. We are going to put that exhibit in. Will that serve your purpose? That covers six months rather than five months.

The Witness: I didn't know you agreed to give them. I would be very glad to withdraw that, with the understanding that you will put that in. All I wanted to do was to have the latest figures.

I believe that concludes all I wanted to say.

Exam. Brown: Is there any cross-examination?

Mr. Smith: No questions.

Mr. Miller: No questions.

Mr. Donadio: No questions.

(Witness excused.)

Exam. Brown: Mr. Hodkinson is recalled for the purpose of introducing certain information requested by the protestants.

E. A. Hodkinson having been previously sworn, was recalled, and testified as follows:

Direct examination.

By Mr. Smith:

Q. Mr. Hodkinson, have you prepared three additional exhibits, numbers, 65, 66, and 67?

[fol. 710] A. I have.

Q. Will you describe what they are, please?

A. Exhibit 65 supplements my Exhibit No. 3, and is prepared at the request of some of the protestants.

Exhibit 3 was limited to showing total unloads of fresh fruits and vegetables at the piers in New York where that unloading is performed by the railroads. I was requested to furnish the figures showing all carloads of freight unloaded at those points, and I have done so, and shown the results in Exhibit 65. I might point out, however, that Exhibit 65 takes into consideration Pier 48, which was not shown on my Exhibit 3, and Pier 30, which likewise was not shown on my Exhibit 3.

For the calendar year 1946, 96,939 cars of all freight were unloaded. 72,753 of those consisted of fruits and vegetables. That is shown on my Exhibit 3. Which leaves 24,186 cars of other freight.

I was also requested to show the total unloads for the six months January to June, 1946, and January to June, 1947. Those figures appear in the bottom right-hand corner of the exhibit. I have broken the total unloads in each period down to show the total number of fruits and vegetables, the total number of dairy freight shipments, and the total of all other freight.

Exhibit No. 66 shows the rate of return for the five [fol. 711] carriers involved in this proceeding for the first six months of 1946 as contrasted with the first six months of 1947.

The last exhibit, No. 67, is self-explanatory. It is a statement showing the estimated weight, the number of packages in a car, and carload minimum rates on representative fruits and vegetables. These weights are in accordance with the tariff provisions, and the tariff minimum weights

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are also in accordance with the tariff provisions, and the tariff authorities are shown on the extreme right of the exhibit.

Exam. Brown: Who asked you to furnish that?

The Witness: No one asked me to furnish that except my own counsel. They thought the record at that time was not complete as to the various estimated weights.

Exam. Brown: I thought the evidence you were going to put in now related to that requested by the protestants, but if there is no objection at this time, I will permit this exhibit to go in. Otherwise, you can put it in later.

Mr. Wells: I waat to question one item on there.

Exam. Brown: We will eliminate Exhibit 67 at this time and just cover Exhibits 65 and 66.

Is there any question on these two exhibits?

Is there any objection?

They are received in evidence.

[fol. 712] (Respondents' Exhibits 65 and 66, Witness Hodkinson, received in evidence.)

Exam. Brown: You are excused for the time being, Mr. Hodkinson.

(Witness excused.)

Mr. Miller: If the Examiner please, to complete these items which were requested by the protestants, I would like to submit in evidence a photostat of a 10-page contract dated January 2, 1940, between the Pennsylvania Railroad Company and the Penn Stevedoring Corporation, and in addition, four pages of letters, one letter dated November 1, 1944, addressed to the Penn Stevedoring Company by Mr. Frushour, general manager of the Pennsylvania Railroad Company; the second letter dated October 4, 1947, again from Mr. Frushour to the Penn Stevedoring Corporation.

This is the contract requested governing the unloading of fresh fruits and vegetables by the Penn Stevedoring Company at Piers 27, 28, and 29.

The two letters are supplementary letters of agreement which change some of the provisions of the basic agreement. Be it noted that there are some 10 to 15 pages of other letters which I have not submitted because I did not think

they were material, most of them being letters changing the rate of compensation to the Penn Stevedoring Company which were later supplemented by this letter of October 4, 1946.

[fols. 713-717] The record should show the correct date of that letter. I am informed that I originally referred to it as October 4, 1947.

Exam. Brown: This will be marked Exhibit 68, and will be received in evidence, if there is no objection.

(Respondents' Exhibit 68 received in evidence.)

Exam. Brown: All right, Mr. Wells.

Mr. Wells: I will call Mr. Gaughan.

[fol. 718] Exam. Brown: Is that the protestants' case?

Mr. Augello: I believe so, Mr. Examiner.

Exam. Brown: Is there anything further from the respondents?

Mr. Smith: May we have a two-minute recess?

Exam. Brown: You may have a five-minute recess.

(A short recess was taken.)

Exam. Brown: Have the respondents anything to offer now?

Mr. Smith: If the Examiner please, the respondents with-[fols. 719-912] draw the offer of Exhibit No. 67, and they have no rebuttal.

Exam. Brown: Let the record show that Exhibit No. 67 has been withdrawn.

(Respondents' Exhibit No. 67 withdrawn.)

Mr. Miller: Mr. Examiner, in connection with Exhibit 68, the contract between the Pennsylvania Railroad and the Penn Stevedoring Corporation, I find I have omitted from that exhibit one letter of agreement which should be included. The effect of that letter is to change the provision for payment for idle time. The letter reads as follows:

"Article 2nd, Section F", to be eliminated, and the following substituted as a new section:

"F. In the event that idle time continuously for a period of 30 minutes or more and for which the railroad is respon-

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sible is forced upon the contractor, payment will be made to the contractor for all of such idle time on the basis of wages for actual time paid to employees of contractor who are held idle during such period awaiting performance of services in connection with the work covered by Article 1st of this agreement, together with such other costs as may be properly chargeable thereto."

Exam. Brown: That statement will be considered in connection with Respondents' Exhibit 68, there being no objection.

[fol. 913] Proceedings of September 27, 1949

Colloquy Between Examiner and Counsel

Exam. Brown: Are there any remarks or questions pertinent to this proceeding which any person wishes to make before we proceed?

Mr. LaRoe: I would like to make a brief statement, Mr. Examiner.

Our exhibits have arrived and will be distributed immediately, but in fairness to the other parties, and so that the Examiner will understand our evidence better, practically all of our evidence will hinge around the nature of the delivery, and we will ask if the Interstate Commerce Commission will take into account what we consider to be a three-fold situation.

The first feature of the three-fold picture is what we call simple delivery. We shall undertake to show that simple delivery involves the placing of the goods on the floor of the pier and nothing beyond that. In conjunction with that, we shall undertake to show that the freight is not accessible to the consignee until it reaches that point on the pier.

We shall also contend, of course, that that simple delivery is included and always has been in the line haul rates and that there is no delivery at all until that simple delivery has been accomplished.

Now, there is a second category of delivery services which sometimes accompanies simple deliveries and sometimes does not accompany them. What I refer to in that second category are such accessorial or collateral services

[fol. 914] as stacking, sorting and so on, which in some instances accompany the delivery and in other instances do not, but which in every instance are paid for as separate accessorial charges.

A third category is completely divorced from the transportation service and will be defined by our witnesses as the commercial auction sales phase of the proceeding.

That has, as we shall contend through our witnesses and prove through our witnesses, nothing whatsoever to do with the transportation service rendered by the railroad, and, of course, is in no sense in issue here.

So that our case will deal primarily and exclusively, as a matter of fact, with the first phase, which is simple delivery, and we shall ask the Examiner to, if he deems it consistent with his duties, try to keep out of the record matters relating to issues which are not here, namely, the charges for stacking, the charges for sorting, the use of the pier for commercial and display purposes, which have nothing whatever to do with the transportation service.

We are now ready to proceed with our first witness, Mr. Laux, if the Examiner is ready.

Exam. Brown: Before we take up the next witness, you realize, Mr. LaRoe, that that type of evidence was offered and received at the prior hearing?

Mr. LaRoe: Yes, I do.

Exam. Brown: Is it your idea that it now be excluded [fol. 915] from the evidence here?

Mr. LaRoe: We would wish that it were feasible to have the old evidence excluded on the ground that it has no relation to the unloading service. We do not think that is feasible. I do not know how we could exclude now what has been received before, but if any such evidence is received here, it will certainly be received over our objection, and if you feel that you must receive it because it was received before, we ask that you bear in mind our point of distinction between the unloading service and these collateral services which are not in issue.

Exam. Brown: The Examiner will make no ruling at this time but will consider the evidence as it is offered.

Mr. LaRoe: Thank you, sir.

Exam. Brown: And at the same time, you can make any objections that you wish, Mr. LaRoe. Mr. Loos?

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Vol. III

TRANSCRIPT OF RECORD

(Pages 997 to 1558)

Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 481

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, ET AL.,

vs.

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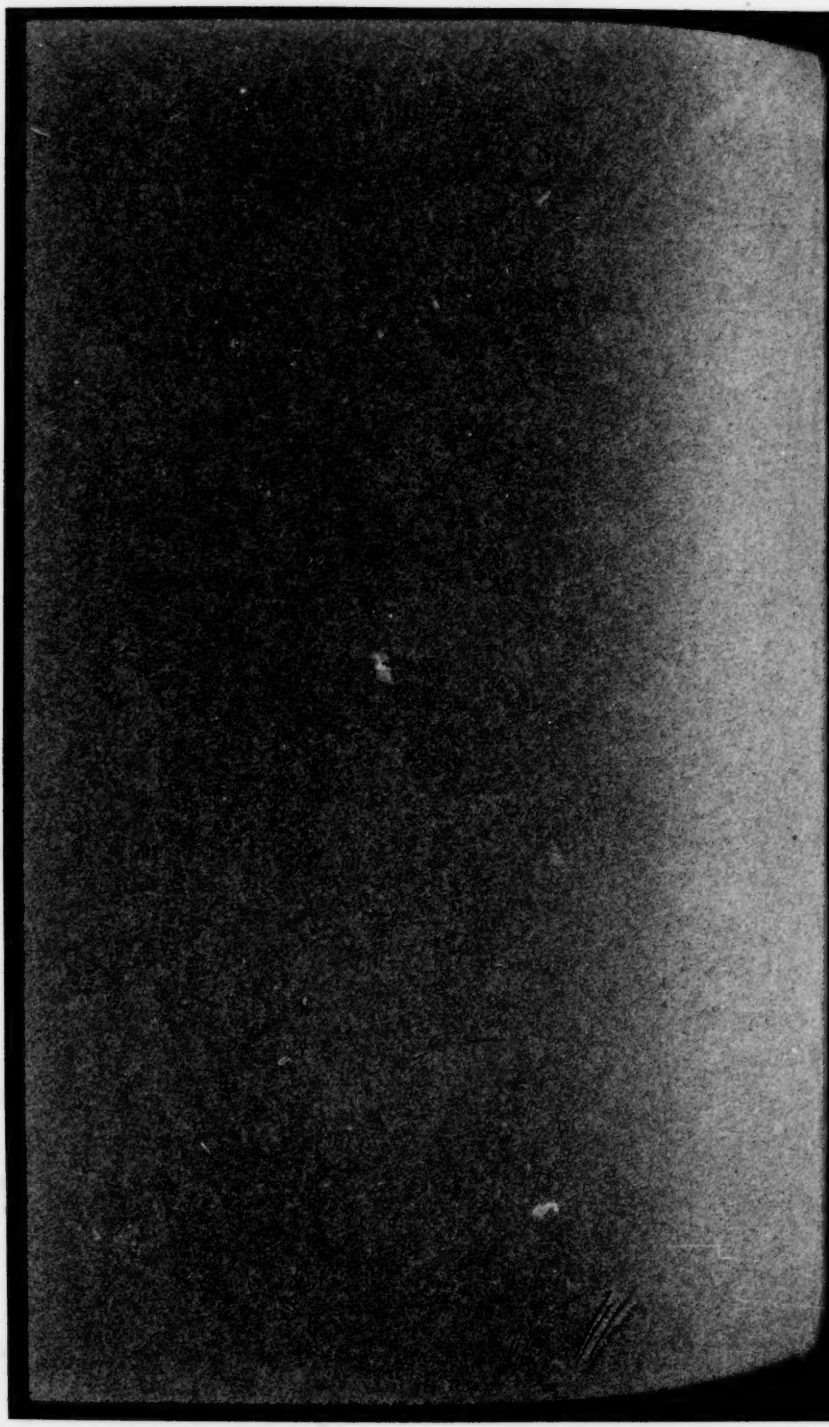
APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

FILED NOVEMBER 21, 1953

Probable jurisdiction noted February 1, 1954



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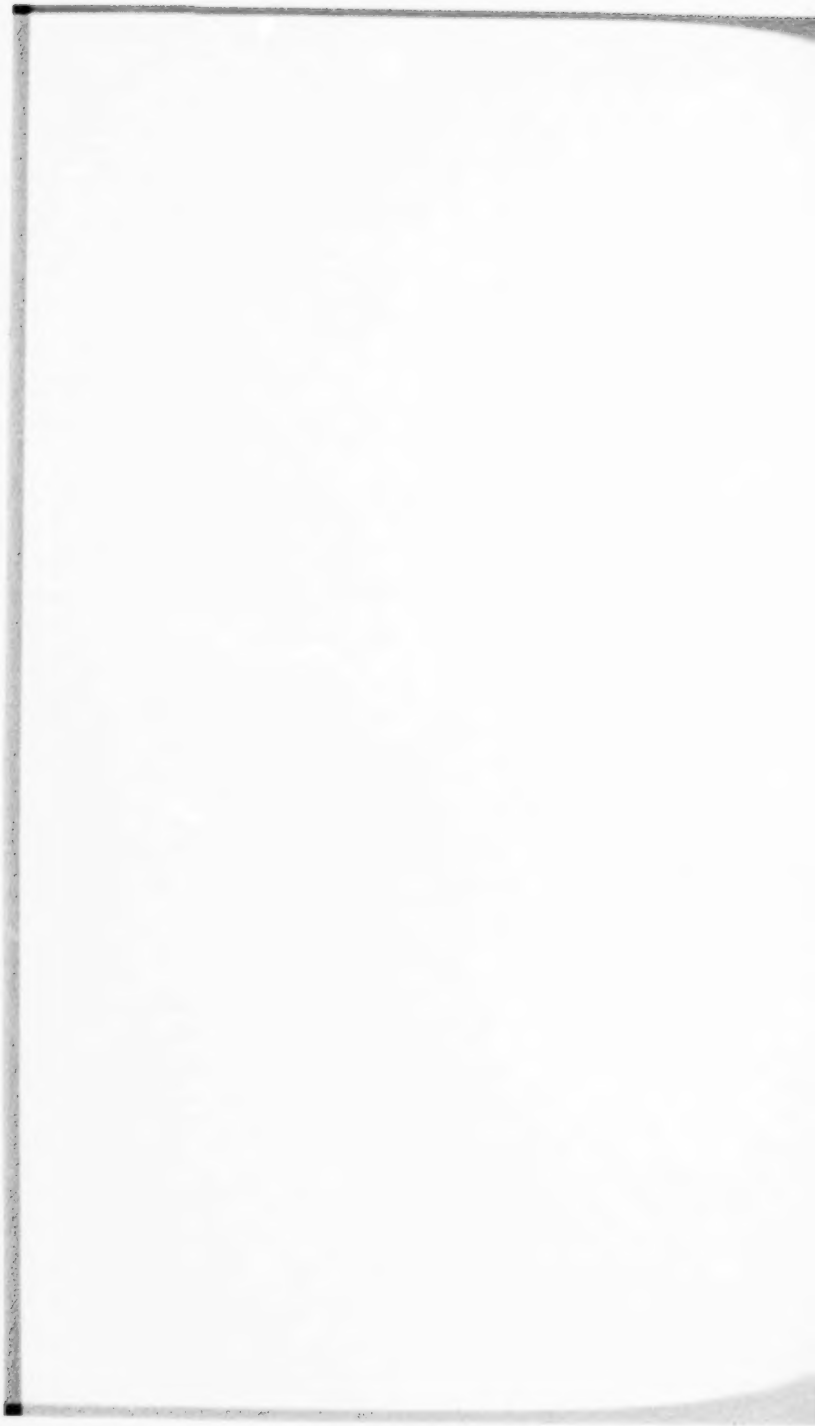
Order permitting the Secretary of Agriculture and The City of New York to intervene	1995	1551
Order of Interstate Commerce Commission in Docket No. 31105 and No. 31106 (omitted in printing)	1996	
Stipulation designating parts of the record to be printed and statement of points to be relied upon	2012	1552
Order noting probable jurisdiction	2020	1555



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Mr. Loos: Mr. Examiner, I should like to join in and support the statement just made by Mr. LaRoe, and in addition, I should like at this time to call attention and have appear at a conspicuous place in the record—I assume the opening of the record is a conspicuous place—a reference to the decision of the Commission in Fruits and Vegetables at Duane Street, New York, 66 ICC 135, decided back in about early 1920's. I do this because this case was not referred to in the Commission's decision in this proceed-
[fol. 916] ing, and I want to be sure that this time it will not be overlooked.

Mr. Augello: I would like to support Mr. LaRoe's statement.

Mr. Thornton: The City of New York also supports and endorses and is in accord with the comments of the three prior speakers, especially Mr. LaRoe of the Port Authority. It is our position that this is a matter of simple unloading upon the piers and evidence as far as sorting or stacking or any services beyond the act of simple unloading is immaterial and irrelevant to this proceeding.

Exam. Brown: We will assume that the rest of the protestants agree with the statements made by Mr. LaRoe, unless we hear to the contrary.

Mr. Hoffman: Mr. Examiner, I want to raise a question with respect to the scope of these proceedings. In connection with the former decision, we found that 166 automatically became applicable so as to increase the charges 30 percent. I should like to inquire at this time whether this proceeding is sufficiently comprehensive so that the 30 percent allowed in the 166 would not be applicable or would the proceedings be of such nature that we would have to secure a modification of the 166 so as to exempt any decision here from the so-called 30 percent surcharge, being realized that there was no evidence introduced in connection with 166 with respect to these specific proceedings.

Exam. Brown: What is your specific question, Mr. Hoffman?

[fol. 917] Mr. Hoffman: My question is, can a decision be rendered in this case which will exempt this tariff from the 166 30 percent surcharge?

Exam. Brown: That will be up to the Commission so far

as such action as they may wish to take on that is concerned. However, we are here on a wide open reopening. Any evidence with respect to the unloading charges, plus the 166 increases, will be pertinent here. In other words, any evidence the parties wish to offer showing the original level of the charges, plus the level of the charges which include ex parte 166, would be pertinent evidence here. If the Commission would wish to make any specific finding in that respect, that is up to them. I will receive any evidence here pertaining to 166 as it relates to this case.

Mr. Wells: Mr. Examiner, I take it from the statement just made that the points raised in the petitions for reconsideration filed before the Commission are certainly before the Commission on the rehearing for reconsideration.

Exam. Brown: If pertinent to this proceeding, that is correct. The Commission had no strings on its order. The case is reopen for rehearing.

Have the Respondents any statement to make?

Mr. Smith: No, sir.

Exam. Brown: You may proceed, Mr. LaRoe.

Mr. LaRoe: Off the record, is my understanding correct, [fol. 918] Mr. Examiner, that the next exhibit is No. 73?

Exam. Brown: That is right, sir. We will go off the record for the purpose of numbering, identifying and distributing the exhibits.

(Off the record)

Exam. Brown: On the record. Let the record show that the exhibits for this witness have been numbered, identified and distributed off the record. They are exhibits No. 73 to 96, inclusive. All right, Mr. LaRoe, will you proceed, please?

Edward K. Laux was sworn and testified as follows:

Direct examination.

By Mr. LaRoe:

Q. Will you give your name, position and transportation experience?

A. My name is Edward K. Laux. I am employed by The

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Port of New York Authority at its home office, 111 Eighth Avenue, New York 11, New York, in the capacity of traffic manager.

My experience in transportation and traffic matters covers a span of 38 years, most of which was in official traffic capacities with coastwise lines. I have been in the employ of the Port of New York Authority in my present position for approximately 5 years.

Q. For whom do you appear as a witness?

A. On behalf of the Port of New York Authority.

Q. Explain the Port Authority's status.

[fol. 919] A. The Port of New York Authority is a municipal corporate instrumentality created by compact between the states of New York and New Jersey with the approval of the Congress of the United States and charged with the duty of protecting, promoting and developing the commerce of the Port of New York District. This mandate falls directly within the provisions of the national transportation policy which states its purpose to be, in part, "to promote safe, adequate, economical and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof".

Q. Did the Port Authority actively participate in the original proceeding?

A. Yes, in the original proceeding we appeared as a protestant and testimony against the protested unloading charges was introduced by a Port Authority witness, Philip G. Kraemer, our assistant traffic manager. The Port Authority is also among the petitioners that requested the reopening and rehearing in this proceeding by the Commission.

Q. The Port Authority's interests and concern with regard to the charges now being applied by the respondents is just [fol. 920] as great as ever, isn't it?

A. Yes, and we hope that through this rehearing we shall be able to show that the findings and orders under which

the charges were permitted to become effective were based on an erroneous conception of the respondents' obligations under the Interstate Commerce Act to make delivery to the consignees and failure to distinguish this basic delivery service from other services performed by the railroad which are merely incidental.

Q. Are you familiar with the issues in this proceeding and with the respondents' practices in delivering freight at or through the pier stations?

A. Yes, I am familiar with the issues and the carriers practices in offering delivery of carload freight at pier stations. I can say that I have observed railroad operations of deliveries along the North River or Hudson River pier stations for over 30 years. Many years ago, when employed by the Old Dominion Steamship Company, predecessor of the Eastern Steamship Lines, I took part in the checking and delivering operations of large quantities of all kinds of freight including Irish potatoes, spinach, kale and other varieties of vegetables originating in Virginia, southern and western points. This traffic was competitive with the railroads and because of this competition it was necessary to be familiar with the system and practices that [fol. 921] the railroads followed at the pier stations. The produce business of the coastwise lines was diverted to the Pennsylvania Railroad when that railroad rehabilitated its pier stations and established the produce terminal at Piers 27 and 28. The Old Dominion Line had its delivery facilities at Pier 26, North River, contiguous to those of the Pennsylvania.

Q. Has the Port Authority made a study of the railroad practices at their pier stations at which unloading and delivery of fresh fruits and vegetables are accomplished?

A. Yes, we have, in connection with the Port Authority's proposal "For Development of Municipally Owned Waterfront and Piers of New York City", and reports to Honorable William O'Dwyer, Mayor of the City of New York. Another Port Authority witness will introduce evidence in connection with these studies, and other data with regard to effect of the present protested unloading charges. These charges have temporarily and in many cases permanently, diverted fruit and vegetable traffic in substantial quantities

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to railroad facilities where consignees are accorded access to the door of the freight cars for delivery of contents and thus the payment of the railroad protested charges are avoided.

Q. Was the evidence that you are now about to give previously submitted by a Port Authority witness?

A. No. Our evidence in the original proceedings was very limited. We believed that the facts surrounding the [fol. 922] station delivery were so obviously clear, that rail cars on car floats alongside of pier stations were not accessible to consignees for direct unloading from car door to motor vehicle. We did not believe it necessary to include evidence with regard to the overall pier station delivery practices. However, now that the Commission's further order reopened the proceeding for rehearing, our presentation will be more comprehensive.

Q. Will you proceed with your evidence?

A. First, I believe it is again necessary to emphasize that the railroad pier stations at which the charges apply, as per my exhibit No. 73, consisting of three pages which I now desire to introduce, have no on-shore track facilities. Cars for delivery at these railroad pier stations are moved by the carriers from their rail heads on the Jersey shore by car floats. The cars remain on the floats and the contents of the cars are not accessible to the consignee or owner for unloading. It should be noted from my exhibit, which is a reproduction of the carriers' tariff Rule A-204 and Items shown in the exhibit as published in Agent Boin's ICC A-881, that the carriers indicate that the fruits and vegetables, cantaloupes and melons would be unloaded by the carriers only at the stations shown in Note of the Rule. These stations under Note A are all pier stations with the exception of the Bronx Terminal Market.

The carriers do not give the consignees or owners the [fol. 923] option to perform their own unloading. The freight rates on fruits and vegetables, cantaloupes and melons are published from western and southern origins to New York, N. Y., thus indicating transportation service to the New York stations by the railroads.

However, according to the provisions of Rule A-204 as reproduced in my exhibit, it can be seen that the line-haul

rate is circumvented in that respondents now segregate the service, using the old rate to cover the service up to the placing of the car at the pier, where it is not accessible to the consignee, and adding a separate charge for the delivery service, although delivery was always included in the old rates. In other words, the consignee now pays for the delivery twice. Stated differently, the consignee or owner does not get his car on arrival at New York unless unloading charges are paid in addition to the line-haul rates. The nature and incidents of the pier station unloading here in issue is beyond a doubt a service inextricably bound up with the line-haul service and rate.

Q. Have the railroads at New York always treated the unloading as a terminal service, as a part of transportation covered by the freight rates?

A. Yes, as long as I can recall in my 38 years' of experience. Going back in history with regard to the Pennsylvania Railroad, it entered Jersey City and New York [fol. 924] through acquisition of the United Railroad of New Jersey November 30, 1871, and thereafter afforded producers of fresh fruits and vegetables west of the Hudson River access to the New York market via ferries.

As far as that railroad was concerned, it was not until 1882 that pier space along the east side of the North River could be leased from the City of New York for exclusive use in connection with the handling of freight traffic including perishable commodities. The first lease arranged for covered two piers, numbers 27 and 28, which were open piers until August, 1884.

From the beginning of operations of the two piers diversified perishable food products in small quantities were offered for a movement to them without any requirements, however, to display for sale.

Perishable traffic from the south which was moved in boats and delivered to the New York trade places or markets between 1850 and 1882 included lettuce, radishes, strawberries, potatoes, watermelons, etc. The pier development was designed to secure that traffic. General business including perishable commodities during the next few years was such as to make it desirable for the Pennsylvania leasing another public pier from the City of New York to be

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used exclusively for the concentration and handling of other perishable products for New York deliveries.

[fol. 925] The display feature of the market arrangement pertaining to perishables and which had been agitated intermittently also assumed a quite definite status, the subsequent development involving delivery and sale of perishable products over North River piers being indicated by records showing that the volume of such traffic representing a few hundred carloads annually during the early days had increased to a level annually representing approximately 38,000 carloads, an annual average over the 6 years which ended in 1926 of 35,612 carloads.

Pier 29 was partially heated in 1892 and completely heated in 1907 and was used almost exclusively for perishable traffic until the demand exceeded its capacity and then pier 28 was completely heated and assigned for use to take care of the overflow of pier 29.

The Pennsylvania Railroad has since the year 1882 endeavored to meet the requirements of the produce industry, the facilities having been coordinated with train schedules, yard and floating operations, display and auction arrangements.

It was in 1927 that the Pennsylvania Railroad rehabilitated their pier facilities with additions to satisfy the trade demand for deliveries at pier stations on Manhattan Island with regard to fresh fruits and vegetables from the far west.

I shall now introduce a series of 12 exhibits which are reproductions from the carriers' freight tariff, Agent Boin's ICC A-881——

[fol. 926] Exam. Brown: Before you take up your next exhibits, I wish you would turn to your Exhibit 73.

Mr. LaRoe: Are you going to testify to that now or have you concluded with that?

The Witness: I have finished with 73.

Exam. Brown: Well, will you turn to page 3 and explain the abbreviations for the benefit of the record, the abbreviation at the top, for example: "Piers 10 and 11, N. R."

The Witness: N. R.? The abbreviations N. R. stand for North River. H. R. shown under Erie stands for Hudson River. B. & O. stands for Baltimore and Ohio.

Exam. Brown: Well, that is understandable, but "N.Y.C. (W.S.) that would be West Shore?

The Witness: Yes. N.Y.C. stands for New York Central.

Exam. Brown: And N.Y.O. & W. for New York Ontario & Western?

The Witness: That is correct.

Exam. Brown: I think that is enough on that. I think it might be well for you to state for the record that these are the present basis of charges increased by 30 percent over the old charges, is that right?

The Witness: Yes, these are the current charges, which includes all of the entries up to 166, ex parte 166. These unloading charges were not subject to the increases under ex parte 168.

[fol. 927] Mr. Miller: Mr. Laux, these charges are not actually published the way they appear on this exhibit, are they?

The Witness: Yes, sir.

By Mr. LaRoe:

Q. When you set up the 166, did you mean up to and including 166?

A. Yes, sir.

Q. So that this is an up-to-date exhibit and current as of today, because 168 did not increase them further; in other words, these are the present charges?

A. These are the present charges; that is correct.

Exam. Brown: And for convenient comparison, you might state that the former charge on citrus fruits, that is, the charge which was originally proposed, was $1.50 per net ton, is that correct?

The Witness: On some commodities, that is correct.

Exam. Brown: Citrus fruits I am referring to.

The Witness: On citrus fruit, that is correct.

Exam. Brown: And 30 percent of $1.50 would be $1.95; that is, added to the $1.50 would be $1.95; is that correct?

The Witness: That is correct.

Exam. Brown: And the same thing is true of other charges in here?

The Witness: That is correct.

Exam. Brown: In other words, for cantaloupes and

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melons the former charge was $2. 30 percent of that is [fol. 928] 60 cents, which added to the $2 makes $2.60?

The Witness: That is correct, sir.

Exam. Brown: And that is the same through your Exhibit No. 73?

The Witness: That is right, sir.

Mr. Hodkinson: That is not quite right.

Exam. Brown: Former proposed charge. I used "proposed" when I first referred to it.

Mr. Hodkinson: The originally published charge never took effect. When the effective date of the Commission's audit was reached, 166 was operative so that instead of $1.50, we got $1.95; instead of $2, we got $2.60.

Exam. Brown: When I first referred to this, I said, "The original proposed charge." I think the record will show that. My understanding is in agreement with Mr. Hodkinson; when the charges went into effect, they carried the 166 increases.

Mr. Hodkinson: That is correct.

Exam. Brown: But, as first published, it did not carry the increases applied against them.

Mr. Hodkinson: That is right.

Exam. Brown: All right, sir.

A. (Continuing) I shall now introduce a series of 12 exhibits which are reproductions from the carriers' freight tariff, Agent Boin's ICC A-881, describing the railroad pier stations. No. 74 two pages, No. 75 one page, No. 76 two [fol. 929] pages, No. 77 one page, No. 78 one page, No. 79 one page, No. 80 one page, No. 81 one page, No. 82 one page, No. 83 one page, No. 84 one page, No. 85 one page. It will be noticed from my exhibit No. 74 that Pier 22 of the B. & O. is open for receipt and delivery of carload freight in packages as well as fresh fruits and vegetables.

Furthermore, that all freight is unloaded from or loaded into cars on car floats.

The same may be said with regard to the Central Railroad of New Jersey, Piers 10 and 11, North River, my exhibit No. 75; likewise the D. L. & W. Piers 13, 41 and 68, my exhibit Nos. 76, 77, 78; Erie Railroad Piers 19, 20, 21, 48 and 67, my exhibit No. 79; Lehigh Valley Piers 8, 38 and 66, my exhibit Nos. 80, 81, 82; New York Central Barclay St.

Station, my exhibit No. 83. The Pennsylvania Railroad Produce Terminal Piers 27 and 28, my exhibit No. 84, is the only pier station that is limited to the receipt and delivery of perishables, however Penn Station Desbrosses Pier 29 N. R. my exhibit No. 85 is typical to the other carriers stations as portrayed in my previous exhibits. Referring back to my exhibit No. 84 Penn stations Produce Terminal, even there it should be noted that this station is opened to handle butter, butter substitutes, cheese, eggs, dressed poultry and/or game, fresh meats, sausage, fish, clams, oysters, flower bulbs, and raw silk.

These commodities are unloaded by the carriers from cars [fol. 930] on car floats alongside of the piers to the floor of the pier stations and no charge is assessed for that service. At all of the other railroad pier stations, which are not limited for the handling of perishables, all types of freight are unloaded by the carriers from cars on car floats alongside of piers to the floor of the pier stations where such freight is made accessible to consignee.

Q. Let me interrupt you there, Mr. Laux, because this we regard as an important point. If you will look near the top of your exhibit 74, about the fourth paragraph, under the heading "deliveries," it says: "This station is open for receipt and delivery of carload freight in packages, including fresh fruits" and so on.

Now, do I understand your testimony to indicate that the railroads, other than the Pennsylvania Railroad, will deliver any freight at all, any carload freight at all, in packages to the pier without an extra charge?

A. That is correct. The exception with regard to the Pennsylvania covers only those two stations, Pier 27 and 28.

Q. I am not talking about the Pennsylvania in this question. I am talking about the railroads other than the Pennsylvania.

A. That is correct, sir.

Q. Do I understand that there is no carload freight at all in packages that this tariff is not applicable to? In other words, it covers everything?

[fol. 931] A. It covers everything, sir.

Q. And it is only the Pennsylvania that makes certain exceptions, exclusions?

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A. That's right.

Q. And that goes far beyond the fruits and vegetables?

A. Yes, sir, they do.

Q. All right; go ahead.

A. (Continuing) The protested charges with regard to application at the various pier stations are prejudicial and discriminatory. We think it is also important for the Commission to note from my exhibit No. 74, which I have just introduced, that at B. & O. pier 22 station and my exhibits Nos. 76, 77, 78, D. D. & W. Piers 13, 41 and 68, commodities in mixed carloads which ordinarily move at transportation rates under Rule 10 of the consolidated freight classification are received and delivered. This type of freight is miscellaneous in character and is ordinarily handled by the railroads in behalf of freight forwarders subject to Part IV of the Interstate Commerce Act.

This freight is loaded or unloaded to and from cars on car floats to the floor of the pier stations.

These provisions also contain the marriage clause whereby two different station locations will be treated as one station.

This exhibit further indicates that the B. & O. and Erie handle dairy products, dressed poultry, etc., which are [fol. 932] highly perishable commodities. However, here again no charge is assessed for unloading from cars to pier station floors.

Q. Do the respondent carriers publish a specific rule providing for the loading and unloading of carload freight at the New York stations?

A. Yes, and in that connection I would now like to introduce my exhibit No. 86, consisting of one page, which is an excerpt from Agent Boin's ICC A-881, Item 4645B, Supplement No. 20. It will be noted from this excerpt that freight in carloads, other than bulk freight, carried at carload rates, received or delivered at stations in Note 19 through carriers' warehouses or sheds or over carriers' piers or platforms, will be loaded into or unloaded from car by carriers.

This item is silent with respect to the application of charges under the carriers' tariff rule A-204, my exhibit No. 73.

Fresh fruits and vegetables may be received at the various

stations for westbound movement and that eastbound movements of dried fruit and various kinds of dairy products, poultry, etc., and also Rule 10 mixed carloads, are loaded and unloaded by the carriers without added charge shows again that the protested charges are unjust and unreasonable.

Q. You made reference to stations in Note 19. Can you explain what those stations are?

A. Yes, through my next exhibit No. 87, consisting of [fol. 933] two pages, which is a reproduction of the carriers' tariff Note 19 published in Agent Boin's ICC A-881. Among the stations in Note 19 are listed the stations at which the protested charges are assessed. All the other stations shown for the most part are pier stations.

Q. Where the carriers unload cars without extra charge to the floors of the pier stations, do they customarily tally such freight?

A. Yes. The freight is ordinarily delivered according to delivery orders presented by consignee's authorized truckman. However, in further evidence, I submit my exhibit No. 88——

Exam. Brown: Before you take up 88, explain the N.Y.C. (E). What does "E" mean? Does that mean East River?

The Witness: Wait a minute—that is on 87?

Exam. Brown: 87.

The Witness: No. N. Y. C. (E) stands for New York Central Eastern Lines.

Exam. Brown: That is to be distinguished from the Eastern Shore, is that the idea?

The Witness: That is right.

Exam. Brown: West Shore.

The Witness: West Shore.

By Mr. LaRoe:

Q. I do not think you finished that last sentence.

A. (Continuing) Yes. The freight is ordinarily de- [fol. 934] livered according to delivery orders presented by consignee's authorized truckman. However, in further evidence, I submit my exhibit No. 88, consisting of one page, which is also an excerpt of Agent Boin's ICC A-881,

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Rule M-60, and applies for account of the Pennsylvania Railroad.

It shall be noted from my exhibit that tallying is performed without extra charge. The railroad undertakes to keep record of the number of packages with marks and description of freight loaded to each truck leaving the carriers' premises.

Q. Do the carriers have any provisions under which motor vehicles of shipper or consignee are loaded or unloaded from or to the pier station or platform floors?

A. Yes, and in evidence I introduce my next exhibits Nos. 89, consisting of two pages, and 90, consisting of one page, which are reproductions of the carriers' tariff Rules A-197 and A-198, Agent Boin's ICC A-881.

The stations at which the service is performed include those pier stations at which the protested charges apply. It shall be noted from exhibit No. 89 that Note B under Rule A-197 prohibits application of the charge on fruits and vegetables. However, with regard to Rule A-198, my exhibit No. 90, applying for account of Pennsylvania Railroad, that carrier holds itself out to unload cars on team tracks to vehicles at its 37th St. Station, Henderson St. Station and Manhattan Produce Yard at a nominal charge of 6¢ per 100 lbs.

[fol. 935] At the stations shown in my exhibit No. R the car doors are accessible to vehicles and freight handled through such facilities is not subject to the protested charges.

The carriers offer a further service of loading the vehicle with the freight direct from the cars on the team tracks. This arrangement is a preference and advantage which the carrier disallows at the pier stations at which the protested charges apply.

Q. Are there any other provisions the carriers have under which unloading and loading are performed by the carriers under line haul charges and without extra charge?

A. Yes. I now offer in evidence my exhibit No. 91, consisting of one page, which is a reproduction of Item 4635, Rule A-200, Agent Boin's ICC A-881, which indicates that unloading and loading is performed on carload freight received directly from or delivered directly to water equip-

ment, within which category may be included lighters and other marine equipment.

I also offer exhibit No. 92, consisting of one page, which is a reproduction of Item 2525, Rule A-10, of Agent Boin's ICC A-881. It shall be noted that on export, import, intercoastal and coastwise traffic, loading and unloading is performed without charge.

Q. In your opinion, would perishables such as fruits and vegetables move export, intercoastal or coastwise?

A. Yes. During certain seasons apples and potatoes [fol. 936] move from the Port of New York by water.

In further evidence, however, I shall introduce my exhibit No. 93, consisting of one page, which is an excerpt of Rule A-10, Item 2520, Agent Boin's ICC A-881, which it shall be noted provides for the loading of grapes, pears, plums or prunes for export.

Q. Do you know of any other conditions under which the carriers hold themselves out to load and unload carload freight within the port district without added charge over the line haul rates?

A. Yes. I shall not introduce my exhibit No. 94, consisting of one page, which is an excerpt from Agent Boin's tariff ICC A-881, Rule A-155 therein. This shows that the B. & O., Erie and Pennsylvania Railroads are willing to load and unload cars in lieu of lighterage service, without extra charge.

Q. Perhaps I should ask you there, what does that mean, "in lieu of lighterage"? There is a very extensive lighterage district here, is there not, in which lighterage freight is delivered at the line haul rates throughout what is known as the lighterage district?

A. Yes, there is.

Q. And the railroads sometimes, when the lighterage service is not performed, have truck deliveries or other deliveries in lieu of lighterage, is that right?

A. That is correct. At their option and convenience they [fol. 937] perform the service sometimes with other motor vehicles.

Q. And when they do that, they load and unload freight?

A. That is correct.

Q. In your opinion, are the circumstances and conditions

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affecting the unloading of these commodities as referred to in your exhibits similar in material respect to those affecting the unloading of fresh fruits and vegetables?

A. Definitely, yes. The best illustration is with regard to poultry, dairy products, eggs.

Q. Why?

A. I should now like to introduce my exhibit No. 95, consisting of one page, which again is a reproduction from Agent Boin's ICC A-881, Rule M-67, Supplement No. 20, Item 7163. This rule indicates that the carriers unload at the line haul rates butter, eggs, cheese, dressed poultry, etc. Furthermore, where sorting is required, that additional service is performed by the carriers and a charge is assessed therefor.

Q. What significance does this have with relation to the protested charges?

A. Under Rule M-65, Agent Boin's ICC A-881, which is reproduced in the exhibit I am about to offer as No. 96, the carriers provide for a charge for a sorting service according to grades, kinds, marks or brands. The charge assessed appears to be a very nominal one compared to the charge for similar service assessed on dairy products.

[fol. 938] Exam. Brown: Mr. LaRoe, I thought you wanted to keep out of the record the sorting service charges?

Mr. LaRoe: As I tried to say, Mr. Examiner, I may be guilty of some inconsistency there, but I do not see how we can draw a clear line of distinction between the simple unloading service on the one hand and the accessorial services on the other without stating what the latter are. I do not see how we can keep out of the record any reference to them. In fact, as the Examiner has already reminded us, the record is already full of them. So that we realize that we have to draw that line of distinction between simple unloading on the one hand, and sorting, stacking, auction and other phases on the other hand.

Our point is that the latter should not be regarded as in issue in the proceeding.

Exam. Brown: I think every party here agrees that those particular services are not in issue. Is that right, Mr. Smith?

Mr. Smith: That is right.

Exam. Brown: We are only considering the unloading charges as such from an issue standpoint, right?

Mr. Smith: That is correct.

Mr. LaRoe: We go one step beyond the issue standpoint, however, Mr. Examiner, to make our position entirely clear. In addition to arguing that these accessorial charges are not in issue, we make the further contention that they have [fol. 939] nothing whatsoever to do with transportation. In other words, that the transportation ends with simple delivery on the pier and that if the goods are displayed, for example, or sorted according to grade or kind, that is a commercial thing that has nothing to do with transportation. The railroad service ends, we contend—the transportation service ends when the freight is put on the floor of the pier in simple delivery.

By Mr. LaRoe:

Q. Will you go ahead, Mr. Laux?

A. Yes. Then we have certain fruits and vegetables that are for export or for water movement beyond the port and such freight is unloaded without a charge. Some of the commodities are similar particularly when referring to potatoes, apples, grapes, plums and pears.

Q. Do you contend that the rail carriers are not entitled to compensation for the delivery?

A. No. Our contention is that the line-haul rates includes simple delivery, and by simple delivery we mean the placing of the freight on the floor of the pier.

However, we feel that if a car is offered to the carriers with diagram loading of contents, such a car should be made available and accessible to the consignees for unloading to pier station floors with the contents of the car placed on the pier station floor in accordance with the diagram of the car. If the contents of the car are not diagram loaded by the [fol. 940] shipper, such freight should be unloaded from the car to the floor of the pier and stacked promiscuously.

Where it appears necessary, in the interest of auction purpose or for negotiating sales in the pier terminal areas, that the contents of cars be sorted according to grades, sizes, kinds, brands, marks or other designations or stacked in some special order for inspection before sale, these serv-

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ices undoubtedly are of worthwhile benefit to the trade, consignees, shippers or owners. Such services are beyond the carriers' transportation function. Therefore, the cost thereof should be in addition to the transportation charges of the carriers. Stated differently, the common carriers should make the car accessible for delivery at the line haul charges. However, where the terminal facilities or piers are offered for use as a sales mart, an adequate charge would be reasonable to compensate the carriers for making their premises available.

Q. Have you any ideas as to what charge should be assessed where service and facilities of the carriers are in the interests of sales?

A. Nothing definite, but it is perhaps a fact that the charges provided under the carriers' Rule M-65, my exhibit No. 96, are inadequate and may be a more compensatory charge for the carriers would be the charge of 4¾ cents per 100 pounds, such as provided already today in connection with the dairy products under Rule M-67, my exhibit No. 95.

[fol. 941] Q. Is it your view that the unloading of freight to a platform accessible to the consignee is required as part of the line-haul service?

A. Yes. Where floating is employed in lieu of rail switching and cars are delivered on floats alongside of piers.

Q. Is it also your position that this privilege applies to fresh fruits and vegetables as well as any other commodity?

A. To do otherwise would be unjust, unreasonable, prejudicial and discriminatory, in the face of the carriers' practices in performing without added charges unloading and loading services for every other commodity, including fruits and vegetables, when for export or imported, coastwise and intercoastal. The freight rates are published for application to New York, N. Y., and it is the carriers' duty to make accessible to consignee or owners cars consigned to New York at the carriers lawfully provided and advertised New York pier stations and at which other freight is handled between cars and the carriers' pier station floor or platform, without an added charge.

Traditionally the practice of unloading at the pier stations has been in effect for over half a century and where

the terminal service has always been treated by the carriers as part of the transportation service covered by the freight rate and regularly performed by the respondents over such a long period the carriers should not now be permitted to segregate that service and assign to it a separate charge without taking into consideration the entire through serv-
[fol. 942] ice of which it forms a part and the consideraton received for such through service.

The carriers recognize that by reason of physical conditions the economy of operation, inadequacy of team tracks and obligation to accomplish delivery of property at the pier stations to unloading the freight to the pier floors making some accessible to the consignee for the reason that this is and has been a practice with regard to all types and character of freight, the fresh fruits and vegetables now being the only exception.

Q. I confess a little confusion on my own part with respect to the first part of your answer up there. You say without extra charge for the unloading service for every other commodity, including fruits and vegetables when for export or imported, coastwise or intercoastal. It was my understanding from your previous testimony that all carload freight in packages, whether for local delivery or for coastwise or intercoastal or export or import is unloaded on these piers without charge and that fruits and vegetables are the only exception, except possibly as to the Pennsylvania Railroad.

A. That is correct.

Q. Well then, you did not intend to give the impression here that this free unloading for all other commodities is limited to the coastwise or water movement. It applies to local movement.

[fol. 943] A. Yes, sir.

Mr. Wells: Pardon me, may I ask for further clarification there, Mr. Laux?

The Witness: Yes.

By Mr. Wells:

Q. Mr. Laux, on imported fruits and vegetables, isn't there an unloading on the same piers without any additional charge to the consignee, and doesn't the records you have

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there, exported or imported, refer primarily to your fruits and vegetables?

A. Yes, sir. It refers to the fruits and vegetables that are moved either outbound by water beyond the rail carriers' facilities or inbound by water to the rail carriers' facilities.

By Mr LaRoe:

Q. That is to say, if some fruit comes in from Italy or any other place abroad, it will be loaded into the cars without charge, but if it is Florida fruit, there is a charge for unloading?

A. That is right.

Mr. LaRoe: Does that cover your point?

Mr. Wells: Yes.

By Mr. LaRoe:

Q. Does that complete your testimony?

A. It does, sir.

Mr. LaRoe: Witness may be cross examined.

Exam. Brown: Before we proceed with the cross examination, I think this should be straightened out in the record. During the course of your testimony, you stated that a [fol. 944] car should be made available and accessible to the consignees for unloading to pier station floors with the contents of the car placed on the pier station floor in accordance with the diagram of the car.

The Witness: That is right.

Exam. Brown: It might be inferred, perhaps, from that statement that you meant that the contents of the car should be made available and accessible to the consignees so that they might unload themselves. That was not intended?

The Witness: No, that was not intended.

By Mr. LaRoe:

Q. Will you explain what you did mean there?

A. My testimony ran along the line that if a car arrives at one of these pier stations with freight in it, that was loaded by the shipper according to a diagram, that the carrier in making the contents of that car available to the

owner on the pier floor should be responsible for placing the contents of that car on the pier floor in accordance with the diagram covering the unloading of the car by the shipper.

Exam. Brown: Do you wish to offer your exhibits, Mr. LaRoe?

Mr. LaRoe: If you please, sir.

Exam. Brown: Exhibits 73 to 96, inclusive. Any objection?

(No response)

Exam. Brown: They are received in evidence.

(Protestants' Exhibits 73 to 96, inc. witness Laux, received in evidence.)

[fol. 945] Exam. Brown: Are there any further questions coming under the head of direct examination of this witness?

Mr. Wells: May I ask one additional question about the query I put a moment ago?

Exam. Brown: Proceed.

By Mr. Wells:

Q. Actually, Mr. Laux, do you know whether there is citrus fruit and possibly tomatoes from Cuba and the Isle of Pines and grapefruit from Puerto Rico that is actually unloaded on to piers that are involved in this proceeding, but without any charge whatever to consignee?

A. Well, I understand that there are imports of those commodities from those countries, and that those commodities are loaded by the railroads without any extra charge, but whether the loading is performed at these particular pier stations, I could not say. I am not sure about that.

Q. This question is unloading, unloading on to the pier floor.

Exam. Brown: The witness answered with respect to loading. I do not think he meant loading. I think he meant unloading. What is the situation? Did you mean to answer from an unloading standpoint?

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Mr. LaRoe: Let us get the question clear.

The Witness: I thought Mr. Wells was talking about imports.

By Mr. Wells:

Q. I am speaking, for example, about a shipment of grapefruit from Puerto Rico, that might come from Puerto Rico by ship into the Port of New York and is placed on [fol. 946] a lighter and brought alongside one of these particular piers and unloaded on to the pier floor by railway labor, and in that case, there is no unloading charge on to the pier payable by the consignee.

Mr. Donadio: Ask him if there is any such practice, if anything like you suggest in your question takes places.

By Mr. Wells:

Q. My question is, is that true?

A. Well, on imported fruits and vegetables, the carriers performed loading without charge, loading to cars.

Q. Unloading on the imports coming in and delivered on the pier?

A. From the lighter. Well, I am not clear as to that. I do not think I understand your unloading part of the question.

Exam. Brown: We will have a short recess and clear it up after recess, at which time we will also take up the cross examination.

(A short recess was taken)

(Off the record)

By Mr. Wells:

Q. Mr. Laux, in an effort to clarify the question a moment ago, do not the unloading charges on fruits and vegetables at the North River Pier referred to in your exhibits and testimony apply only on fruits and vegetables delivered by rail?

A. That is right.

Q. And the tariffs in question provide that those unload- [fol. 947] ing charges will not be assessed against imported

fruits and vegetables that may be unloaded and delivered to the same pier?

A. That is correct where the railroad participates in that movement, and it is also correct where a railroad pier is used by a steamship line that brings in fruit and places the fruit on the railroad premises for delivery.

Q. In other words, if there is not an antecedent rail movement of the fruits and vegetables, although it is unloaded on this pier, the consignee does not pay this particular unloading charge?

A. That is correct. That works that way. He would not pay that charge.

Exam. Brown: While we are on that subject, do you know whether or not there are actual unloadings under that term at the present time?

The Witness: You mean on this water freight?

Exam. Brown: That is right.

The Witness: Well, on this foreign traffic there has been occasions where some of the railroad piers have been used, particularly Erie, I believe.

Exam. Brown: My question has reference to the present time. In the past I think it probably would be conceded that there has been none.

The Witness: Frankly, I could not say, Mr. Examiner, as to the present time.

[fol. 948] Exam. Brown: Tariff provisions are available if there is such an unloading?

The Witness: That is correct.

Exam. Brown: Cross examine.

Mr. Smith: I have no questions, Mr. Examiner.

Cross-examination.

By Mr. Miller:

Q. Mr. Laux, I understood you to say in your testimony that at one time, at least, watermelons were unloaded at these pier stations; is that correct nowadays?

A. I am not sure whether watermelons are still unloaded or not. There was a time that they did bring the watermelons over to New York piers. I understand, too, that the carriers find it more convenient to keep the watermelons

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on the Jersey side and delivery it to trucks and perhaps make some allowances from ferryages.

Exam. Brown: At the last hearing, it was understood unanimously that watermelons were all unloaded on the Jersey side at that time. You do not know whether there has been any change in that situation?

The Witness: No, I do not.

By Mr. Miller:

Q. Can you explain to me how these charges are prejudicial to the Port of New York Authority, if you know?

A. Well, they are prejudicial because it sets up a charge in the port district which is not applicable in other parts [fol. 949] of the district. For instance, these charges would be assessed on freight at the Manhattan piers and cars are made available on the Jersey side where deliveries could be accomplished by the receiver having access to the car door.

I should like to mention, too—you mentioned watermelons, my testimony in regard to watermelons. I think I mentioned melons and not watermelons, which covers a variety.

Mr. LaRoe: Perhaps counsel should really answer that question. Mr. Miller, we do not contend that the Port Authority, as an agency, is prejudiced. Our contention is that we have a duty under the statute to see that the port is developed as a whole, and without discrimination, and that this hurts one of the parts of the port as against another and some shippers against others, and some traffic as against others. The port authority, however, does not sell watermelons.

By Mr. Miller:

Q. Can you tell me whether the Port Authority would be opposed to a reduction in the level of charges at Philadelphia as compared with those at New York?

A. Which charge are you talking about?

Q. These charges.

A. Unloading charges? Our position is simply this—I

think I made it plain in my testimony—we want the charge abolished entirely. We are not concerned directly.

Q. I understand that, Mr. Laux. My question is, would you be opposed or in favor of a difference in charges for unloading this traffic at Philadelphia as against New York.

[fol. 950] Mr. LaRoe: To the disadvantage of New York.

By Mr. Miller:

Q. Well, assuming that the charges would be lower at Philadelphia than at New York.

A. Well, my answer would be, we are opposed to any kind of a charge, whether it is lower or higher. If there is a charge, we are against it.

Q. Assuming there is going to be a charge at both places, would you be opposed to or in favor of the publication of lower charges at Philadelphia?

Mr. LaRoe: I do not think we should be called upon to answer that, Mr. Examiner, because it is not in issue. I want to be frank with counsel; in similar cases in the past we have taken the position of opposition to anything that would operate to the disadvantage of New York in that manner, and I should think we probably would take that same position if an attempt were made to favor Philadelphia. But that issue is not here.

Mr. Miller: The issue is raised, Mr. Examiner, by a number of the petitions for reopening and reconsideration.

Exam. Brown: That is correct. And the question is what is the position of the Port of New York Authority. I think that is a question you might ask of counsel.

Mr. Miller: Very well, Mr. LaRoe.

Mr. LaRoe: Well, our position regarding that is that, as [fol. 951] Mr. Laux has well explained, there should be no charge for unloading at all. Now, if there is a proposal to favor Philadelphia in that matter, I should think that we would have to oppose it. But our Port Authority has not acted on any such thing as yet, and I am hesitant to take the position in absence of official action.

In other words, I, as a lawyer, cannot determine their policy. I can only determine what their policy will be, and I think it will be a policy of opposition.

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Exam. Brown: When you refer to discrimination and prejudice during the course of your testimony, then you were not referring to Philadelphia in any respect?

Mr. LaRose: We were not, no, sir.

The Witness: No, sir.

Exam. Brown: Is that satisfactory along those lines?

Mr. Miller: Yes, sir. That is all.

Exam. Brown: Any questions, Mr. Brown?

Mr. Brown: No questions.

Exam. Brown: Mr. Donadio?

Mr. Donadio: No questions.

Exam. Brown: No more questions for respondents.

Mr. Fitzgerald: Mr. Examiner, may I move that the last question of Mr. Miller's be stricken from the record? I think it was improper. This witness did not testify as to Philadelphia in any respect.

[fol. 952] Exam. Brown: Well, is there any statement that the witness made harmful to the City of Philadelphia?

Mr. Fitzgerald: No, sir.

Exam. Brown: I do not see any reason why we should strike it. I think it is well to know what the position of New York Port Authority is. We will let the record stand as it is. Redirect.

Mr. LaRoe: No redirect.

Exam. Brown: That is all, Mr. Laux; thank you.

(Witness excused.)

Mr. LaRose: I call Mr. Walter P. Hedden, please.

Walter P. Hedden was sworn and testified as follows:

Direct Examination.

Mr. LaRoe: Mr. Hedden has no exhibits; only the prepared statement that is being circulated now. There will be a few last minute changes in the printed testimony, but I will call your attention to it when we come to that point.

Exam. Brown: You are referring to the prepared testimony?

Mr. LaRoe: Yes, sir. Has he been sworn in, Mr. Examiner?

Exam. Brown: Yes.

By Mr. LaRoe:

Q. Will you give your name and address?

A. My name is Walter P. Hedden. My business address is 111 Eighth Avenue, New York 11, New York.

Q. Please state your present duties and briefly summarize the experience which qualifies you to testify on the issues [fol. 953] in this proceeding?

A. I am Director of Port Development for The Port of New York Authority. I have been in the employ of the Port Authority for 27 years in various capacities, having to do with terminal and transportation improvements and the protection and promotion of traffic into and through the Port of New York.

In 1922 and 1923 I also acted as Research Agent for the U. S. Department of Agriculture in charge of studies for terminal improvements and more efficient distribution of fresh fruits and vegetables in the New York metropolitan area.

Q. Throughout your career with The Port of New York Authority have you paid particular attention to projects and operations in connection with the delivery of fresh fruits and vegetables to the New York wholesale market?

A. Yes. I was in charge of comprehensive studies of this subject which were made as early as 1922 and 1923, jointly between the Port authority and the U. S. Department of Agriculture. I have kept closely in touch with it ever since. Recently I had the immediate responsibility for preparation of proposals submitted by the Port Authority, at the request of the Mayor of New York, under date of February 10, 1948, for rehabilitation and reconstruction of the New York City's waterfront, including the waterfront piers used for the delivery of fresh fruits and vegetables by rail. [fol. 954] Q. Are you familiar with the methods of delivering fresh fruits and vegetables by rail and other means to New York City, the merchandising practices, the rate structure, the distribution to dealers and consumers and other physical and economic factors affecting this problem?

A. Yes.

Q. Have your duties also required you to become generally familiar with the delivery of other types of freight to Manhattan Island and other portions of the Port of New

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York and to acquaint yourself with operations in connection therewith?

A. Yes.

Q. Have you testified previously in this case?

A. No. The Port of New York Authority has been a party to the case since the beginning but our testimony in the original proceeding was presented through Mr. Philip Kraemer, our assistant traffic manager. My testimony will cover aspects which have occurred since the original hearings or were not developed adequately in previous testimony in behalf of the Port Authority.

Q. Will you state briefly the facts and reasons why deliveries of fresh fruits and vegetables by rail are made primarily to the pier stations on Manhattan Island, the locations of which have been described in greater detail by previous witnesses?

[fol. 955] A. Approximately 75 percent of the fresh fruits and vegetables consumed in the New York market are delivered in an area along the waterfront of Manhattan Island, between Barclay Street on the south and Canal Street on the north. It is within this area that the pier stations of the Pennsylvania Railroad, Erie Railroad, B & O Railroad and New York Central are located. These railroads are the principal carriers of fresh fruits and vegetables to the New York market.

The balance of the deliveries are made to chain store warehouses or are northern potatoes, and other types of vegetables and fruits which are delivered to team tracks or sidings in other parts of the district because they have special physical characteristics.

From a price-making standpoint individual lots of these decentralized commodities are not highly differentiated and they do not have to seek a central market when buyers and sellers meet for auction sales or private bargaining on the basis of the available daily supply and demand at that point.

The principal consuming population served by the New York wholesale market lies East of the Hudson River. About 80 percent of the volume delivered to the New York wholesale market area is distributed to consuming points East of the Hudson River.

The wholesale market, for many years, has been located

in the lower Manhattan area and the original considerations [fol. 956] which led to the location at this point have been fortified by the growth of facilities in this area to receive, sell and store these perishable commodities. Today there are 18 cold storage warehouses, with a gross of 13,000,600 cubic feet of cold storage space within 2½ miles of this wholesale produce centre. The railroads established their delivery terminals on this waterfront during the latter part of the nineteenth century and since 1900 have concentrated their fruit and vegetable deliveries at this point.

In 1927 and 1928 the Pennsylvania and Erie Railroads spent substantial sums in reconstructing the pier stations which they leased from the City of New York to improve them for handling fresh fruits and vegetables.

Q. If fresh fruits and vegetables are to be delivered by rail to terminals on Manhattan, do you regard the method of delivery of cars on floats alongside a waterfront station as a more economical and feasible method than an attempt to deliver these cars over a floatbridge to a team track?

A. Yes. Operationally there are only three possible alternative methods of delivery to Manhattan Island, none of which are economically practicable for the volume of fruits and vegetables which must be handled.

Q. Will you explain?

A. Only one of the carriers, the New York Central, has and all-rail line into Manhattan Island for freight deliveries. [fol. 957] This trackage, which is known as the West Side Line, enters Manhattan from the north over a low-level bridge at Spuyten Duyvil and continues south as far as Spring Street, to a station not far from the present wholesale market area. There are intermediate yards at various points, principally at 60th Street and 30th Street. This west side line, formerly operated over the City streets, but was reconstructed in 1930-32 at a heavy cost to the railroad. It has limited capacity and could not handle expeditiously the volume of fresh fruits and vegetables which are delivered to the New York market by rail even if the line were opened by interline tariff agreements to roads other than the New York Central.

It is significant that many cars of fresh fruits and vegetables delivered by the New York Central for trading in

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the wholesale market are carfloated to the pier stations of that railroad in the vicinity of Barclay Street.

A second theoretical possibility is the construction of a Trans-Hudson Bridge or terminal for railroad freight. A system of underground freight tunnels between New Jersey and Manhattan for delivery of cars of fresh fruits and vegetables and other freight at underground stations was considered in 1920 in great detail by the New York-New Jersey Port and Harbor Development Commission. Aside from the heavy cost of such a system it would be practicable for fresh fruits and vegetables only if trading could be conducted on a sample or grade basis and deliveries made [fol. 958] at several decentralized stations. In my judgment and many others who are familiar with the characteristics of these products, and the considerations governing their sale, such a change in method is not practicable.

The third method, available to the railroads in some degree at present, is the floating of the produce cars across the River on car floats and the switching of the cars across a float bridge into a team-track yard or alongside of the delivery platform. Certain railroads have limited facilities of this type on the west side of Manhattan in an area between West 26th Street and West 37th Street.

These team-track yards, served by a float bridge, are limited in capacity and deliveries thereto have to be trucked to the central wholesale market area.

I might interpolate in my prepared statement, Mr. Examiner, that the working capacity of those team-tracks, based upon the estimates of the agents, are as follows: Pennsylvania Railroad West 37th Street yard, 130 cars; Erie West 28th, 35; Lehigh Valley West 27th, 74; B. & O. West 26th, 56.

Also, I might state at this point that the working capacity of the New York Central 33rd Street yard served by the all-rail line is in the neighborhood of 350 cars, but it is heavily used, as are all of these, by other than fresh fruits and vegetables.

[fol. 959] Mr. Miller: Mr. Hedden, could you tell me—you said you got these figures from the agent. Do you mean they are taken from the testimony at the last hearing?

The Witness: No, sir. Our own staff periodically inter-

views the railroad agents for many facts, and these were the latest figures, right up-to-date, as to what they thought could be handled at a point accessible to a truck.

Exam. Brown: You have given figures for the New York Central team-tracks which are served by the float bridges.

The Witness: I did not separate those. That yard is accessible both from the all-rail line and from the float bridge. The 350 cars covers both of them.

Exam. Brown: You made no breakdown?

The Witness: No, I have not.

Exam. Brown: In other words, those yards will handle the rail freight coming in by the physical lines and also across the River by car floats?

The Witness: Yes. They are all heavily used, all of them, by non-perishables.

A. (Continuing): Consideration has been given from time to time to a plan for attempting to unify deliveries by rail to a large joint team-track yard with added facilities for receiving produce by other modes of transportation, selling, storing and distributing. Such a plan for switching cars off the floats into yard tracks and platforms has never been [fol. 960] advocated for Manhattan, because of the high cost of the real estate which would have to be acquired for such a terminal.

Aside from the economical impracticability of such an operation on Manhattan Island because of the high value of land, such an operating procedure, in my judgment, would not have capacity for handling cars across float bridges by switch engines in the heavy peak periods.

The existing practice of floating cars to Manhattan Island and discharging the freight to the deck of a waterfront station without taking the cars off the floats is the most feasible and economical method.

Under this system the waters of the Hudson River, within the pier-head line, are available to the railroads for floating car yards. The cost of acquiring the land space on expensive Manhattan real estate for the spotting of an average of 500 cars per day and a peak of 1,000 per day throughout the busiest season, is eliminated.

This is the most important factor to consider in equating the cost of delivery by float to a waterfront station as

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against delivery over a float bridge to adjoining upland area team-tracks.

Mr. LaRoe: Now, at this point, Mr. Examiner, there is an insert that is not in your prepared copy. Just one question and answer, so I wish you would listen carefuly to this.

Q. How much space on the Manhattan waterfront is now [fol. 961] used by the railroads at the fruit and vegetable piers, and what would it cost them, in your judgment, to acquire equivalent upland space to spot cars at teamtracks?

A. The total area occupied by the railroads at Piers 16, 17, 20, 21, 22, 27, 28 and 29 North River is about 40 acres, of which 20 acres are the pier structures themselves and the balance the water slip between the piers which are used as floating car yards to hold the cars on floats and to switch them in and out with tugs.

Real estate in the upland along the waterfront in the vicinity of the present produce piers, according to our calculations, would run about $800,000 per acre. To acquire 40 acres of such property would cost in the neighborhood of $32,000,000. The taxes and interest which together came to at least 6 percent, would approximate $2,000,000. At 100,000 cars per annum this would be $20.00 per car.

In the vicinity of the present team-track yards on Manhattan between 28th and 37th Streets, there is comparatively litle room for expansion since the upland begins to rise at 11th Avenue. Land in that vicinity costs about $400,000 an acre. Using the same method of calculation, the interest and taxes per annum would be at least $10.00 a car for a location in that area.

The reliance upon waterfront stations by the railroads serving Manhattan is not confined to fresh fruits and [fol. 962] vegetables. Today the railroads occupy approximately 35 City-owned piers on the Manhattan waterfront for the handling of freight of all descriptions in which the delivery by car float and necessary removal of the lading to an adjoining platform to make it accessible to the consignee is identical.

Q. Have the Port Authority and other public agencies considered, from time to time, the establishment of facilities designed to increase the efficiency of delivery of fresh fruit and vegetables to Manhattan Island?

A. Yes.

Q. Have these plans contemplated a continuation of the basic system of delivery of cars on floats alongside a waterfront station and the removal of the lading to the station platform as part of the transportation function of the carrier?

A. Yes. Plans for such terminals to accommodate all of the railroads in substantially the same location of their present terminals were developed as far back as 1921 by the then Commissioner of Docks of the City of New York in cooperation with a trade committee. Subsequently, both the City of New York and the Port Authority developed plans similar in this respect, but differing in other details, in the years between 1928 and 1948.

Q. Without going into a detailed description of these plans, will you state whether the improvements which the Port Authority or the City proposed to finance in the [fol. 963] interest of greater economies of operation departed from the basic operational procedure which you have outlined, namely, receiving cars on the floats to be unloaded by the railroad to the station platform?

A. These plans for improved terminals on Manhattan Island all retain this essential feature because no more practicable and economical method of delivering the cars appeared possible.

Q. Was it your judgment and the judgment of others who prepared the Port Authority plans that substantial economies could be achieved in delivery to the pier platform without departing from the basic operational procedure which you have outlined, that is, the unloading of the lading from the car to the platform by the carrier?

A. Yes. By establishing a union waterfront terminal which would reduce the overhead charges against each car through combining the alternating traffic peaks of the several individual carriers and providing an operation susceptible to efficient overall control of labor services, and using extensive modern platform-handling equipment, it was my judgment that the project would be financially self-sustaining from an overall standpoint if the entire revenues from the carriers for furnishing the use of the terminal and paying for the unloading equal $2.00 a ton. This figure was

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not only adopted in the revenue calculations of the project upon which an offer was made to the City of New York to build a union terminal at a cost of $27,000,000 on February [fol. 964] 10, 1948, but it was also the basis of my discussions with the railroad general managers at about that time. The costs were upon the wage levels of 1947.

Q. Let me get this clear. You say that you, as representative of the Port Authority, discussed with the railroads a proposal which had been made to the City of New York with the official approval of your Board under which they would be furnished a union waterfront terminal at which they would deliver freight in car floats and assume responsibility for unloading the freight to the platform at a cost of $2.00 per ton which would cover not only the unloading but the use of the terminal and the maintenance thereof?

A. Yes. We proposed that the Port Authority would finance the terminal and offered to maintain it and to perform the unloading and other services as agent for the railroad. We estimated the cost to the railroad of $2.00 per ton and used that figure in the economic analysis upon which the project was submitted to the City of New York. Our calculations were based upon the wage levels of 1947.

Q. What is the bearing on the issues in this case of your reference to Port Authority's Union Produce Terminal proposals in 1948?

A. My purpose is to stress that the most economical plan of terminal handling of fresh fruits and vegetables to Manhattan Island which we could devise, called for holding [fol. 965] the car on the float in accordance with the present practice and making the delivery to the station platform to effect final delivery to the consignee.

Q. Did not you make a further supplemental report on this subject to the City of New York at the request of Mayor William O'Dwyer in 1949?

A. Yes. Following the Board of Estimate hearings previously referred to—I am not sure I did previously refer to it. Anyway, Board of Estimate hearings were held in July, 1948, and the Board of Estimate of New York City, in September, 1948, rejected the Port Authority proposal in favor of going ahead with its own general program of waterfront rehabilitation and improvement.

However, on December 3, 1948, the Port Authority was again requested to review its entire proposal for the rehabilitation of the shipping and railroad piers at a cost of $114,000,000 and to transmit a supplemental report which might be more financially attractive to the City.

In compliance therewith the Authority submitted a report on April 27, 1949. In this supplemental report, the Port Authority withdrew that part of its proposal which dealt with the $27,500,000 Union Produce Terminal and referred to the change occasioned by the Interstate Commerce Commission's decision in October 19, 1948, which approved the assessment of a separate fruit and vegetable unloading [fol. 966] charge at Manhattan waterfront terminals. The subject was discussed at some length but was summarized in the three paragraphs appearing in the letter of transmittal which said—and I am quoting now from the letter of transmittal of the supplemental report to the City of New York dated April 27, 1949:

"The change in railroad practice was approved by a split decision of the Interstate Commerce Commission, effective on November 1st. The Port Authority had energetically opposed the imposition of the extra charge. An appeal for reconsideration of this decision is now pending before the Interstate Commerce Commission on petition of the Port of New York Authority and shippers and receivers. However, there is no certainty that this appeal wil lbe given favorable reconsideration. There has been a substantial reduction of rail deliveries of fresh fruits and vegetables to the lower Manhattan piers, and a shift in the comparative costs of such delivery as between the lower Manhattan waterfront and other delivery points.

"Furthermore, there is no certainly that the reversal of the long-established practice of delivering fresh fruit and vegetable consignments and making them accessible to consignees by unloading the cars at Manhattan waterfront stations, may not presage other changes which will further affect the economies of a waterfront produce terminal location.

[fol. 967] "It is the firm conviction of the Port Authority that the plan for a modern terminal market as outlined in the previous report of February 10, 1948, still represents a

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sound and efficient method of reducing the costs of handling this produce, and the elimination of the present congestion in the market. However, the addition of a separate charge for delivery at the lower Manhattan piers raises a serious question of whether it is safe to risk the investment of $27,500,000 at this location until the method of assessing railroad charges has been further clarified."

Q. In withdrawing the proposal for the Union Produce Terminal, in lower Manhattan, the Port Authority's report to the City of New York on April 27, 1949, referred to the shift in rail deliveries of fresh fruits and vegetables to lower Manhattan piers. Will you develop that point a little further?

A. I think your question, if I may say so, Mr. LaRoe, would be better if the "to lower Manhattan piers" was changed to "from lower Manhattan piers."

Q. That is right, "in rail deliveries of fresh fruits and vegetables from lower Manhattan piers."

A. Effective on shipments after November 1, 1948, the railroads making deliveries at the lower Manhattan pier stations assessed charges for the unloading of fruits and vegetables. As a result the deliveries to these stations increased from $1.95 to $2.60 per ton, above the rate for team-track delivery was available either east or west of the [fol. 968] Hudson River. The immediate result was an attempt on the part of the shippers or receivers to avoid paying the extra charges, by taking rail deliveries at these outlying team-track stations and paying the cost of trucking into the market, or by shifting from rail to over-the-road motor truck for the line haul. In February, 1949, deliveries of fresh fruits and vegetables to the Manhattan pier stations were off nearly 50 percent from the same period of 1948. Only 2,828 cars were delivered by carfloat to Manhattan piers in February, 1949, as compared to 5,450 in February, 1948. During the same period truck and boat receipts increased by 1,135 carload equivalents. Rail deliveries to team-tracks in the New Jersey waterfront yards increased by 915. In April, the deliveries at the Manhattan pier station were down by 2,471 cars, the boat and truck receipts were up 1,156 and the New Jersey team-track deliveries were up 845.

Substantially all of the produce which was shifted from the Manhattan pier stations had ultimately to be taken to the lower Manhattan market for primary sale. The shift to the over-the-road trucks certainly did not help the railroads. The diversion of rail cars from Manhattan piers to scattered team-tracks in New Jersey and New York, although it may have saved individual shippers or receivers a small margin of cost to the extent that the trucking to the market was less than the unloading charge assessed at the railroad pier [fol. 969] stations was not beneficial to anybody. The railroads were forced to make deliveries at yards which were not adequate. The increased movement through the streets in the congested central market area created greater traffic problems in an already overcrowded section.

Q. Let me interrupt there to ask you whether ever since the Port of New York Authority was created, this matter of street congestion on Manhattan Island has not been one of the major problems that they have been fighting?

A. Yes, it has been.

Q. And this has made that condition worse?

A Particularly in the market area which is one of the worst congested centers.

Q. All right; go ahead.

(A) (Continuing) The diverson of rail shipments from the pier stations to other points did not establish a new central trading point. It simply intensified the problems of the established market. The net result was greater congestion in terminal handling and dissatisfaction among buyers, labor and other elements concerned in the central wholesale market. From the standpoint of progress in bringing about some orderly plan for the modernization of the central wholesale area, the assessment of the charge for unloading caused a severe setback.

[fol. 970] As long as the marketing of fresh fruit and vegetables requires a central trading point for the majority of the receipts, and such trading point is east of the Hudson River, so that rail delivery must be made in floating equipment, real progress in reducing handling costs, wastage, street congestion, can be achieved only through a plan for providing a modernized waterfront terminal. At such a terminal rail deliveries by carfloat must include delivery of

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the freight to a point accessible to the consignee without extra charge for such delivery, or nobody can count on a continued volume flow of the cars direct to the terminal.

The imposition of the extra loading charge has demonstrated that it serves to scatter deliveries to points where the charge is not assessed, requiring local trucking into the market, with increased local street congestion, disorganization of trading, more waste and confusion.

Q. The Port Authority has a direct interest in this question of improving terminal conditions and reducing terminal costs for handling food stuffs, does it not?

A. Yes. The 1921 Treaty between New York and New Jersey, which created the Port Authority, touched at several points on the necessity for better co-ordination of terminal transportation and other facilities of commerce, which was expected to result in economies benefiting the entire nation, as well as the two States.

[fol. 971] The Port Authority was expected to encourage the investment of capital in development of terminals which would be more efficient and was given powers itself to finance and construct such terminals and, in addition, was directed to cooperate with Federal, State and Municipal officials in improvements of this character.

Q. And in accordance with these objectives, the Authority has actively planned and proposed such improvements?

A. Yes, as I have outlined heretofore.

Q. You regard the imposition of an extra charge for performance of the carriers' obligation to deliver freight at a point accessible to the consignee is not only contrary to the proper interpretation of its transportation obligation, but also detrimental to attempts to plan and carry out terminal improvements such as you have described?

A. Yes, and that goes for not only fresh fruits and vegetables but any other commodities to which this same plan might be applied. We see no valid distinction between unloading a carload of oranges from a car to place it on the platform of Pier No. 28 of the Pennsylvania Railroad, where the consignee can pick it up, and the unloading of a car of butter at the DL&W Pier No. 13 in the same general vicinity.

Nor for that matter is there any difference in principle

between a carload of oranges unloaded on Pier No. 28 and a carload of plumbing fixtures unloaded on Pier No. 29. [fol. 972] Neither is accessible to the consignee on the carfloat.

Our proposals to the City of New York for improvement in the methods of delivering railroad freight to Manhattan waterfront stations were not confined to the proposed Union Produce Terminal. We proposed four consolidating stations on the waterfront for other freight, delivered to Manhattan Island by carfloat.

If these plans are ever to be carried forward, it is necessary that the float delivery method at union pier stations not be subjected to an assessment of an extra charge to make the freight accessible to the consignee. Otherwise, consignees would inevitably scatter cars to such team-tracks as are available, and there are not very many, with the result that a substantially increased burden would be thrown upon the streets and highways in an already congested area.

Q. Are you generally familiar with the physical operations in connection with the unloading of both fruits and vegetables and other commodities from cars on floats at waterfront railroad stations?

A. Yes. I have observed the operations many times and have supervised studies of the physical operations.

Q. In the case of fresh fruits and vegetables is there a distinction in your mind between the basic process of unloading a car to make the lading accessible to consignees and other auxiliary services that may be performed with or [fol. 973] without specific compensation in conjunction therewith?

A. Yes. What I call the basic delivery under the railroad's obligation to make the freight accessible to the consignee, it is necessary to bring the lading from the car on the float to the platform at a point to which the consignee's truck can come. Any special sorting, stacking or display other than that required to put the consignee's freight from a given car into the same section is a service over and above the basic delivery. So is recoopering. So is the furnishing of space on the station platform for selling.

Mr. LaRoe: Now I have another insert of one question there which is not in the prepared testimony.

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Q. There has been a great deal of confusion as to what services are performed at the produce piers and their relationship to the issues in this proceeding. Will you endeavor to clarify this situation?

A. The fruit and vegetable terminals of the railroads are used for three purposes. First, it is the place where normal unloading from carloads to the pier platform takes place so that the consignee can get his freight. Beyond the unloading some consignees request, and the railroad performs, certain sorting, stacking services for which an extra charge is made. Thirdly, some consignees make use of the space on the piers for selling and some do not.

As I see it, the only issue in this proceeding is whether [fol. 974] the railroads should be permitted to make a charge for the normal unloading. The question of any services performed at the request of the consignee and the adequacy of the compensation therefore for such things as stacking, sorting, use of the space on the pier for sales, are not an issue in this case, and should not be confused with it.

Q. I suppose that you are not taking any position here with regard to what compensation, if any, the railroads should get for the services that go beyond simple delivery on the floor of the pier?

A. No. I do not understand that there is any point in issue on that.

Q. But you are taking the position, as I understand you, that the imposition of this extra charge for simple delivery on the pier has thrown a monkey wrench into the plans of the Port Authority and the City for the improvement of this situation?

A. Yes, they have.

Q. To the extent of causing the Port Authority to withdraw a 27 million dollar offer?

A. That is correct.

Mr. LaRoe: You may cross examine.

Exam. Brown: No further questions on direct?

(No response.)

Exam. Brown: All right, Mr. Miller.

Cross-examination.

[fol. 975] By Mr. Miller:

Q. Under this treaty of 1921 between New York and New Jersey, which you refer to, Mr. Hedden, can you tell me what is the area which is subject to the jurisdiction of the Port of New York Authority?

A. It is defined by specific means and bounds, but for purposes of quick characterization, it is the area in both states, New York and New Jersey, within about a 25 mile radius of the Statue of Liberty.

Mr. Miller: That is all.

Mr. Smith: I have no questions, Mr. Examiner.

Exam. Brown: No further question from the respondents?

(No response)

Mr. LaRoe: No redirect.

Exam Brown: During the course of your testimony, you stated that the principle consuming population served by the New York wholesale market lies east of the Hudson River. Also, that about 80 per cent of the volume delivered to the New York wholesale market is distributed to consuming points east of the Hudson River. I consider that statement somewhat vague. I think you should explain what you mean by the term "east of the Hudson River" and I think you should also tell us where the other 20 per cent goes.

The Witness: The phrase "east of the Hudson River" means the New York City, Westchester County, Nassau, and Suffolk Counties, which are on Long Island, east of New York City, any redistribution into Connecticut, and [fols. 976-981] any redistribution into the Counties of New York State east of the Hudson River, north of Westchester —there is a very insignificant part that goes in that area— but I would say I am talking about greater New York City, plus Westchester, Nassau and Suffolk Counties, and to a limited extent Connecticut.

Exam. Brown: How about the other 20 per cent?

The Witness: The other 20 per cent is trucked back to either northern New Jersey or points, in a few cases—very minor—where they go on through the State of New Jersey

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to a point in Pennsylvania. During summer vacation seasons, some of the buyers out there draw their supplies from the New York market.

Exam. Brown: Any further questions of this witness?

(No response)

[fol. 982] G. C. SPANGLER was sworn and testified as follows:

Direct examination.

By Mr. Augello:

Q. Mr. Spangler, will you give us your name and position that you hold with your company?

A. My name is G. C. Spangler and I am the traffic manager for Tassini and Salisch, located at 363 Washington Street, New York City.

Exam. Brown: Traffic manager of what organization?

The Witness: Tassini and Salisch.

By Mr. Augello:

Q. Are they receivers of fruits and vegetables?

A. They are.

Q. Will you please give us your experience in the transportation field?

A. I have been in the transportation field of fruits and vegetables over a period of about 25 or 30 years.

Q. Have you worked for a railroad?

A. For a private refrigerator carline, the Pacific Fruit Express Company.

Q. Who is that owned by?

[fol. 983] A. I understand it is owned by the Union and Southern Pacific.

Q. How many years were you employed by the Pacific Fruit Express?

A. About 10 years.

Q. And how many years have you been employed as traffic manager for your present connection?

A. 15 years.

Q. In the course of your duties, have you had occasion

to visit the New York piers to see the unloading of your vegetables?

A. I have, yes; frequently.

Q. Will you please tell us, for the record, just how that is done?

A. The merchandise is brought over on carfloats and unloaded from the car from off the float on the pier where we take delivery.

Q. And what happens to the vegetables when you take delivery?

A. We truck them to our store in Washington Street.

Q. For sale?

A. For sale.

Q. Is that the usual procedure of all your vegetables?

A. Yes.

Q. And how many cars of vegetables do you normally handle in a year?

A. Approximately 2,000 cars.

Q. Do you take delivery of any of your vegetables at team-track?

[fol. 984] A. We do.

Q. Will you tell us just where those team tracks are located and what proportion of those cars represent your total tonnage?

A. We take delivery on B&O team-track located on 26th Street on the Island of Manhattan, and the percentage of the number of cars that we take at 26th Street would be approximately, without knowing the exact number, 25 percent.

Exam. Brown: 25 percent of the total?

The Witness: 25 percent of the total.

Exam. Brown: This 2,000 carloads was just the fresh vegetables that you received from pier delivery, is that right?

The Witness: 2,000 carloads, Mr. Examiner, would be the total amount received at the pier and the team-tracks.

Exam. Brown: Can you give us a better, a little better breakdown on that?

The Witness: Well, in what way?

Exam. Brown: Well, you included the 2,000 carloads and the others 25 percent. Will you give us the carloads for

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both, approximately? It would be a little more enlightening and save a little mathematical computation.

The Witness: You mean the number of carloads?

Exam. Brown: How many carloads do you receive from pier delivery and how many do you receive from B&O track delivery from 26th Street?

The Witness: Approximately 1500 on the pier and 500 on the team track. That is approximately.

[fol. 985] By Mr. Augello:

Q. Is the method that you just testified to as to the unloading and the delivery by your trucks the same for other receivers of vegetables on those piers?

A. Yes. Without knowing the exact details of the other man's business, I would say yes.

Q. So that as to vegetables, all cars are unloaded and delivery is taken immediately in trucks off the pier and brought into the receivers' stores in Washington Market and sold there, is that correct?

A. That is correct.

Q. That is all.

Mr. LaRoe: I have just a few questions.

By Mr LaRoe:

Q. When the goods come to the pier on the carfloat, and the carfloat ties up to the pier, is there any physical means provided whereby the truck of the consignee can get on to the carfloat?

A. None whatsoever.

Q. Do the railroads permit you to have access to the cars on the carfloat?

A. For inspection purposes, yes.

Q. I mean for delivery purposes.

A. They do not.

Q. You could not, if you wanted to, go on to the carfloat and take delivery of the freight?

[fol. 986] A. No.

Q. Where is the first point where the freight is physically made available to you so that you can conveniently pick it up?

A. On the pier floor.

Q. Now, there are certain services in addition to that of placing it on the pier floor that are sometimes rendered on certain of these commodities. Are they rendered on yours?

A. On some occasions, yes.

Q. Are there any for which you do not pay?

A. No.

Q. Now, it being admitted here this morning that the accessorial charges are not in issue, you take the position, as I understand it, that simple delivery, in order to be accomplished, must reach the floor of the pier, is that right?

A. That is correct.

Q. And there cannot be delivery on the carfloat?

A. No, sir.

Q. And is not delivery on the carfloat?

A. No, sir.

Mr. LaRoe: I think that is all. Thank you. Oh, one moment.

By Mr. LaRoe:

Q. Why did you have 500 cars in the B&O yard? That isn't normal, is it?

A. Well, it is pretty hard to determine the exact number of cars that we handle in the B&O yards because conditions fluctuate from time to time. That depends largely to some extent on commodities that might require handling through [fol. 987] the team track.

Mr. LaRoe: All right, that is all; thank you.

Exam. Brown: Any further questions on direct?

(No response)

Exam. Brown: Cross examine.

Cross examination.

By Mr. Smith:

Q. I have just one question, Mr. Spangler, if I may. You referred to the fact that you take delivery of vegetables on B&O team tracks at 26th Street, and I should like you to tell me whether within the past few months you have

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taken delivery of vegetables on any team tracks other than the B&O team tracks at 26th Street?

A. Just recently, yes.

Q. Would you expand that a little bit and give us some details?

A. Well, it just so happened that we took delivery of two cars of our merchandise at 28th Street on the Erie Railroad, and 28th Street is located on Manhattan Island.

Exam. Brown: Two carloads?

The Witness: Two carloads, and that just happened about 48 hours ago.

By Mr. Smith:

Q. Can you think of any other instances within the past few months?

A. Not on Manhattan Island.

Mr. Smith: That is all.

[fol. 988] Exam. Brown: You left an inference here that this team-track delivery to the extent of 500 carloads—I assume that is per year—was rather unusual.

The Witness: That is right.

Exam. Brown: Well, now, let us find out exactly what the situation is. Take the year 1946. What was your percentage of team-track delivery?

The Witness: That I could not tell you, Mr. Examiner. We use the team-track—we did use the team track during that period for what you might call normal operation.

Exam. Brown: Well, what would normal operations translated into terms of carloads mean?

The Witness: Oh, I would say 250 cars.

Exam. Brown: As compared with a total operation of how many?

The Witness: Of the entire—of our entire tonnage?

Exam. Brown: That is right.

The Witness: It would be pretty hard to say exactly, because our tonnage fluctuates with the season. It would probably reach around 2,000 cars.

Exam. Brown: No, how about the year 1947?

The Witness: 1947 operation would have been approximately about the same.

Exam. Brown: How about 1948?

The Witness: Well, up to a certain period that would be about the same, also.

[fol. 989] Exam. Brown: Now, what period do these figures that you originally gave cover; 1,500 carloads for pier delivery and 500 carloads for team-track delivery?

The Witness: That would approximate between the first of November, 1948, to about now.

Exam. Brown: In other words, that includes both the '48 and '49 seasons?

The Witness: That is right, which figures are not exact because I haven't checked them, but I am giving you estimates which I think are correct.

Exam. Brown: Where did you get these particular estimates, these 1,500 carloads and 500?

The Witness: Where did we get them?

Exam. Brown: That is right.

The Witness: That is——

Exam. Brown: California? Florida?

The Witness: No. These vegetables all originated on what we would term the Pacific Coast States.

Exam. Brown: And moved to the Chicago area and then through Erie?

The Witness: Through St. Louis and Chicago gateways.

Exam. Brown: Most of them moved through Chicago, didn't they?

The Witness: Well, yes, that is right.

Exam. Brown: Now, what carrier handled it from Chicago, handled this tonnage from Chicago?

[fol. 990] The Witness: Baltimore and Ohio Railroad.

Exam. Brown: Exclusively?

The Witness: Yes, I would say exclusively.

Exam. Brown: It did not have any material amount of shipments over the Erie Railroad?

The Witness: He did not.

Exam. Brown: Any further questions, Mr. Miller?

Mr. Miller: No, sir.

Exam. Brown: Any further questions on direct?

(No response)

Exam. Brown: You are excused, sir.

(Witness excused)

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HERBERT E. VOLK, was sworn and testified as follows:

Direct examination.

By Mr. Augello:

Q. Mr. Volk, will you state your name and position with your company?

A. Herbert E. Volk, traffic manager for Robert T. Cochran & Company, Inc.

Mr. LaRoe: Speak up. These people back here cannot hear you.

By Mr. Augello:

Q. How long have you been employed with your present employer?

A. Over 30 years.

[fol. 991] Q. Will you please tell us if you have been on the New York piers in the course of your employment with R. T. Cochran observing the unloading and the delivery of your vegetables?

A. Frequently.

Q. And by the way, are you also a grower and a receiver?

A. Yes, sir.

Q. And where do you get your vegetables from, principally?

A. Florida and the Carolinas.

Q. And what is your total tonnage, approximately?

A. Around 2,000 cars.

Exam. Brown: Per year?

The Witness: Per year.

By Mr. Augello:

Q. In the course of your duties, you say you have been on the piers observing the unloading. Will you please state for the record just what you have observed?

A. On Pier 28 the cars were floated over from Jersey and unloaded from the carfloats on to the pier floor for delivery to the consignee.

Q. At approximately what time is that done?

A. Anywhere between 10 p.m. and 2 a.m.

Q. And what happens after the cars are unloaded by the railroad?

A. The consignee takes delivery and trucks it to his store for sale.

Q. And is that the usual and customary procedure?

A. On vegetables, it is.

[fol. 992] Q. In all cases?

A. In all cases.

Exam. Brown: Are you speaking for your own firm or for all firms in that connection?

The Witness: My own firm.

Exam. Brown: And Mr. Augello asked you if that is the usual procedure. Now, when you answered that, did you answer it in a general way or are you speaking only for your own firm?

The Witness: I could say it in a general way, too.

Exam. Brown: I just want to be sure.

By Mr. Augello:

Q. From your observation, Mr. Volk, that is generally true?

A. That is true because there is no market on Pier 28.

Q. You mean no selling market?

A. No selling market on Pier 28.

Q. So that in all cases, your vegetables are unloaded and immediately trucked by your trucks to your store and sold there?

A. That is right.

Q. And approximately how long do the vegetables stay on the pier floor before you take delivery?

A. They are removed at once, after delivery.

Mr. Van Arnum: You mean that you truck them off the pier immediately they are made available to you by the railroad putting them on the pier?

The Witness: That is right.

[fol. 993] Exam. Brown: You mean, by your question, you draw a distinction between the time that they were put on the pier and the time it became physically available?

Mr. Van Arnum: That is right.

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By Mr. Augello:

Q. Mr. Volk, who loads these vegetables from the pier floor to your truck?

A. Private people, truckmen, for instance.

Q. You mean labor hired by your truckmen?

A. That is right.

Q. For which you pay for?

A. That is right.

Q. And that also applies to other receivers of vegetables?

A. Yes, sir.

Exam. Brown: Are they on the pier floor all during the delivery period or do they ride the trucks? You are talking about labor employed for the purpose of loading, as I understand it, is that right?

The Witness: That's right.

Exam. Brown: You understand my question?

The Witness: No, sir, not exactly.

Mr. Augello: Mr. Examiner, I think I can clear that.

Exam. Brown: If you will, Mr. Augello.

By Mr. Augello:

Q. On occasion, some of these vegetables are taken on what the trade calls "on the fly." Will you please explain what that means?

[fol. 994] A. Oh, they are put on the trucks as soon as they come off of the carfloats. They do not stay on the pier a minute. They are put right on to the trucks to be taken away.

Mr. Van Arnum: But, Mr. Volk, what the Examiner wants to find out is, the men who load the vegetables from the pier floor to your trucks to take to Washington Street are your employees.

The Witness: Yes.

Mr. Van Arnum: Do they remain on the pier all during the night, or are they employees who come over on the truck and then go back with the truck? That is what he was trying to find out.

The Witness: They are loaders who stay there on the pier.

Mr. Van Arnum: Is that what you want to know?
Exam. Brown: Yes.

By Mr. Augello:

Q. And are not paid by the railroads?
A. Not paid by the railroads.
Q. So all you get, Mr. Volk, is simple delivery?
A. Right.

Exam. Brown: I think you had better explain what you mean by simple delivery. The term has been used, but whether you mean it in the same sense or not, I do not know.

Mr. Augello: A simple delivery, as Mr. LaRoe stated in his opening remarks, is the freight available, accessible to the consignee to place on his truck from the pier floor, with-[fol. 995] out any stacking or sorting or any accessorial services.

Exam. Brown: Then your question does not include shipments which have been stacked on the pier floor?

Mr. Augello: It is stacked by the railroad labor, yes, taking them off the hand trucks and placing them on the pier floor, but not sorted according to marks or sizes.

Exam. Brown: Then when you say simple delivery, you would include stacking where the shipments have not been sorted, isn't that right?

Mr. Augello: Stacking, yes. It is the duty of the carriers to stack the freight on the pier floor approximately in the same manner that they appear in the car.

Exam. Brown: Well, by simple delivery, then, as I understand it, you mean after the shipments are on the pier floor, ready for delivery to the consignee.

Mr. Augello: Yes, sir.

Exam. Brown: Whether they are stacked or not stacked.

Mr. Augello: That is right. In other words, on the fly, that would be simple delivery because the truck is waiting there for these hand trucks to come out of the car and they are put on the truck by consignee's labor and paid for by the consignee.

Mr. LaRoe: If the Examiner will permit, I should like to get that clear, too.

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By Mr. LaRoe:

Q. Do I understand now that there is any commercial [fol. 996] stacking of these goods for the convenience of the consignee and his sales efforts? What I have in mind is this: I should think that the railroad itself, if it is going to make economical use of the pier, would have to do a little stacking. They would not want everything in one layer on a pier because they would be wasting space. Now, it is my understanding that the railroad itself, in order to make economical use of the pier, does some piling of the freight on the pier, but that is for their convenience.

I want to know if there is any commercial stacking of your freight that you do not pay for.

A. No, there is not.

Exam. Brown: Isn't it a fact that the railroads do not sort fresh vegetables?

The Witness: They do not.

Exam. Brown: Neither do you?

The Witness: We do.

Exam. Brown: Do you sort them on the pier?

The Witness: After the railroad stacks them on the pier, our labor breaks down the stacks and separates the marks and the grades and the sizes and the varieties of vegetables.

Exam. Brown: Do you load the vegetables then or later?

The Witness: And then we load them on the trucks.

Exam. Brown: In other words, you sort them and later load them. You do not sort them and immediately put them in a truck, is that the idea?

[fol. 997] The Witness: Right. Except on the fly. When we take stuff on the fly, we do not try to sort it.

By Mr. LaRoe:

Q. You said that on the fly is exceptional.

A. Yes, it is.

Q. In the normal cases, the railroads simply put it on the pier in such piles as operates to their convenience, and any stacking that you want for your convenience, you do yourself and pay for it?

A. Exactly so.

By Mr. Augello:

Q. And that is usual and customary for all receivers to do of vegetables?

A. Yes, right.

Mr. Augello: That is all.

Exam. Brown: What carriers handle your vegetables from the south?

The Witness: From the south? Seaboard, Pennsylvania —

Exam. Brown: Just separate them according to route. The Seaboard takes the——

The Witness: The Florida East Coast.

Exam. Brown: The Seaboard, for example, will take your vegetables from Florida up to what point?

The Witness: Potomac Yards.

Exam. Brown: And from Potomac Yards, what carrier then will handle it?

[fol. 998] The Witness: The Pennsylvania Railroad.

Exam. Brown: Do you use any other carriers beyond Potomac Yard other than the Pennsylvania Railroad?

The Witness: Not on southern vegetables.

Exam. Brown: You use Pennsylvania delivery exclusively?

The Witness: Yes, sir.

Exam. Brown: From the south?

The Witness: Yes, sir.

Exam. Brown: Do you have any vegetables coming from the west?

The Witness: Yes, sir.

Exam. Brown: What lines do you use there?

The Witness: New York Central from Chicago.

Exam. Brown: You do not use any other carrier?

The Witness: No.

Exam. Brown: From Chicago?

The Witness: Except occasionally where we want Pier 29 delivery on a commodity like tomatoes, we route that on the Penn.

Exam. Brown: You use the Erie?

The Witness: Only on fruit. We handle a little fruit, too.

Exam. Brown: Where do you get that, Pacific Coast?

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The Witness: Yes, sir.
Exam. Brown: What carriers handle that east of Chicago?
The Witness: Erie.
[fol. 999] Mr. LaRoe: Did you finish, Mr. Examiner?
Exas. Brown: Yes.

By Mr. LaRoe:

Q. Can I ask to what extent you use team-track delivery?
A. Well, on the New York Central, we handle all our western vegetables team-track delivery.
Q. Aside from the New York Central deliveries, to what extent do you use team tracks?
A. On the Penn we use the pier delivery.
Q. No, I did not ask you about the pier delivery. On the other than New York Central, fruits or vegetables, to what extent do you use team-tracks?
A. None.

Mr. LaRoe: That is what I understood.
Mr. Augello: That is all.

Exam. Brown: Any further questions on direct examination?
Mr. LaRoe: Yes, I have just one or two.
Exam. Brown: All right, Mr. LaRoe.

By Mr. LaRoe:

Q. In your case, is there any means by which you can get on to the carfloat with your truck or otherwise take delivery of the freight on the carfloat?
A. No, sir.
Q. Where is the first place where you are given real access to the freight to accept delivery?
A. On the pier floor.
[fol. 1000] Q. Does that involve, in your case, anything beyond the mere placing or piling of the freight on the pier floor?
A. No, sir.
Q. Is there any accessorial service in connection with delivery for some commercial purpose such as display or sorting or stacking which the railroads perform?
A. No, sir.
Q. In no case whatever?

A. No, sir.

Q. So that all they do with respect to all of your freight is simply place it on the pier floor and nothing more?

A. That is all.

Mr. LaRoe: That is all.

Exam. Brown: You use auction services at all in connection with the disposition of your fruit?

The Witness: Only a few cars of tomatoes during the Cuban season.

Exam. Brown: You do not handle any auction service in connection with citrus fruits?

The Witness: We handle no citrus fruits.

Exam. Brown: What fruits do you get from the west?

The Witness: From the west we get cantaloupes and honeydews.

Mr. Wells: I cannot hear the witness.

Mr. Augello: Will you speak a little louder, Mr. Volk? [fol. 1001] The Witness: From the west we handle fruit cars of cantaloupes and honeydews.

Exam. Brown: You do not handle those through auction?

The Witness: No, through private sale.

Exam. Brown: Tell us about these tomatoes.

The Witness: The Cuban tomatoes?

Exam. Brown: Any tomatoes.

The Witness: Well, right now we are handling the California tomatoes at private sale through our store and taking delivery from the pier and riding them to our store, putting them on display and sale there.

Exam. Brown: You do not put them on display on the docks?

The Witness: No, sir.

Exam. Brown: And you do not use auction facilities for them?

The Witness: No, sir.

Exam. Brown: How about your practice in the past? Has that been the same?

The Witness: That has been the same.

Mr. Donadio: You display your melons on the pier platform for sale?

The Witness: We have them displayed on Pier 19, I think it is, when we can get on to it.

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Exam. Brown: What do you mean by that?

Mr. Donadio: They are displayed on the platform for the [fol. 1002] purpose of sale.

The Witness: Not necessarily.

Mr. Donadio: What are they displayed for then?

The Witness: Well, there is a buyers' market down there on Pier 19 and sometimes you are able to sell part of a car down there.

Exam. Brown: Just a moment. I want to straighten this record out before we proceed. What did you mean when you said when we can get on to the floor?

The Witness: The space is limited for melons during the heavy period. They haven't got enough room for all the arrivals to unload them on Pier 19.

Exam. Brown: All right, Mr. Donadio.

Mr. Donadio: Then I do understand correctly, do I not, that you do, on occasions, display your melons on the pier floor for sale?

The Witness: Just the melons, yes, sir.

Mr. Donadio: That is all. Thank you.

Exam. Brown: How many carloads of melons do you handle in a year?

The Witness: Oh, not over 50.

Examiner Brown: 50?

The Witness: That is all.

Exam. Brown: Have you any questions, Mr. Wells?

Mr. Wells: Yes.

[fol. 1003] By Mr. Wells:

Q. Mr. Volk, in the case of the vegetables from Florida, you handle those by pier delivery?

A. Yes, sir.

Q. And that has been true during the thirty years, roughly, of your experience here in the New York market?

A. Yes, sir.

Q. Up until the time that the suspended schedule went into effect, had there been any charge of any kind paid by you as a consignee other than the line haul charge up to the point where you could take delivery on the pier of the vegetables you received from Florida?

A. No, sir.

Q. Has there been during all of that period of time any

service after you took delivery on the pier or where it was available to you for delivery, for which you have not paid additional?

A. No, sir.

Q. And any sorting or any stacking or any displaying or anything of that sort is something for which you, yourself, have expended money or expended labor for which you have paid direct to that labor?

A. That is right.

Q. And there is no difference today in the amount of the service rendered by the rail lines subsequent to the time when it is available to you on the pier floor?

[fol. 1004] A. No, sir.

Mr. Wells: That is all.

Mr. LaRoe: There is only one point that I am not satisfied with as to clarity.

By Mr. LaRoe:

Q. It seems that on all your traffic, other than melons, you never asked the railroads to do anything beyond simple delivery, is that right?

A. Correct.

Q. Now, let us deal with the melons and get that picture clear. On the melons, they are sometimes displayed for one reason or another on one pier, but in that one instance, does the railroad perform any service beyond simple delivery, and by that I mean the mere placing of the freight on the floor of the pier?

A. No, sir.

Q. Anything beyond that is an expense that you bear and the railroads do not?

A. Right.

Mr. LaRoe: That is all.

Exam. Brown: That is all, sir.

(Witness excused.)

Mr. Miller: Mr. Examiner, I should like to ask Mr. LaRoe a question for the purpose of clarity. There have been a number of questions here referring to certain accessorial services on the piers, and most of the time that has appar-

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[fol. 1005] ently referred to the sorting and stacking. I am not sure whether Mr. LaRoe has some idea of some other services or not that he is covering with that term "accessorial services."

Mr. LaRoe: When I use the word "accessorial" in this case, I refer to any service performed in connection with this freight beyond the point of simple delivery. Such as, for example, the use of the pier for auction purposes. Now, if after simple delivery has been completed and the railroad's obligation has ended with respect to delivery, then, if there is a use of the pier for auction purposes, we contend that if the railroads want to charge for that, that is a matter of leasehold and rental, and has nothing to do with the transportation rate because the transportation service has ended.

Mr. Miller: Now, all I want to know, Mr. LaRoe, is what is the meaning of your word "accessorial services."

Mr. LaRoe: I told you—anything that happens to the freight in connection with delivery beyond the point of simple delivery, and to clarify my answer, we take the position that every——

Mr. Miller: Wait a minute. Can't you just tell me? Instead of saying it is everything beyond something, can't you tell me exactly what it is that you are talking about?

Mr. LaRoe: I am not under cross examination.

Mr. Miller: No, sir. You do not have to answer my questions if you do not want to. I am only asking you to do it so [fol. 1006] I can understand what your questions mean.

Mr. LaRoe: I am trying to be helpful to you, and I should like you to clarify the record by showing any service that you render beyond simple delivery that is not paid for.

Mr. Miller: Would you mind if I get straight your question first?

Mr. LaRoe: You see, I have the same right to ask you questions that you have to ask me.

Mr. Miller: Certainly. There is no question about that. Before I start answering your question——

Mr. Donadio: Maybe we ought to object to the question before we know what the question is about.

Exam. Brown: Read that back.

(The reporter read back the discussion between Mr. Miller and Mr. LaRoe.)

(Discussion off the record.)

Mr. LaRoe: I think that Mr. Miller is entitled to a frank answer as well as I can give it to him about these accessorial services. I do not claim to be as familiar in detail with these individual services as some of these expert witnesses are, but I will say this, that I call an accessorial service anything that is rendered beyond the end of the transportation service; that is to say, beyond simple placement of the freight on the floor of the pier where it is accessible to the consignee and the items which I have in mind as em- [fol. 1007] braced in such accessorial service include these: the stacking of the goods for the benefit of the consignee, as distinguished from a mere piling of them for the convenience of the carrier; the sorting of the goods for some commercial purpose of the consignee; the display of the goods for some purpose that the consignee has in mind; or any use of the pier for auction services which we contend should be covered by a lease arrangement and could not possibly, on any theory, be embraced in the transportation rate of charge.

Now, I may have left something out, but if I have, it is done unintentionally.

Exam. Brown: You intend to include cooperage in the accessorial service?

Mr. LaRoe: Cooperage is clearly an accessorial service for which a separate charge is paid, or whether the charge is paid or not, it is an accessorial service.

Exam. Brown: You include that in your definition?

Mr. LaRoe: Of course, when you talk about cooperage, you are getting into the claim field, loss and damage to freight, and I would not know just how to classify that.

Exam. Brown: All right. We will leave that out then. Are you satisfied, Mr. Miller?

Mr. Miller: Yes, indeed.

Exam. Brown: All right, next witness.

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[fol. 1008] HOWARD HOUSTON was sworn and testified as follows:

Direct examination.

By Mr. Augello:

Q. Mr. Houston, will you give us your name and the firm you work for and your title?

A. My name is Howard Houston and I am traffic manager for Simons & French Co. of 99 Hudson St., New York City, which position I have occupied for 28 years.

Q. Previous to your employment with Simons & French, who were you employed with?

A. I was assistant secretary to what was then known as the National League of Commission Merchants for a period of four years.

Q. Prior to that?

A. Prior to that I was with the New York Central Railroad for a period of eight years, and the Lehigh Valley Railroad for a period of two years.

Q. Now, will you tell us just what commodities your company handles?

A. Our company handles fruits primarily, apples, pears, peaches, grapes, cherries—all the deciduous fruits.

Q. From what origins?

A. From California, Oregon and Washington, primarily.

Q. Are you a shipper, as well as a receiver?

A. We are.

[fol. 1009] Q. And approximately how many cars of fruits do you handle per year?

A. Approximately 2,500 cars annually.

Q. And what is your business as an exporter or importer?

A. We are not only local New York City distributors of fresh fruits, but we are also importers and exporters.

Exam. Brown: What do you mean, foreign exportations and foreign importations?

The Witness: That is correct.

By Mr. Augello:

Q. To what extent, Mr. Houston, do you export and import?

A. At the present time, our exports are extremely limited due to the world economic situation, but at the time of our peak handling of exports, we shipped as many as 150 carloads of fruit per week.

Exam. Brown: Straight throughout the year?
The Witness: That is correct.
Exam. Brown: How long ago was that?
The Witness: That is fully 20 years ago.

By Mr. Augello:

Q. And you are familiar with the handling of the unloading and the loading of cars by the railroads on export and import shipments of fruit?
A. I am.
Q. Will you please state for the record just how that is done?
A. Well, for example, we have a car arriving on the Erie [fol. 1010] Railroad in the Jersey City Terminal which is ordered for delivery to a steamer for export. The first move that is made is to have that car switched into the Jersey City Terminal. The fruit is then unloaded on to the pier.

Exam. Brown: Where?
The Witness: At Jersey City, by railroad labor. Then, if we specify that it is to be delivered in a refrigerated lighter, a refrigerated lighter is placed alongside the pier and by railroad labor the fruit is then trucked into this refrigerated lighter. After the loading of the lighter is completed, it is floated to the ship's side.
Exam. Brown: How does that hook into this case, Mr. Augello?
Mr. Augello: I will connect it, Mr. Examiner.
Exam. Brown: I wish you would. It seems a little remote.

By Mr. Augello:

Q. Then what would happen, Mr. Houston?
A. Then the fruit is unloaded from the lighter into the steamer.
Q. By who?
A. By railroad labor—no, pardon me, correction: the

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fruit is unloaded from the lighter into the steamer by labor employed by the steamship company.

Q. Now, what you just testified to is shipments for export, is that correct?

A. That is correct.

[fol. 1011] Q. And in that case, you stated the unloading from the car, from a refrigerated car at Jersey City on to the pier of the Erie Railroad and from the pier to a refrigerated barge, and then the barge floated alongside of the steamer, is all done on the through freight?

A. That is correct.

Q. Without any additional charge for both unloadings?

A. That is correct.

Q. Or any additional charge for the use of a refrigerated barge?

A. That is correct also.

Q. Now, will you please tell us what happens on the shipments, on an import shipment of fruit from a foreign country that you shipped out of New York to, say, Chicago, on the Erie Railroad?

A. In the case of an import shipment where we desire to ship carloads of fruit westbound, we so notify the railroad as to how many carloads we expect to have and what the destinations will be. The railroads take delivery of the fruit from the steamer, and there again, I believe that the unloading from the steamer is performed by labor employed by the steamship company.

Exam. Brown: You say you believe. Do you know?

The Witness: I believe I do not know that definitely.

Exam. Brown: Testify, please, as to what matters within [fol. 1012] your own knowledge.

The Witness: Yes. Then those cars are placed on the carrier's rails.

By Mr. Augello:

Q. Just a minute, Mr. Houston. I think there is a lapse there between the time that the steamship company unloads the fruit from the steamer to the time that the railroads get it. Will you please explain how they get it?

A. Well, of late years, there has been embargo against the use of railroad company's marine equipment for the

handling of import freight, so it has become necessary for importers to employ outside towing companies, and those outside towing companies will load their barges with the freight and take it to the railroad terminals for loading to cars.

Mr. LaRoe: Does it ever go over one of these piers that we are dealing with here?

The Witness: To my knowledge, no.

By Mr. Augello:

Q. And you stated "late years." How about the normal and usual method prior to the war years which you no doubt are referring to?

A. There was a time when, if we had an import shipment arriving, we will say, from Argentina, the railroad companies would put alongside, on carfloats, the required number of cars for our fruit, load them by their own labor alongside the steamer, float them to the auction terminal, [fol. 1013] our business being primarily at auction for local sales.

Q. And for that loading of the cars from the steamer, there was no charge made other than the transportation charge?

A. The transportation rate.

Exam. Brown: Mr. Augello, you are putting this type of testimony in for comparison purposes, is that it?

Mr. Augello: Yes, sir, to show on export and import fruits there is no charge for loading or unloading.

By Mr. Augello:

Q. Have you anything else, Mr. Houston, that you can tell us?

A. I do not think there is anything else I can add to that.

Mr. LaRoe: I should like to ask a few questions, please.

By Mr. LaRoe:

Q. Does all of your westbound freight move to Chicago and St. Louis; I mean, your freight from the west moves through Chicago and St. Louis?

A. Chicago and St. Louis, that is correct.

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Q. What are the railroads that you use east of those gateways?

A. Principally the Erie Railroad.

Q. To what extent do you use team-track deliveries?

A. We do not use it at all.

Q. Are all of your deciduous fruits handled over these piers?

A. That is correct.

Q. Are you allowed access to the carfloats?

A. No, we are not.

Q. Where do you first get delivery of your fruits?

[fol. 1014] A. On the pier floor.

Q. Does the railroad perform, free, any accessorial service of any type beyond the mere placing of the goods on the floor of the pier?

A. No, they do not.

Q. What are some of the services that are rendered on the floor of the pier in connection with your fruit after the railroads finish the simple delivery?

A. When the railroads finish the delivery, the sorting, which is charged for by the railroads and paid for by us, is done; then the fruit is removed from the floor of the pier after the auction sale is over and placed on our trucks.

Q. At your expense?

A. At our expense.

Q. Is there any accessorial service of any type, and by accessorial service I mean anything beyond the simple delivery rendered by the railroads, that you do not pay for?

A. Nothing.

Mr. LaRoe: That is all. Thank you.

Exam. Brown: Mr. LaRoe asked you with respect to movements from the west. Do you have any shipments from the south?

The Witness: Very, very rarely. We have had a few cars of oranges, occasionally, that arrived for delivery via the Pennsylvania Railroad.

[fol. 1015] Exam. Brown: How many would that comprise in a year? How many carloads of oranges?

The Witness: Not more than two.

Exam. Brown: What is the approximate breakdown between interstate shipments received by you and the export-import situation?

The Witness: At the present time, out of the total number of cars I mentioned that we handled, at the present time I would not say that there are more than 50 of those cars that we export.

Exam. Brown: And you stated you handled approximately 2,500 carloads a year?

The Witness: That is correct.

Exam. Brown: What was the situation in 1946?

The Witness: Approximately the same as it is now. It was not a bit easier with regard to exports than it is now.

Exam. Brown: Well, has the relative situation changed in the last 10 years?

The Witness: Not appreciably, no.

Exam. Brown: Well, most of your shipments are local interstate shipments in the sense that they originate in the United States and are delivered to you at New York?

The Witness: That is right.

Mr. Augello: Mr. Houston, I have a question that I should like to ask at this time.

[fol. 1016] By Mr. Augello:

Q. In the normal years, what was the percentage of the 2,500 cars that you handled normally in export and import, as compared with the domestic shipments?

A. When I said 2,500 cars, I was speaking of the past year, the past two years, harking back to the time that we did do a very considerable export business, the number of cars we handled was a great deal more than 2,500.

Q. Oh, they were? I am glad you mentioned that. How much more were they?

A. Well, I mentioned that we handled—we exported 150 carloads a week and that continued throughout the year. A great majority of that export business was made up of apple shipments from the south, and I would say that the percentage of the number of cars handled was fully 65 percent.

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Exam. Brown: And you testified, also, that that was 20 years or more ago.

The Witness: Yes, sir.

Exam. Brown: Have you had any such comparable situation during the last 20 years?

The Witness: Not since that time, no.

Mr. Augello: That is all.

Exam. Brown: You have some questions, Mr. Hoffman?

Mr. Hoffman: Yes.

By Mr. Hoffman:

Q. Mr. Houston, I believe you testified that the deciduous fruit handled by your company moving from points [fol. 1017] of origin to the Pacific Coast and coming to New York, is brought into New York by the Erie Railroad?

A. That is correct.

Q. And at what points in the course of the transcontinental haul does the Erie Railroad receive those cars?

A. They receive them at Hammond, Indiana, to be exact, at Lima, Ohio, and at one other point—I cannot recall at the moment.

Q. And prior to the time that the Erie has received those cars, would they be moving over lines of carriers located in Illinois?

A. Yes, some lines.

Q. Do you have any movement at all of fruits from the Pacific Coast moving into New York which would pass through St. Louis?

A. Yes, we do.

Q. Would that be exceptional?

A. It would be exceptional. Most of these shipments pass through Chicago or Hammond.

Exam. Brown: Do you use the same type of routing now as you did prior to the effective date of these schedules?

The Witness: We do.

Exam. Brown: You have not changed as a result of the increased charges?

The Witness: No, we have not.

Exam. Brown: You are still using Erie delivery and line

[fol. 1018] haul east of the gateways primarily?

The Witness: That is correct.

Exam. Brown: And how about your traffic from the south?

The Witness: We have very little, if any, traffic.

Exam. Brown: I understand you testified as to that, but when you get it, don't you use Pennsylvania Railroad?

The Witness: We use Pennsylvania delivery.

Exam. Brown: Any further questions on direct?

(No response.)

Exam. Brown: Cross examine.

Mr. Smith: I have no questions.

Exam. Brown: Mr. Miller:

Mr. Miller: Yes.

Cross examination.

By Mr. Miller:

Q. Mr. Houston, will you tell me roughly how many cars of import freight you handled this year?

A. We had—well, in carloads I would have to think a minute. We had a considerable quantity of fruit from Argentina. We also had some shipments from Brazil; all together—this is merely an estimate—I would say that we handled from 50 to 75 carloads.

Q. Where did you receive that freight?

A. It was sold at auction, 100 percent. We did not ship anything westbound this year.

Q. Where?

[fol. 1019] A. At the Erie Railroad, Pier 20, North River.

Q. Now, on these accessorial services that Mr. LaRoe asked you about, is any of your fruit from the west sorted on the piers?

A. It is all sorted.

Q. And you pay a charge for that service?

A. Yes, we do.

Q. Is there any accessorial service performed on your account on the piers for which you pay a charge, other than the unloading?

A. Nothing.

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Q. The only charges for any services rendered to you on the piers, then, is the unloading charge and the sorting charge?

A. The sorting charge, that is right.

Mr. Miller: That is all.

Redirect examination.

By Mr. LaRoe:

Q. Do the railroads perform any other service for you than that?

A. No, they do not.

Q. Why should there be any further charge, then? How could there be?

A. There could not be.

Exam. Brown: Is that a question of the witness or an observation, Mr. LaRoe?

Mr. LaRoe: A little of both. Incidentally, I hope Mr. [fol. 1020] Miller did not overlook answering my question of him, which was that he would, in the same way that I did, answer what services are performed and are not paid for by the consignee.

Mr. Miller: Now, I have no objection to arguing this case right now, but I do not think it is a proper time.

Mr. LaRoe: All right.

Exam. Brown: Well, Mr. LaRoe answered your question and he expects you to answer his. But, of course, nobody is going to require you to do it.

Mr. Miller: Well, now, if you are talking about the sum total of services and facilities furnished by the carriers at the pier stations, those includes the unloading, sorting and stacking, the cooperage, the furnishing of the station, the billing operations——

Mr. LaRoe: Billing operations?

Mr. Miller: (Continuing)——the notification of consignees as to location of freight in its course of transportation; all other normal agency services which occur at any railroad station; the furnishing of heat and light; the furnishing of auction rooms.

Mr. LaRoe: You haven't overlooked the furnishing of the freight car?

Mr. Miller: No. Your question was as to the services furnished at the station.

Mr. LaRoe: At the pier.

[fol. 1021] Mr. Miller: Yes. They perform the delivery.

Mr. LaRoe: What is that again?

Mr. Miller: They perform the delivery. They effect the delivery to the consignee.

Mr. LaRoe: I realize that we should not argue the case, but you are very frank in trying to answer my question. May I asked you if you take the position, for example, that billing should be paid for extra?

Mr. Miller: No, indeed; by no means.

Mr. LaRoe: You are not taking the position that in listing these things, they ought to be paid for extra?

Mr. Miller: No, indeed. That was not the question.

Mr. LaRoe: You would not claim that the consignee should pay extra for heat and light, for example, at the station?

Mr. Miller: Well, I will say this, that the heat and light, we are not charging for heat and light in this proceeding. We are charging for unloading.

Mr. LaRoe: Yes, I so understand. Well now, could I impose on you to try once more to answer what you think is performed in the way of an accessorial service in connection with the delivery of this freight that the consignees do not pay for.

Mr. Miller: What is performed in connection with delivery?

Mr. LaRoe: Accessorial service in connection with delivery that they do not pay for, or beyond the delivery. If it is [fol. 1022] accessorial, it would be beyond the delivery. They pay for the stacking; they pay for the sorting. What is it that you do for them that they do not pay for as a service in connection with this delivery that they ought to pay for?

Mr. Miller: I would say nothing.

Mr. LaRoe: All right, that is all. Thank you.

Exam. Brown: You neglected to refer to police protection.

Mr. Miller: That is right, sir.

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Exam. Brown: I think that is about the only possible element you omitted.

Mr. LaRoe: I am asked to move that the case be now dismissed, but I am not going to do it.

Exam. Brown: Any further questions of this witness?

(No response.)

Exam. Brown: You are excused.

(Witness excused.)

Mr. Miller: Mr. LaRoe, parenthetically, I would like to second the motion.

Mr. LaRoe: You would like to see our petition dismissed. You would like to have the charges dismissed.

Exam. Brown: Off the record.

(Discussion off the record.)

ROBERT C. NEILL having been previously sworn, testified as follows:

Direct examination.

[fol. 1023] Exam. Brown: Let the record show that the exhibits numbers 101 to 103, inclusive, have been identified off the record and marked accordingly.

(Protestant's Exhibits Nos. 101 and 102, witness Neill, and 103, marked for identification.)

Mr. Loos: Mr. Examiner, may we proceed?

Exam. Brown: Yes.

Mr. Loos: Mr. Neill has previously testified, Mr. Examiner, and, of course, we will not repeat any of his previous testimony, but I would like to call attention to the fact that the record shows that he is here representing the California Citrus League, which is an organization composed of the shippers and growers' organizations of California and Arizona who grow and ship more than 90 percent by volume of all of the citrus fruit produced in those two States, and he is speaking for that group.

By Mr. Loos:

Q. Now, Mr. Neill, at the previous hearing, you introduced as Exhibit No. 62 a history of rates on California-Arizona citrus fruit. Have you brought that up to date?

A. I have.

Q. And is that done in the document which has been marked as Exhibit No. 101?

A. It is.

Q. In stating the rates per hundred pounds in the second column of that exhibit, and using the first page for illustra-
[fol. 1024] tion, have you included in the rate per hundred pounds the unloading charge which became effective on November 1, 1948?

A. Yes, I have.

Q. And is that simply a computation you have made?

A. Yes. I reduced it to a 100-pound basis.

Q. That is not a rate so published in the tariff?

A. No. It is published on a per ton basis.

Q. And have you carried that through, at the rate of 100 pounds, in the subsequent lines for the periods following November 1, 1948?

A. That is correct.

Q. Now, do you recall that at the previous hearing held in July of 1947, the offer of the railroads to permit the shippers to perform the unloading from the carfloats to the pier?

A. Yes, I do.

Q. And following the Commission's decision in this proceeding, the decision of October 4, 1948, did the California Fruit Growers' Exchange make any effort to obtain permission from the carriers or the shippers as a group to perform the unloading service at these piers?

A. Yes, they did.

Q. What was the result of that effort?

A. That permission was denied.

Q. And was there an exchange of telegrams between the California Fruit Growers Exchange and the Erie Railroad on the subject?

[fols. 1025-1026] A. There was.

Q. And are copies of those telegrams shown in the document which has been marked Exhibit No. 102?

A. Yes.

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Q. Do those include all of the telegrams, to your knowledge, that were exchanged on that subject?

A. Yes.

Exam. Brown: You did not actually ask the carriers for authority to unload, did you? You merely asked them if it would be permitted.

The Witness: Well, we asked for permission to unload, to perform the unloading service for ourselves, yes.

Exam. Brown: That does not say so in these wires.

The Witness: Well, that was intended.

Exam. Brown: You asked merely if the shippers can unload.

The Witness: Well, we were asking for permission to perform this service.

Exam. Brown: That is the construction you placed on this telegram?

The Witness: Yes, sir.

Exam. Brown: Now, with respect to the alleged statements of the witnesses for the carriers, that they would permit shippers to unload, the record should speak for itself in that respect. I do not believe that there was an outright agreement in that regard, but as I say, the record must [fol. 1027] speak for itself in that respect.

Mr. Loos: Yes. I do not intend to characterize other than what the record may show. There is quite a bit of discussion about it on the record, and I think the offer is not entirely clear and far be it from me to have you clarify it at this late date.

Mr. LaRoe: May I suggest, Mr. Examiner, that the reply by Mr. Von Willer to the telegram shows that he interpreted it as a request by the shippers for permission to unload because he said it would not be practicable for him to do it. He had no difficulty in understanding the telegram.

Mr. Fitzgerald: Any doubt is clarified by a later exchange.

Exam. Brown: Mr. Weller merely stated that the "physical unloading by shippers would be impracticable." The inference might be there that shippers could not unload is a physical situation rather than a permissive one.

By Mr. Loos:

Q. Mr. Neill, was the California Fruit Growers Exchange

at that time endeavoring to work out an arrangement whereby the shippers, as a group, might perform the unloading in the hope of saving money by so doing?

A. Yes, they were.

Q. And as a result of this exchange of telegrams, did they gave up that effort?

A. They discontinued.

Q. In the Commission's decision of October 4, 1948, the [fol. 1028] statement is made at sheet 3, Mr. Neill, that most of the fruits and vegetables originating at western producing points, particularly in California, and destined to New York, are routed over the Erie. Does that situation still prevail with respect to your shipments?

A. Not to the extent that it did at that time.

Q. What has been the change that has taken place and when did it occur?

A. We recently, since early in September, have been routing a portion of our fruit for Pennsylvania delivery and New York.

Exam. Brown: Let us be a little more specific in this testimony. A portion of our fruit—I think it would be better if you could give us an approximation.

By Mr. Loos:

Q. Can you say how much of the deliveries at New York by the California Fruit Growers Exchange, and since this change was made early in September, have been delivered to the Pennsylvania?

A. Yes, I can. It so happens that we just figured that out yesterday and it is just slightly over 17 percent of our total deliveries.

Exam. Brown: As to the Pennsylvania Railroad?

The Witness: Pennsylvania Railroad.

Exam. Brown: And the balance, 83 percent, to the Erie?

The Witness: Correct.

Exam. Brown: That is the present situation?

[fol. 1029] The Witness: That was up to yesterday, from September 7th.

Exam. Brown: You are going to develop the prior situation, Mr. Loos?

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Mr. Loos: Well, I think the prior situation is adequately developed on the previous record.

Exam. Brown: Well, it is practically 100 percent, as I recall it.

The Witness: It was 100 percent.

Exam. Brown: So your testimony is now that approximately 17 percent has been diverted to the Pennsylvania Railroad.

The Witness: That is right.

Exam. Brown: And what period would that cover?

The Witness: From September 7th to September 26th.

Exam. Brown: Just one month, a little less than a month?

The Witness: A little less than a month.

Exam. Brown: All right, Mr. Loos.

By Mr. Loos:

Q. What was the reason for that change?

A. The congestion on the Erie Pier.

Q. Now, do you still object to the unloading charges that are in issue in this proceeding?

A. Yes, we do.

Q. And has there been anything that has occurred during your experience since the effective date of these unloading charges on November 1, 1948, that in any way lessens your objections to those unloading charges?

[fol. 1030] A. No, there has not been.

Q. What will be the effect upon the deliveries of California-Arizona citrus fruit by the California Fruit Growers Exchange if these unloading charges are permanently continued at New York?

A. Well, we will have to try to find some other means of delivering the fruit here to escape the payment of the delivery charges.

Q. And will that diminish the deliveries on the piers?

A. I would think it would.

Q. Now, have you made any such effort to change your delivery method to date?

A. No, we have not because we have been hopeful that these charges would be withdrawn. We tried, after the Commission's decision was issued, to get it postponed, and,

of course, we joined in asking that the case be reopened for this rehearing.

Q. And you are awaiting the result of this rehearing, are you, before you make any move toward a change?

A. Yes, we are.

Q. Did you hear the testimony of Mr. Laux and Mr. Hedden?

A. I did.

Q. And do you concur in what they have said?

A. Yes. I thought it was very well presented.

Q. Do you recall Mr. Hedden's testimony about the proposals for modernizing the produce terminals here in New York?

[fol. 1031] A. Yes, I do.

Q. Now, as a shipper representative, do you consider that modernization of the produce terminals in New York is a desirable thing?

A. I would say from a transportation standpoint it would be very desirable because it would probably give us additional means of reaching this market.

Exam. Brown: What do you mean by that?

The Witness: By water or by other railroads that are not serving the market.

By Mr. Loos:

Q. Going back to the change in routing, I meant to ask you on the deliveries to the Pennsylvania, the deliveries at the Pennsylvania pier, where are those delivered to the Pennsylvania Railroad?

A. Well, on the shipments that we are able to divert west of Chicago and St. Louis, the haul is either from Chicago or St. Louis. I think there have been some occasional diversions in Central Freight Association territory, and in that case they might be delivered to the Pennsylvania at Pittsburgh or some other junction in CFA territory, but it is our aim to give them their maximum haul.

Exam. Brown: Give whom?

The Witness: The Pennsylvania.

Exam. Brown: You still give 83 percent to the Erie. Your

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testimony there was with respect to the haul over the [fol. 1032] Pennsylvania only, as I take it, then?

The Witness: Yes. We do the same for the Erie. We do not attempt to short-haul any railroad. We give them the maximum haul wherever we can.

Exam. Brown: In other words, if you are going to have the Pennsylvania as a delivering line, you will give it to them as close to Chicago as you can?

The Witness: Right.

Exam. Brown: And the same is true with the Erie?

The Witness: That is correct.

Exam. Brown: We will have a short recess.

(A short recess was taken.)

Exam. Brown: All right, Mr. Loos.

Mr. Loos: That concludes the direct examination. I offer Mr. Neill's Exhibits 101 and 102.

Exam. Brown: How about 103?

Mr. Loos: I am going to take that up after Mr. Neill is finished. I want to take that up later.

Exam. Brown: I will receive Exhibits 101 and 102 without objection.

Mr. Miller: No objection.

Exam. Brown: They are received in evidence.

(Protestant's Exhibits Nos. 102 and 102, Witness Neill, received in evidence.)

Mr. Loos: That concludes the direct examination of Mr. Neill.

[fol. 1033] Exam. Brown: Off the record.

(Discussion off the record.)

Exam. Brown: Any further questions on direct with Mr. Neill?

Mr. LaRoe: Only one question.

By Mr. LaRoe:

Q. Mr. Neill, you speak for a very large volume of citrus fruit from the Pacific Coast, and I should like to ask you whether there is any accessorial service or any other collateral service in connection with this traffic beyond the

point of simple delivery that the railroads render that they do not get paid for.

A. Oh, no, there is not.

Mr. LaRoe: That is all.

Exam. Brown: Mr. Neill, these unloading charges, as such, became effective in 1948, is that right?

The Witness: November 1, 1948.

Exam. Brown: November 1, 1948?

The Witness: Right.

Exam. Brown: Was there any diversion to any extent between November 1, 1948, and September 7, 1949, to the Pennsylvania Railroad?

The Witness: Just as I have described it, since September—no, no diversion of the Pennsylvania Railroad.

Exam. Brown: You described the 17 percent diversion as applicable during a period from September 7 to September [fol. 1034] 26, 1949. Prior to that time, there was no diversion?

A. No, sir.

Exam. Brown: Is that all on direct?

(No response.)

Exam. Brown: Cross examine.

Mr. Smith: There is one question, Mr. Neill, I should like to clear up.

Cross examination.

By Mr. Smith:

Q. In response to a question from the Examiner, you stated that the unloading charges became effective November 1, 1948. It is correct, is it not, that the charges became effective on traffic initially billed on and after that day?

A. Yes, that is correct, on traffic bills of that date, not deliveries. But the tariff was effective November 1.

Mr. Smith: That is all I have, Mr. Examiner.

Exam. Brown: Mr. Miller, do you have any questions?

Mr. Miller: No, sir.

Exam. Brown: Any further questions of this witness?

(No response.)

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Exam. Brown: That is all, Mr. Neill. Thank you.

(Witness excused.)

Mr. Loos: Mr. Examiner, in reference to the document marked 103, that consists of extracts from testimony of carrier witnesses in several proceedings dealing with this [fol. 1035] New York situation, and the purpose is to show that the position of the carriers from 1909, the date of the first hearing, from which there is an extract, to April, 1947, the date of the last hearing, from which an extract is presented, was continuously that this unloading service had to be performed by the carriers because of the physical disabilities in the New York situation. I am not attempting to characterize by what I am saying what these witnesses testified. That testimony will speak for itself.

Now, pursuant to Rule 82 of the Commission's Rules of Practice, I have prepared true copies of these extracts from the records of the Commission, and I prepared them in the form of an exhibit, and I submit them as an exhibit.

Exam. Brown: Any objection?

Mr. Smith: Mr. Examiner, on that point, if Exhibit 103 is received, I should like for you to afford the Respondent the right, within, say 10 days after the close of this hearing, to decide whether there are any other extracts from these particular cases that we might want to submit by way of clarification or expansion. I haven't had an opportunity to study these extracts yet, and, of course, I haven't read the dockets that the exhibit refers to.

Mr. Loos: That will be entirely satisfactory, Mr. Examiner.

Exam. Brown: Other than that, you have no remarks to [fol. 1036] make in connection with this exhibit?

Mr. Smith: No, sir.

Mr. Miller: I have one remark, namely, that in the half a second I had to run through this exhibit, it appears to me clearly that it does not prove what Mr. Loos has stated that it does prove.

Mr. Loos: Oh, Mr. Examiner, I beg to differ with the statement just made by Mr. Miller. I specifically said I was not attempting to state what the witnesses had stated.

Mr. Miller: Yes.

(Witness excused.)

BERNARD A. EGAN was sworn and testified as follows:

Direct examination.

By Mr. Wells:

Q. Will you please state your name and residence?
A. Bernard A. Egan, Mountainville, New Jersey.
Q. What is your business, Mr. Egan?
A. General manager of Egan-Fickett & Co. Inc., distributors of citrus and deciduous fruits.
Exam. Brown: Now say that over again. Say it good and loud so they can hear it all the way back at that curtain there.
A. Egan-Fickett & Co. Inc.

By Mr. Wells:

Q. What is the nature of the business of Egan-Fickett & Co.?
A. Primarily distributors of citrus and deciduous fruits. [fol. 1040] Q. Do you also grow some of the fruits that you distribute?
A. Yes, sir.
Q. You are the manager of the New York City office?
A. Yes, sir.
Q. As such, how long have you been familiar with the methods and deliveries of citrus fruits from Florida, for example, in New York City?
A. Since 1937.
Q. Continuously during the intervening years?
A. Yes, sir.
Q. What is the approximate volume handled by you in New York City in carlots?
A. Between 1,500 and 2,000 carloads of citrus.

Exam. Brown: How many?
The Witness: Between 1,500 and 2,000.
Exam. Brown: I still did not get it.
The Witness: Between 1,500 and 2,000 cars.

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Mr. Wells: Of Florida citrus.

By Mr. Wells:

Q. Do you know whether or not all of the Florida citrus is sold by auction or is some of it sold in other ways in New York City?

A. Some of it is sold at private sales in New York and others by auction.

Q. Is there any difference in the service rendered by the railroad company in making delivery of the citrus fruit [fol. 1041] from Florida in New York City as between that sold at auction and that sold at private sale?

A. No, sir.

Q. At what point is delivery made?

A. When the fruit is unloaded from the cars and dumped in one lot, carlot lots on the pier.

Q. At the time when it is first available for you to take delivery?

A. That is right.

Q. After the point at which it has been unloaded from the cars on the carfloats and placed at a spot on the pier, is there any additional service rendered to that fruit by the railroad?

A. No, sir.

Q. Whatever additional may be done, by whom is it done?

A. It is done by contract employees of our company, in our case.

Q. And paid by you, in addition to the line haul and transportation charges?

A. Yes.

Q. So that it does not enter in any wise to the transportation service rendered by the railroad?

A. That is correct.

Q. Do you handle any vegetables, Mr. Egan?

A. No, sir.

Q. Just the citrus fruit from Florida?

[fol. 1042] A. A few Georgia peaches.

Exam Brown: The witness testified he handled deciduous fruits also.

Mr. Wells: He said and peaches from Georgia.

The Witness: Yes, sir.

Exam. Brown: Well, you testified as to 1,500, 2,000 carloads of Florida citrus.

The Witness: Yes, sir.

Exam. Brown: Now, that does not cover the deciduous fruits. I should like to know something about that.

By Mr. Wells:

Q. What is the volume of deciduous fruits that you handle?

A. A small volume in New York. Most of our deciduous handling is in carlot sales. We would not run over 100 cars on peaches.

Exam. Brown: Peaches?

The Witness: Yes, sir.

Exam. Brown: And when you are referring to deciduous fruits, you include peaches only?

The Witness: Yes, sir.

Exam. Brown: You do not get any from California?

The Witness: No, sir.

Exam. Brown: No citrus from California?

The Witness: An occasional car, that is all.

Exam. Brown: How many a year?

The witness: Oh, it might be five cars in a year.

[fol. 1043] By Mr. Wells:

Q. Is there any opportunity afforded to you by the railroad of unloading the car that is floated to the North River Pier?

A. No, sir.

Q. The first time it is available to you is after it is unloaded by the rail employees?

A. That is right.

Mr. Wells: That is all on direct, Mr. Examiner.

By Mr. LaRoe:

Q. Do you use team track delivery at all?

A. No, sir, not ourselves. We have sold the people that use the team track delivery.

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Q. I am talking about what you do.
A. No, sir.
Q. How are the peaches handled, over the same route that north of Potomac Yards handle the citrus?
A. Yes, sir.
Q. On the peaches, do the railroads make the simple pier delivery?
A. Yes, sir.
Q. And they do not render any service beyond that that you do not pay for?
A. No, sir.

Mr. LaRoe: That is all.
Exam. Brown: The delivery north of Potomac Yards is through Pennsylvania Railroad Company?
[fol. 1044] The Witness: Yes, sir.
Exam. Brown: Exclusively?
The Witness: Yes, sir, with very, very few exceptions. Occasionally, a car will come in out of route or something. It is practically 99-9/10ths percent Pennsylvania.
Exam. Brown: Mr. Wells?
Mr. Wells: That is all.
Exam. Brown: Cross examine.
Mr. Smith: I have no questions, sir.
Exam. Brown: Mr. Miller?
Mr. Miller: No questions.
Exam. Brown: That is all, sir.

(Witness excused.)

Gordon Stedman was sworn and testified as follows:

Direct examination.

Mr. Wells: May we have the exhibit consisting of four pages numbered as 104?
Exam. Brown: One exhibit?
Mr. Wells: Yes, sir.
Exam. Brown: Let the record show that Exhibit No. 104 has been distributed to the parties and has been marked for identification.

(Protestant's Exhibit No. 104, witness Stedman, was marked for identification.)

[fol. 1045] By Mr. Wells:

Q. Please state your name and residence.

A. My name is Gordon Stedman. My residence is 45 West Central, Orlando, Florida, and I am secretary-manager of the Growers and Shippers League of Florida.

Q. State briefly your transportation experience.

A. I have been associated with national associations concerning transportation of fresh fruits and vegetables since 1927.

Q. Mr. Stedman, will you briefly explain the first sheet of your Exhibit 104?

A. The first sheet of Exhibit 104 is a statement showing the total unloads of fresh citrus fruit originating in Florida, shipped to New York City, and the total number of carloads sold at auction, and the percentage of those carloads to the total carloads received in New York City.

Q. Under the first column headed "season," is that the period from September 1 through August 31 of the following year?

A. That is.

Q. Did you obtain the figures as to total carloads by rail to New York City from the same source mentioned by Mr. Pease in his testimony?

A. That is correct, yes.

Q. So that the New York delivery, Erie, includes the same that he testified to?

A. It does. I might say the only difference between these figures and those given by Mr. Pease is that the [fol. 1046] *figures and those given Mr. Pease are that the* figures in Exhibit 104 are on a season basis, where the figures given by Mr. Pease are on an annual basis.

Q. Is there any additional comment necessary by you on page 1?

A. I do not believe so.

Q. Is page 2 of Exhibit 104 similar to the first page except for Philadelphia delivery?

A. It is.

Q. And Philadelphia auction sale?

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A. That is right.

Q. What comment do you have with respect to page 3 of Exhibit 104?

A. Page 3 is a statement showing the unloads of Florida citrus fruits and vegetables by rail and truck at New York City for the 1937-48 and 1948-49 seasons. It also shows the total shipments from Florida to all destinations by rail and truck for the same seasons.

This exhibit is in supplemental form. It is pages 2 to 7, inclusive, of Exhibit No. 38, introduced by Witness O'Rourke in the prior proceeding, and it simply brings that exhibit up to date.

Q. When you say the prior proceeding, you mean the prior hearing in this proceeding?

A. The prior hearing in this proceeding.

Q. From that sheet which you have just been explaining, [fol. 1047] it appears that the truck unloads of citrus increased from 90 in the 1947-48 season to 1,358 in the 1948-49 season.

A. That is correct.

Q. Do you know whether or not the imposition of the unloading charge at New York effective November 1, 1948, has any bearing on that change?

A. I would say that it had.

Q. Do you have any further comment with respect to page 3?

A. No. I believe the balance of it is self-explanatory.

Q. Is page 4 similar to page 3 with the exception that it deals with Philadelphia?

A. It is.

Q. Do you have anything additional to add, Mr. Stedman?

A. I believe that is all, except that as far as Florida vegetables are concerned, very few of them are sold at auction except tomatoes.

Q. In other words, you are speaking now of New York and Philadelphia?

A. New York and Philadelphia.

Q. And the deliveries of the vegetables from Florida at New York and Philadelphia is for sale other than at

auction with the exception of tomatoes which you mentioned?

A. That is right.

Q. And the figures of percentage sales of Florida citrus by auction is as shown in your Exhibit 104?

[fol. 1048] A. That is correct.

Mr. Wells: I offer Exhibit 104 in evidence.

Exam. Brown: Any objection?

Mr. Smith: No objection.

Exam. Brown: Exhibit 104 is received in evidence.

(Protestant's Exhibit No. 104, witness Stedman, received in evidence.)

Exam. Brown: Off the record.

(Discussion off the record.)

Mr. Wells: The witness is available for cross examination or further direct, as the case may be.

Mr. LaRoe: I have no questions.

Exam. Brown: Cross examine.

Cross examination.

By Mr. Miller:

Q. What is the season you refer to in your exhibit, Mr. Stedman?

A. September 1st to August 31st.

Mr. Miller: That is all.

Exam. Brown: You are excused, Mr. Stedman. Thank you.

(Witness excused.)

Exam. Brown: Off the record.

(Discussion off the record.)

Exam. Brown: We will take a short recess.

(A short recess was taken.)

[fol. 1049] Joseph G. Papa was sworn and testified as follows:

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Direct examination.

By Mr. Kaplan:

Q. Mr. Papa, are you a member of the Industry Committee for the Improvement of Washington Market?

A. I am.

Q. What position in that committee do you hold?

A. Chairman of the executive committee.

Q. Have you been authorized by the Industry Committee to appear at this hearing?

A. I have.

Q. In addition to being chairman of the executive committee of the Industry Committee for the Improvement of Washington Market for which committee you appear, do you hold any other position?

A. I am president of Local 202 of the commission drivers and chauffeurs union, affiliated with the International Brotherhood of Teamsters of the American Federation of Labor.

Q. Speaking generally, what is the jurisdiction of commission drivers and chauffeurs union, Local 202?

A. It has jurisdiction over all fruits, vegetables, butter, eggs, cheese and cream.

Exam. Brown: You mean the transportation of them by truck?

The Witness: The jurisdiction over those commodities [fol. 1050] insofar as it concerns loaders, porters, salesmen, drivers, helpers, checkers and coopers.

By Mr. Kaplan:

Q. For how long have you been president of Commission and Drivers and Chauffeurs Union, Local 202?

A. Since May, 1940.

Q. Now, have you been authorized by the Industry Committee to appear here and pursuant thereto have you prepared a statement which you wish to incorporate in the record?

A. Yes, I have, and I have a statement here which I wish to read into the record.

Q. Will you proceed with the statement?

therefore I think an objection to its continuance should be honored at this time.

Exam. Brown: There are several factual statements made in this.

The Witness: You can ask me questions after.

Exam. Brown: Just a moment, please. There are several factual statements made in this prepared testimony. There is considerable argument in it, also.

Mr. Miller: It actually makes very little difference to me whether the witness goes into the argument or not, so long as it is understood on all hands that it is entirely an argumentative statement.

Exam. Brown: It is not entirely argumentative. There are several factual statements in it, as you will see as it [fol. 1064] goes along.

Mr. LaRoe: Mr. Examiner, during this interruption, may I say the Mayor has arrived and it will be serving his convenience if there be an interruption before you rule on this matter.

Exam. Brown: Very well.

(Witness excused.)

Mr. McGrath: Mr. Examiner, may I note my appearance as corporation counsel of the City, John P. McGrath.

Exam. Brown: Corporation counsel, City of New York?

Mr. McGrath: Yes, sir.

Mayor William O'Dwyer was sworn and testified as follows:

Direct examination.

By Mr. McGrath:

Q. Mr. Mayor, are you the Mayor of the City of New York?

A. Yes, sir. I am William O'Dwyer, Mayor, City of New York.

Q. Mr. Mayor, did it come to your attention in October of 1948 that the Interstate Commerce Commission had made a decision authorizing the imposition of an unloading

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charge on produce coming through the pier stations of the City of New York?

A. It did.

Q. And when you learned of the imposition of this unloading charge, did you take any steps?

[fol. 1065] A. I did.

Q. As Mayor of the City with respect to seeking a hearing?

A. I did. I consulted with the Port Authority and I asked you, as corporation counsel, to join with them in asking to have the case reopened.

Q. Now, did you do that on the basis of any interest that you conceived the City to have in connection with this decision?

A. I did.

Q. Will you explain what interest the City of New York has in these proceedings?

A. No. 1, in the case of the three railroad companies that are involved in hauling produce here we have about 100,000 cars of produce a year. Under the new arrangement, where the railroad does not deliver the produce to the consignee, where he compels, under the new ruling, the consignee to go in and pay for something that I believe is the railroad's job, and that is delivered to him from the car to a place where he can pick it up, that imposes something between $26 a car and $36 a car of an additional tax in the cost of that food to the City. That runs into about a three million dollars bill, an extra bill the consumer in our City has to bear.

More than that, if this ruling is permitted to stand, we in New York City can expect to have it applied to every pier in the entire City.

At the present time, we are proposing to rehabilitate our [fol. 1066] piers at a cost of about $78,000,000. Our plans have been approved, those that have been drawn, and the other plans are on the drawing board.

We are waiting for a vote on an amendment this coming November, to see whether or not it is not possible for us to get $68,000,000 of that released from the present debt, and to use it for that purpose.

Now, if this ruling is permitted to stand, it will have

the effect of placing a tax on every piece of merchandise shipped through our port, both coming in and going out, and it will place our port at such a great disadvantage to the shipper or the receiver that it is bound to do irreparable damage to our waterfront, and if it does that, it does irreparable damage to our City.

If it has the effect of favoring other ports in the shipment of merchandise, it will have the effect to that extent of making an inland town out of New York City.

As best as I can find the figures, the basic economy of this City, the contribution of our waterfront, is anywheres from 25 to 40 percent of our basic economy, and if we are going to have to leave our piers in their present condition—and they certainly were in bad condition when we took them over, and they still are—if we do not rehabilitate them, we might as well say that we have seen the end of New York City as a major port.

[fol. 1067] This one ruling extended to the other piers will do that kind of harm to the City. So that, Mr. McGrath, I am interested in this from the City's viewpoint. I think it is something that the Interstate Commerce Commission should reconsider before they draw a blue pencil on the map known as New York City and say, "We are going to wipe you out." That is the position we are facing.

Now, it is bad enough to have to take an additional load of $3,000,000 on our food cost every year, but to then go into a rehabilitation program that will take six to seven years to put us in a position where we can meet normal competition with the other ports, gulf ports, Philadelphia, Baltimore—to say to us that we, due to this—we go in and spend $78,000,000 to rehabilitate it, at a time when we are going to be crushed by this unnecessary impost, this impost that has changed the method of doing business in this port that has consistently been the rule in this port for 50 years, if that is going to happen, we will have to revise our thinking about the expenditure of $78,000,000.

Q. Does it also have an impact, Mr. Mayor, on the contemplated plans for the rehabilitation of Washington Market?

A. When we came into office on January 1st, 1946, there

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were plans for a new market, almost at the present site of Washington Market that, on a basis of 1946 prices, would run into about $40,000,000.

[fol. 1068] Well, as everybody knows, construction prices went up to a point where the same plans would have cost more than $60,000,000 if we had built it.

Now, the hauling of our merchandise into that market, under the plan that has been followed consistently for half a century, will place us at this disadvantage: that unquestionably the consignees, rather than pay this impost, would go over to the Jersey side and would make that the final unloading point, the point of delivery, and you could have the Taj Mahal down there and they still would not come into the New York side.

Q. Do the pier stations in lower Manhattan and the operations in Washington Market include the handling of produce which is destined for points outside the City of New York as well as those inside?

A. Yes, certainly. I am not familiar with the actual figures, but I think there is about 25 percent of merchandise, of foodstuffs that come into New York that are shipped to other points. That was, again, a part of the great produce that we had.

Q. Is it your position, Mr. Mayor, that the unloading service is an integral part of the railroad's contract of charge, and hence is included or should be included in the line haul rate?

A. As I understand it, when you ship something, we will [fol. 1069] say, from California, from Texas, from some point in between, the contract with the railroad is that they will deliver that to the consignee. In this present setup, the consignee cannot get anywhere near their cars, and it has been the custom of the railroads to deliver it to the consignee where he can pick it up and haul it away.

Under the present setup, the railroads got to go in and bring it out to the consignee, only now, the railroad charges for what has been and still is their job, and we pay the bill in New York City, about $3,000,000 extra cost to our foodstuffs.

Q. Is it your position as Mayor of the City of New York

that this unloading charge places a discriminatory burden on the consumers of New York City?

A. It definitely does.

Mr. McGrath: I have no further questions.

Exam. Brown: Any further questions on direct examination?

Mr. LaRoe: No questions.

Exam. Brown: Any cross examination?

Mr. Smith: I have no questions, Mr. Examiner.

Mr. Miller: Yes, I have one.

Cross examination.

By Mr. Miller:

Q. Mr. O'Dwyer, if it were shown that this charge or similar charges are assessed for performing the same service at all points where the railroads do provide the service, I take it you would withdraw your opposition, is that [fols. 1070-1072] correct?

[fols. 1073-1114] The Witness: If what the gentleman means is that some other community would take our condition lying down, would I take it lying down, the answer is no.

[fol. 1115] Proceedings of September 28, 1949

D. W. Ward was sworn and testified as follows:

Direct examination.

By Mr. Fitzgerald:

Q. Will you state your name, address and business affiliation?

A. D. W. Ward, general manager, Philadelphia Terminals Marketing Association; address, business, 208 Walnut Street, Philadelphia.

[fol. 1116] Q. What is the Philadelphia Terminals Marketing Association, Mr. Ward, and of what or whom is it composed?

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A. The Philadelphia Terminals Marketing Association is composed of 54 individuals, partners or corporations, handling carlot receipts of fruits and vegetables in the Philadelphia market.

Q. Now, when you say fruits, Mr. Ward, does that include or exclude citrus fruits?

A. That, for the proceeding, will, in a sense, exclude fruits since the auction receivers will be represented in another manner.

Q. Do I understand it, then, that some of the members of the association of which you are general manager may also be members of an association of auction receivers?

A. That is correct.

Exam. Brown: You, at the present time, are not testifying with respect to citrus fruits, is that right?

The Witness: That is right.

By Mr. Fitzgerald:

Q. Mr. Ward, what proportion of the vegetables, and by vegetables I take it from what you have just said that we can include fruits other than citrus, in part, at least, what percentage of such commodities received in the Philadelphia market are received by the members of your association?

A. Approximately 97 percent of all vegetables received [fol. 1117] in the Philadelphia market, excluding that which goes to chain stores.

Q. Now, Mr. Ward, would you explain briefly the method of doing business of the receivers and the territory in which they operate?

A. The receivers act either as commission men or handle on direct consignment by outright purchase carloads of the fruits and vegetables, primarily fruits, and the majority of such receipts, I would say at least 95 percent, are handled at the Pennsylvania Produce Terminal.

Q. Now, do they sell only in Philadelphia or over what territory do their sales reach?

A. I would estimate that approximately 40 percent of their receipts are distributed to wholesalers in points outside of Philadelphia within a radius of 100 to 150 miles.

Within the City of Philadelphia they serve about four to five, between four and five thousand individual retailers.

They also sell to jobbers who transfer the commodity from the produce terminal to the Dock Street area.

Q. Now, Mr. Ward, I direct your attention to the fact that the tariff relating to the unloading charge hearing question refers to three Philadelphia stations, namely, the Pennsylvania Produce Terminal, the B&O Terminal, 31st and Chestnut Street.

Will you explain with reference to those three stations what the operations of the members of your association are?

[fol. 1118] A. As previously stated, at least 95 percent of the receipts to the members of our association are handled at the Pennsylvania Produce Terminal. 31st and Chestnut Street is no longer used except on rare occasions other than for consignments to chain stores. The B&O terminal facilities are not generally used for the delivery and receipt of fruits and vegetables—of vegetables.

Q. So that, as to the members of your association, their operations are almost exclusively then involved at the Pennsylvania Produce Terminal?

A. That is correct, and has continued as that since the opening of the terminal in 1927.

Q. Now, Mr. Ward, will you explain briefly the method of operation of the receivers at the Pennsylvania Produce Terminal with reference to the method of sale and so forth?

A. The receivers have two methods of handling and selling vegetables. The commodities generally referred to as dry vegetables, such as potatoes and onions and to some extent crated melons and tomatoes, at one time were unloaded on the BD boat platform, which is approximately 800 foot long and——

Q. Mr. Ward, excuse me, before you go into a precise description of the facilities of the terminal, in general, would you say that their method of operation at the terminal was that a part of their goods was unloaded and sold after unloading and part was sold by sample?

[fol. 1119] A. Yes. I had not reached the second stage, which deals with the top-iced vegetables, which customarily are delivered from team track and are sold from samples

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which are removed from the cars and brought on to the BD boat platform for display or for sale.

Q. Well now, so that your explanation will be clearer, will you describe briefly the facilities at the produce terminal from the standpoint of the receivers of vegetables?

A. From the vegetable receivers' standpoint, we have a platform facility which is stated to be 800 foot in length and 100 foot in width. However, I think only about 650 foot of the length is available for unloading. This is immediately adjacent, separated by one building only, to a team track which is composed of 16 tracks each accommodating about 25 cars, capacity of the yard at the present time being 400 cars.

The team tracks are laid out with tracks adjacent to each other, separated by an inspection platform, and each pair of tracks is separated by a driveway which measures 65 foot from rail to rail.

Q. Now, Mr. Ward, you have testified that the capacity of that track is about 400 cars. Are you aware of the fact that Mr. Hampton in a previous hearing in this case testified that the capacity of that team-track facility was 510 cars?

A. I am.

[fol. 1120] Q. Will you explain your answer in the light of that?

A. Originally the railroad had one additional track which is outside of the yard proper, that is, to the east side of the yard adjacent to another platform which is now taken over by hard freight.

Q. When you say hard freight, what do you mean?

A. That is the South Philadelphia freight station, package freight. The method of using the freight station and the vehicles and the vans and trailer tracks backed up to it have made the use of track No. 13 impracticable from a vegetable delivery viewpoint.

I think the railroad contended the track, when originally made, would accommodate around 30 cars, but by actual count, due to the shortening of some of the tracks, and also probably the increased length of cars since the yard was

built, 25 cars per rail will fill the track from the front end to the back end of the yard where a road cuts across making access from driveway to driveway, so you actually have 16 tracks with a capacity of 25 cars per track.

Q. You have made that count yourself?

A. Yes, recently.

Q. Now, Mr. Ward, what, briefly, is the background of the construction of the Pennsylvania Produce Terminal?

A. Well, prior to 1927, fruits were distributed from the piers on the Delaware River opposite the Dock Street area. [fol. 1121] The cars were either floated into these piers and unloaded or moved in over the Delaware Avenue street. The vegetables were delivered at 31st and Chestnut Street, which is the other side of the City, or at a few small yards in the northern section, north of the Dock Street area, Willow and Noble Streets, and some small yards of that nature.

In 1927, both the Baltimore & Ohio, Reading and Pennsylvania, in the interest of controlling, shall I say, the fruit and vegetable industry in Philadelphia, went into the construction of then-modern terminals, either one of them capable of meeting the accommodations of the trade in Philadelphia.

Q. These terminals then were in competition and not adjunct?

A. They were in competition with each other. They are located a half a mile apart and they are some distance removed from the Dock Street wholesale area.

Q. When you said the Dock Street wholesale area, will you explain what you mean by that?

A. Dock Street is historically the center of the distribution of fruits and vegetables in Philadelphia from a wholesale viewpoint. It is the first location of that industry and still remains at that point. There are approximately 150 to 200 wholesale houses in this area, and their source of supply is either from the rail terminals or from trucks.

Q. What is the approximate distance of Dock Street from these terminals?

[fol. 1122] A. I would estimate—I have never measured—3½ miles, maybe 4.

Q. Do I understand you to say that prior to 1927 Phila-

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delphia had its own carfloat method of delivery of fresh fruits and produce?

A. No. I said that the fruits were auctioned on piers on the Delaware River, opposite the Dock Street area. To the best of my knowledge, the B&O floated—the B&O and Reading had to use carfloats to get their offerings at that point. The Pennsylvania had to move them up Delaware Avenue on a switch line, and I am told that while I was not there at that time, that in the event of bad weather or some tie-up on the rails, they would revert to the use of carfloats to get their offerings to the piers. That was an exception.

Mr. Fitzgerald: Now, at this time, Mr. Examiner, I wish to offer in evidence the three photographs which I have already shown to Mr. Miller here, which photographs have to do with the team-track facilities at the Pennsylvania Produce Terminal. I have assured Mr. Miller that I will see that he and his associate counsel are furnished copies within the next couple of days.

Exam. Brown: Will you furnish copies to the Examiner, also?

Mr. Fitzgerald: Yes, sir.

Exam. Brown: Any other parties who wish copies of these [fol. 1123] exhibits, please contact counsel during the course of this hearing.

(Protestant's Exhibits Nos. 106, 107 and 108, Witness Ward, marked for identification.)

Exam. Brown: Off the record.

(Discussion off the record.)

By Mr. Fitzgerald:

Q. Mr. Ward, I show you a photograph which has been marked for identification as Protestant's Exhibit 106 and ask you what it is?

A. It is a photograph of a yard condition at the Pennsylvania Produce Terminal, Philadelphia, Pennsylvania, taken a week ago Monday, whatever date that is—September 19th.

Exam. Brown: Any particular reason for introducing that exhibit?

Mr. Fitzgerald: The purpose of this exhibit is to show the adequacy or inadequacy of the driveways between tracks

and the fact that they can be blocked by attempts to unload.

Exam. Brown: You say it is to show the inadequacy? Are you trying to show both?

Mr. Fitzgerald: Sir, I did not intend to argue the point at this time.

Exam. Brown: We want to know what is the worth of this exhibit and what it is introduced for. What is it supposed to show?

Mr. Fitzgerald: Specifically, it is supposed to show, if [fol. 1124] the Examiner please, that these 65 foot driveways under modern conditions and in the light of modern equipment are inadequate to prevent the orderly and efficient withdrawal of produce from cars at team track in Philadelphia.

Exam. Brown: That is a statement of counsel. Does the witness concur with his statement?

The Witness: I do, sir.

Exam. Brown: Take the next exhibit.

By Mr. Fitzgerald:

Q. I show you a paper marked for identification as Protestant's Exhibit 107, and ask you what it is.

A. This is also a photograph of the Pennsylvania Produce Terminal taken on September 19, 1949, and brings out the same conditions as portrayed in Exhibit 106.

Q. From a pan*amora* viewpoint?

A. Yes.

Q. Now I show you a photograph which has been marked for identification as Protestant's Exhibit 108 and ask you what it is.

A. This is a photograph of the Pennsylvania Produce Terminal, a panorama view of the gates at the front end of the yard before the trucks were admitted. It serves no purpose other than just a viewpoint of the congestion on Oregon Avenue prior to the opening of the yard.

Exam. Brown: The purpose of the exhibit is to show congestion outside of the yard?

[fol. 1125] The Witness: Yes.

Exam. Brown: Any objection?

Mr. Miller: No objection.

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Exam. Brown: They are received, Exhibits 106 to 108, inclusive.

(Protestant's Exhibits 106 through 108, inclusive, Witness Ward, received in evidence.)

By Mr. Fitzgerald:

Q. Now, Mr. Ward, I think for convenience we can describe the commodities received by the members of your association in two big categories: top-iced vegetables and dry vegetables.

As to top-iced vegetables—is that correct, by the way?

A. Yes. It will include, in dry vegetables, a certain amount of fruits such as peaches and melons, crated melons.

Exam. Brown: All fresh fruits?

The Witness: Yes, sir.

By Mr. Fitzgerald:

Q. Now, as to top-iced vegetables, what is the method of handling them at the Pennsylvania Produce Terminal?

A. The doors are opened by consignees' employees in the morning and samples withdrawn in the amount of 10 to 25 packages.

Q. Where is the car at the time it is examined?

A. From the car which is located on team track in the yard adjacent to the terminal facilities platforms. These packages are then trucked over to the B platform or pier, [fol. 1126] and lined up, displayed for sale from samples.

Q. Who removes those samples from the cars and who trucks them to the platform?

A. They are removed by truckmen employed by the consignees and trucked likewise by the same party to the platform. The consignee progresses his sale from these samples at 7:15, starting at 7:15 in the morning, and after sale, the sales slips are tendered to the truckmen who are employes of the receiver, who in turn go to the cars and remove the commodity from the cars to their trucks for delivery either into the market area or outside the Philadelphia district.

Q. Do any railroad employes handle the packages at any time during the operation that you have just described?

A. No.

Q. Isn't it a fact that top-iced vegetables, with insignificant exceptions, are not and never have been unloaded?

A. It is very rare for the consignees to order top-iced vegetables unloaded on platforms in Philadelphia.

Q. Now, the operation you have described is the same as it has been over the past years, both before and after November 1, 1948?

A. That is right.

Exam. Brown: These are operations on team tracks, are they not?

The Witness: Yes, sir.

[fol. 1127] Exam. Brown: And there is no unloading charge assessed for that unloading, is there?

The Witness: No, sir.

Exam. Brown: The shippers or the receivers perform those duties themselves?

The Witness: That is right.

Exam. Brown: Do you use the facilities of the carrier, however, in the unloading and displaying of the samples on the platform?

The Witness: That is right. The area of probably 150 feet, depending on the volume, is turned over for that purpose.

Exam. Brown: That is purely team-track delivery, is it not?

The Witness: Purely.

By Mr. Fitzgerald:

Q. Now, to clarify one part of the Examiner's question, facilities of the carrier are used not for delivery, I believe, but merely for placing the packages, that is, for the display of the packages on the platform?

A. That is correct.

Q. The placing, the sampling, all parts of the handling of those packages is done by employees of the consignee?

A. That is right.

Q. Now, as to dry vegetables——

Exam. Brown: Be careful you do not confuse dry vegetables with dried vegetables.

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Mr. Fitzgerald: No, sir. This is as distinguished from [fol. 1128] top-iced vegetables.

Exam. Brown: I am drawing a further distinction between dried vegetables and the vegetables you are referring to as dry vegetables.

Mr. LaRoe: You have not referred at all to dried vegetables, have you?

Mr. Fitzgerald: No.

Mr. LaRoe: Yes.

Mr. Fitzgerald: And, Mr. Examiner, we are referring only to perishable vegetables and the fresh vegetables and the fruits other than citrus that the witness has described.

Exam. Brown: I understand. I am just trying to make the record clear.

Mr. Fitzgerald: To clarify the record, this applies in no case to dried vegetables.

By Mr. Fitzgerald:

Q. Now, will you describe the operation as to vegetables other than top-iced which we characterize as dry vegetables prior to November 1, 1948?

A. Prior to November 1, 1948, commodities such as potatoes and onions, tomatoes, crated melons, to some extent, cabbage, turnips, were in the majority of instances placed adjacent to the platforms, platform B, and unloaded in full on the platform from which sale would be made whereby the buyer could view the entire carlot and take delivery at that point.

Q. How was this unloading operation performed and by whom?

[fol. 1129] A. The unloading operation was performed by the delivering carrier, at this point, the Pennsylvania Railroad.

Q. Will you talk a little louder, Mr. Ward?

A. And by five or six men, depending on whether he was unloading on the vegetable platform, it would be five employees, or whether on the fruit platform adjacent, where the auction commodities are received, it would be six men. The gang would be broken down as to two loaders and three truckers. The commodities on the vegetable platform would be trucked from the car to the location on the dock

where the merchandise was to be stacked, displayed and sold.

At this point of location the consignee would meet the truckers with a group of their own employees known as pilers or sorters and would remove the packages from hand trucks at their expense, at the consignee's expense, and line them up according to brand, size, grade, quality or other factors.

Exam. Brown: Now, this unloading situation in Philadelphia, so far as unloading gangs and that type of evidence is concerned, was covered at the prior hearing. To the extent that your evidence changes any of that evidence, if at all, please indicate as you go along.

Mr. Fitzgerald: I will bring that out by the questions, Mr. Brown.

Mr. Miller: Mr. Examiner, could I ask a question of counsel?

[fol. 1130] Exam. Brown: All right.

Mr. Miller: Mr. Fitzgerald, is there any point in going through this testimony again since it has already been fully described in the record? Couldn't we shorten this by simply stating what differences there are now, if any, from that described by Mr. Hampton at the prior hearing?

Mr. Fitzgerald: One of the things which I believe caused difficulty in the prior proceeding was that there was not an adequate description, explanation or understanding of the operations at Philadelphia.

Mr. Miller: Very well.

Mr. Fitzgerald: And I believe that by only bringing it out in this way can the record show sufficiently clearly the operations as they existed at Philadelphia.

A. (Continuing) In addition to the custom that I have just described, there was one other feature and that was that should the railroad place a car late for unloading or should it be ordered held and not unloaded by the consignee, he in turn could unload that car by himself with his own labor after the market opened.

By Mr. Fitzgerald:

Q. You say he could. Does he do it?

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A. He is not permitted to do so at the present time, but he did do it about—we estimate that approximately 20 percent of the commodities unloaded prior to November 1, 1949, were unloaded by the consignees on labor on the depot.
[fol. 1131] Q. Is there a tariff provision now which prohibits you from unloading?
A. The railroads have interpreted their tariff to that effect. We challenge that.

Mr. Fitzgerald: And we will bring that out.
Exam. Brown: Well, as a matter of fact, you have not unloaded since November 1, 1948.
The Witness: Simply because we have been denied the right.
Exam. Brown: And I am referring to unloading in situations where the carriers would unload and make a charge against shipment.
The Witness: Yes. We have not unloaded since——
Exam. Brown: I am not talking about team tracks.
The Witness: No. This is platform only.

By Mr. Fitzgerald:

Q. Now, Mr. Ward, the employees of the railroad did not, according to your testimony, as I understand it, handle those packages at any time after they placed them on the hand truck and moved the hand truck to the platform location?
A. That is right.
Q. They were removed from the hand truck by employees of the consignee?
A. That is correct.
Q. Did railroad employees perform any sorting service?
A. No, sir.
[fol. 1132] Q. Who did?
A. Consignee sorters.
Q. Did the consignee pay for sorting service?
A. Yes, at a minimum of $7.50 per car.
Q. But to his own employees and not to the railroad?
A. That is right.
Q. Now, I direct you to Mr. Hampton's testimony in the prior proceeding in which he referred to the fact that at

the time of unloading these hand trucks there was, and I want to quote his words in this operation—he said, in answer to a question by his counsel: "The truckers are required to take more time while waiting on the platform for the consignees' men to take the produce off the truck and stack it on the floor since they usually take advantage of that opportunity to make a careful inspection of the produce.

Thus, for example, in the case of onions, potatoes and most of the commodities in bags, the consignee's men will first examine the bag, then turn it over to examine the other side, and only then stack it in its place on the floor."

Mr. Miller: Mr. Examiner, before that question is answered, I should like to have it clarified as to whether that refers to the situation where the railroad performed the unloading, and, further, I would like counsel to specify the transcript reference of the statement to which he refers.

Mr. Fitzgerald: Mr. Examiner, I am unable to cite the [fol. 1133] page in the official record at which this testimony appears. I have here an exhibit as was supplied at the previous hearing.

Exam. Brown: You will find that page number in a few moments. In respect to the other request of counsel, can you comply with that?

Mr. Fitzgerald: This was, as I understand, Mr. Miller's question, relating to the service as provided by the carrier in the unloading of vegetables at B platform, which at that time was a free unloading service and which extended only to the point of trucking the hand truck to the location at which the consignee's men would remove it.

Does that answer your question, Mr. Miller?

Mr. Miller: Yes.

Exam. Brown: This was prior to November 1, 1948?

Mr. Fitzgerald: Yes.

The Witness: Now, will you repeat the question, please, briefly?

Mr. Fitzgerald: I will ask the stenographer to read the question again. I do not think it will be necessary to read the quotation.

Exam. Brown: Restate the question.

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Mr. Fitzgerald: Let me put a question now, since Mr. Miller's objection has been satisfied.

By Mr. Fitzgerald:

Q. Now, directing your attention to the quotation of Mr. [fol. 1134] Hampton's testimony that I have just read, will you comment upon this with particular reference to the question of any delay occasioned by the unloading and sorting by employees of the consignee?

A. The shipper tenders packages to the carrier in good order and the carrier is obliged to deliver to the receiver in that condition. If damage is incurred during transportation, carrier's rules demand that a segregation of such packages be paid prior to claim, prior to determination of the claim.

Exam. Brown: I do not understand what you mean.

The Witness: We start out with good order packages, and if at destination a condition of damage has occurred in transportation, the bad order, the broken or damaged packages, must be segregated from the good order packages; otherwise, the receiver is not entitled to claim, by rules of the Association of American Railroads of principles and practices.

Therefore, we are speaking of the railroad performing an act not related to transportation, but of segregation of damage incurred by them in transit in order that they may even go to the point of minimizing such damage.

Exam. Brown: You stated that the packages must be segregated prior to claim. That is the reason I did not understand you. Do you mean they must be segregated prior to delivery?

The Witness: Prior to delivery.

Exam. Brown: That is what you meant?

[fol. 1135] The Witness: And handled as such in order to facilitate or to make claim possible, if liability exists.

Exam. Brown: And it is your contention that that is not part of transportation?

The Witness: That is right.

Exam. Brown: Assuming, of course, that the car has not yet been delivered to you.

The Witness: We assume—in fact, the packages are not, in a sense, delivered to us since the railroad reserves the right to recooper and return as many of those packages to good order as they can prior to delivery.

Exam. Brown: All right. Now, if the packages are recoopered and brought into a satisfactory condition and then delivered to you, isn't that recoopering part of the transportation?

The Witness: That is correct. It is part of the transportation, not part of the unloading. I think I used the wrong statement. I said it is not part of the unloading of the segregation.

Exam. Brown: Now, if the packages are recoopered after the rest of the car is delivered to you, and it develops that some of those packages are beyond repair and the carriers themselves dispose of them, then that is not part of the transportation, is that right?

The Witness: That is not part of the transportation. [fol. 1136] That is an act of rejection after the packages have been delivered.

Exam. Brown: In other words, anything that occurs after the actual delivery is not transportation?

The Witness: That is right.

Exam. Brown: And anything that occurs prior to that time you consider transportation?

The Witness: I do.

Exam. Brown: Now, that is your personal view?

The Witness: Yes, sir.

Exam. Brown: And these are questions on my part and not statements.

The Witness: Yes, sir.

By Mr. Fitzgerald:

Q. Now, Mr. Ward, as respects Mr. Hampton's statement to the effect that there was delay because of the inspection of these packages by the consignee, what do you have to say with regard to that?

A. Well, again, may I express my personal opinion from observations? The inspection is a brief period. It is done before the packages are removed or at the time they are removed from the hand truck by consignee's help, and in a

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sense, to me, it means a saving rather than a delay because, due to our doing our own sorting, the consignee is not obliged to add additional men to his unloading gang for the purpose of unloading the trucks.

Q. What is the operation of the consignee in removing [fol. 1137] these packages from the truck and in this sorting, as Mr. Hampton calls it?

A. Well, the railroad truckers run their two-wheel truck up to the location where the commodity is to be stacked and the bags are lifted from the truck by consignee's sorters and are placed either in the main line or left on the truck and run back about 15 or 20 feet, at which point the consignee's sorters remove them from the truck and make another pile.

Q. Then the bag or package is picked up by the consignee's employees and put in a stack?

A. Either in the main line or put in a separate pile.

Q. Is there, in fact, any delay occasioned by the necessity of inspecting that package?

A. Very small amount. It is just a matter of looking at one side of the bag or the package—maybe you do not have to turn it. In fact, when a car is running sound, as most of them are, there is no delay at all.

Q. Now, since November 1, 1948, in what respects has the unloading operation changed on B platform?

A. The unloading operation has not changed in any respect except that the consignee now charges for the unloading and he also refuses the consignee the privilege of coming on the platform and unloading their own cars, if they elect to do so.

Mr. Fitzgerald: Mr. Stenographer, read that answer. [fol. 1138] Mr. Montgomery: I think that is a little confusing there. He said the consignee does the unloading.

The Witness: The railroad.

Mr. Fitzgerald: Will the stenographer read the witness's last answer? I did not catch it.

(The reporter read the witness's last answer.)

By Mr. Fitzgerald:

Q. The word "consignee" should read "railroad"?

A. That is correct.

Exam. Brown: In other words, the record will stand like it is. In other words, when you made the statement that the consignee makes a charge, you mean the railroad makes a charge.

The Witness: I do.

Exam. Brown: Off the record.

(Discussion off the record.)

By Mr. Fitzgerald:

Q. Now, Mr. Ward, you say that the consignee is not permitted to unload. Do I understand from that that the railroad will not deliver a car at platform unless the consignee orders the railroad to unload it?

A. That is right. Placement will not be made unless unloading is ordered by the consignee.

Exam. Brown: Now, let us get the facts straight in that connection. The carriers always wait until you order a car to be placed on the platform, or do they move it in on the platform and then ask you?

[fol. 1139] The Witness: They wait until it is ordered placed on the platform.

Exam. Brown: In other words, you are notified in advance of the arrival, of the pending arrival of that car, and then you notify the carriers that you wish either team track delivery or platform delivery?

The Witness: That is right.

Exam. Brown: And after you advise the carriers, then they spot the car?

The Witness: Correct.

Exam. Brown: All right.

By Mr. Fitzgerald:

Q. Now, if you advised them that you want platform delivery, will they make platform delivery?

A. I would say no. No, they do not make platform delivery.

Q. There is a proviso made by the railroad before they will deliver the car at the platform?

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A. The proviso is that they will not make platform delivery, will not place the car on the platform unless the consignee orders car unloaded. That is the difference between platform delivery in that it is not accessible to the consignee at the platform until the railroad has unloaded and assessed a charge.

Q. In other words, after having placed a car alongside the platform at the consignee's order, provided the consignee has ordered the railroad to unload that car with [fol. 1140] its own employees, the consignee is not permitted to enter that car himself or with his own employees or to remove the commodity from that car with his own employees, is that it?

A. Not permitted to enter the car for the purpose of unloading with his own employees.

Exam. Brown: Is he permitted to enter the car for the purpose of inspection?

The Witness: Yes, sir.

Exam. Brown: He may do that?

The Witness: Yes, sir.

Exam. Brown: Who breaks the seal?

The Witness: It is usually the inspector or the consignee-owner of the car, the inspector employed by him, or the owner of the car.

Exam. Brown: In that respect, your practice is no different than it is on the docks of New York?

The Witness: I think not.

Mr. LaRoe: May I ask there what would happen if you should tell the railroads to please place that car and we will unload it ourselves, the shippers, the consignees will unload it? What would the situation be then?

The Witness: The car would be left in the yard. It would not be placed.

Mr. Goldsmith: Mr. LaRoe, you were talking about platform delivery, were you not?

[fol. 1141] Mr. LaRoe: Platform delivery.

By Mr. Fitzgerald:

Q. Is it correct, then, Mr. Ward, that as regards the physical work done by the railroads' employees in the un-

loading of the car which has been placed at the platform, and as to which they have been ordered to do the unloading, no additional services of any kind are performed by the railroads that were not performed prior to November 1, 1948?

A. That is correct.

Q. Now, Mr. Ward, what are the present unloading costs for the unloading by the railroad of the cars of commodities at platform at Philadelphia?

Exam. Brown: Now restrict that to the commodities he is testifying about.

By Mr. Fitzgerald:

Q. (Continuing) As to the commodities to which your testimony has been limited.

A. $1.95 a ton. 650 bags of 50-lb. onions would run about $29.

Exam. Brown: Is that the usual loading of onions?

The Witness: That is the minimum.

Exam. Brown: That is the minimum, but let us be practical; what do you actually pay?

The Witness: The cost runs from that point up to around $35, on that one commodity.

Exam. Brown: Well, how many bags of onions do you normally get in?

[fol. 1142] The Witness: 300 bags. At the present time there is a trend back to the minimum loading since the decease of the ODT heavy loading orders.

By Mr. Fitzgerald:

Q. Now, is it true, Mr. Ward, that the schedule published by the railroad and the tariff printed after the order of the Commission effective November 1, 1948, stated an unloading charge of $1.50 for onions instead of the $1.95 that you have mentioned?

A. That is true. The first tariff which came out stated for that particular commodity $1.50—isn't it? However, that was never charged. The railroads interpreted other increases as applying to this tariff and thereby increased

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the first published unloading allowance, increased it by 30 percent.

Q. And have exacted that increased tariff from Philadelphia receivers ever since?

A. That is correct.

Q. Now, Mr. Ward, since November 1, 1948, as a result of the imposition of this unloading charge, what changes, if any, have been forced upon the receivers of vegetables in Philadelphia in the conduct of their business?

A. Well, in respect to the commodities which we have been discussing as having been unloaded on the platform, the unloading of that commodity has been dislocated to the extent of—our most recent figure—63 percent now being handled in the yard, which formerly was unloaded and distributed, [fol. 1143] sold and delivered from the platforms. The effect has been quite detrimental in a sense to the receivers in that the trade was always accustomed to buying these commodities from inspection of the carlot, and at time of unloading on the platform any bags which had been damaged, rubbed, or spotted, either due to bruising or decay, were segregated into a separate block.

The buyer, therefore, would buy main line merchandise in dry and sound, good condition. He now buys from samples, and when he goes to the car, he encounters all of these conditions, casts them aside and sorts through the car, the result in many instances is—in the majority of instances—a state of confusion exists in the car. The buyer going into the car for his load, the first view he gets is the accumulation of damaged or spotted or decayed or otherwise disfigured packages cast aside in the doorway area of the car.

We are suffering a lot of losses of sales, necessitating reselling or necessitating eventual trucking the car or ordering it unloaded in order to segregate these damaged conditions from the good load.

Q. What happens to the price agreed upon at the time of the purchase by sample in those cases?

A. It is difficult to resell on the following market at the same price you can realize on the first arrival, and in addition to that, adjustments—receivers are obliged to

[fol. 1144] make numerous adjustments because of the delivery from the car and the buyers have accidentally or unintentionally taken packages which do not qualify as sound and main line bags. It is a state of confusion as far as the distribution of that commodity is concerned.

Q. Does it have any effect on the promptness or rate of return to the grower?

A. Not only on the promptness, but on both the promptness and the rate of return.

Q. Will you explain?

A. Well, cars which normally would be sold and delivered in one day are carried over and resold in parts, and as I previously stated, to sell them you cannot realize the same returns on a commodity the second day that you realized when the car was fresh and a new arrival, unless there had been a change in the market value.

Q. Have the receivers encountered to any considerable extent the necessity of adjusting downward the price at which goods had been sold by sample based upon the observation of the car?

A. Well, that I mentioned, that when a buyer does leave the car with some damaged packages, he, as a rule, seeks an adjustment in his selling price before he pays the bill.

Q. Then that would have an effect also upon the delay of the return to the grower, would it not?

[fol. 1145] A. That is right.

Q. Now Mr. Ward, I direct your attention to the photographs that have been introduced in evidence. You said those were made on the morning of September 19, is that correct?

A. That is right.

Q. What is the volume of business being done at the Pennsylvania Produce Terminal as of September 19 compared to normal conditions?

Exam. Brown: What are normal conditions?

Mr. Fitzgerald: Well, I will ask the witness that.

Exam. Brown: No, I am asking you.

Mr. Fitzgerald: It is my understanding, sir, that the market is down to about one-third of its customary, that is, normal volume in peak seasons.

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Exam. Brown: Let us get this straight. Yesterday the term "normal conditions" was used and one witness answered it went back as far as 20 years. Now, are you talking about normal conditions prior to the war or are you talking about normal conditions prior to the effective date of these unloading charges?

Mr. Fitzgerald: No, sir. My question was directed to normal conditions in the course of the produce season. I will try to clarify that through the witness.

Exam. Brown: Well, will you make your question clear so that anybody can know what you mean by your question? [fol. 1146] Go ahead.

By Mr. Fitzgerald:

Q. What is the condition of the produce market in Philadelphia as of September 19 with respect to the volume?

A. We are off about 40 percent of what our volume would be during the winter and spring months. This is the home grown season, which furnishes a great quantity of produce in the Philadelphia area, and the yard and the business is approximately 30 to 40 per cent what it will be after we receive our first killing frosts in the East.

Q. Well, now, Mr. Ward, you say 30 to 40 per cent of what it will be. Do you mean that it is reduced by 30 percent or that it is reduced by 70 percent? I want to make that clear.

A. It is about 30 percent—40 percent of what it would be. It is reduced by 60 percent.

Q. And the reason for that, as you explain it, is that the market is now using vegetables of local origin which do not come in by rail either from the South or the West?

A. That is right.

Exam. Brown: Now, the situation is not any different this year than it was last year or the year before then or five years ago?

The Witness: No. We are speaking now of the seasonal conditional volume received.

Exam. Brown: It is just a question now of local competi- [fol. 1147] tion?

The Witness: That is right, and I bring it out because

the yard looks rather empty. The photographs which do show blocks are not near as plentiful or as many as they would be when the yard is full and our volume is rolling normally.

By Mr. Fitzgerald:

Q. In other words, then, if that picture were taken during the winter, in the height of your winter season, the tracks would be loaded to an extent of perhaps 70 percent more than that picture now shows?

A. That is right.

Q. Now——

A. Maybe—I think we had better state 60 percent. I do not think it goes up to that other figure.

Q. Now, in regard to Exhibit 107, I direct your attention to the fact that there are three, at least three points, in the yard at which there is a very noticeable congestion. Will you explain those?

A. This is track 14, 16, 18 (indicating). On the driveway of tracks 18 and 19, we have a congestion caused by unloading from a car, at which seven trucks are gathered, and at the south, extreme south end of the same driveway we have another like congestion, which shows that the cars intervening—a total of 16 cars—are inaccessible to any truck which would desire to take delivery from those cars at this particular time.

[fol. 1148] Q. In other words, the attempt by trucks to effect delivery from both sides of the driveway at one end of the team tracks will effectively block the entire two sidings or their lengths from anyone else taking delivery at that time?

Mr. Miller: Objection, Mr. Examiner. The witness did not state the facts contained in counsel's question and the exhibit does not so indicate.

Mr. Fitzgerald: Well, I think he can answer my question.

Mr. Miller: It is contrary to fact.

Exam. Brown: Restate your question and make it conform to fact, if it does not.

Mr. Fitzgerald: May I ask that you read the witness's answer, Mr. Knuppel?

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Exam. Brown: Which answer?

Mr. Fitzgerald: The answer to the last question before.

Exam. Brown: The answer to the last question has not been answered. We do not have an answer to the question, do we? There was an objection made and I did not hear any answer.

Mr. Fitzgerald: The witness's last answer to the next preceding question is one that I would like to have.

Exam. Brown: Read it.

(The reporter read the witness's answer above referred to.)

Mr. Fitzgerald: I will withdraw my subsequent question. The one to which objection was made. I think that is a satisfactory answer.

[fol. 1149] By Mr. Fitzgerald:

Q. In your opinion, Mr. Ward, will that condition be increased to the disadvantage of the consignees at the height of the winter season, that is, as the season progresses?

A. Yes, the congestion increases; that is, there are more instances, like instances.

Q. A substantial portion of the cars received in Philadelphia, for the Pennsylvania Produce Terminal, go to auction and are never placed on team track at the present time, is that correct?

A. That is correct.

Q. If the cars now going to auction—and that involves citrus—were to be delivered to team track for unloading by the consignee, what in your opinion would the conditions be at team track with respect to the opportunity to take delivery of the merchandise in the cars?

Mr. Miller: Objection, Mr. Examiner. The question is wholly irrelevant. It presupposes a state of facts which never has existed and which has no prospect that it will ever exist.

Mr. Fitzgerald: I should like to be heard on that, Mr. Examiner. The question is a very pertinent one, as will be shown by subsequent witnesses. I feel confident the auction is in exactly the same position as we are. They are not permitted to unload their cars. They are required to have

[fol. 1150] the railroad unload them. They have no opportunity of taking delivery in any other manner. They do have the opportunity of having their cars delivered at team track and unloading them themselves. There is no reason why the auction receivers should not, if they wish, deliver their cars to team track and take delivery in the same way that has been testified here. It is not a question that has no relevance. It is an extremely relevant question.

Exam. Brown: Is your question limited to citrus intended solely for auction?

Mr. Fitzgerald: For fruits, primarily citrus, intended for auction at the Pennsylvania Produce Terminal.

Exam. Brown: Does your question include any shipments which the consignee might decide not to send too often?

Mr. Fitzgerald: No, sir. It includes only those which are now going to auction for unloading at the platform, and asks what, in his opinion, would be the condition if they were, instead, delivered to this team track.

Exam. Brown: Now, is it true that the present practice—and I will ask that of the witness—is to display all citrus intended for auction?

The Witness: Unload. All citrus intended for auction is unloaded and displayed in full.

Exam. Brown: There is no exception to that, is there?

The Witness: No, sir.

[fol. 1151] Mr. Loos: Mr. Examiner, may I be heard on this? I want to challenge the statement made by Mr. Miller that there is no prospect of this occurring, namely, that fruits now unloaded at auction will be placed on team track. I want to say that there is no basis for any such statement. If this unloading charge continues in Philadelphia, the shippers who now sell at auction will be obliged to find some other way to sell their fruit, and that may well require unloading on team track.

Exam. Brown: Well, I will say this, that the record up to date does not warrant an inference that there is no possibility of the shippers unloading shipments themselves. The record does show that there is a present practice for the carriers to unload citrus when auction is had.

Mr. Miller: I may be mistaken, but I heard no testimony to the effect that any receiver of auction fruits and vege-

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tables at Philadelphia had any present firm intention of discontinuing his present practice in regard to auction.

Mr. Fitzgerald: I say, Mr. Examiner, that no witness has been heard for the Philadelphia auction.

Exam. Brown: Mr. Wells?

Mr. Wells: Mr. Examiner, I would like to call attention to the fact that one of Mr. Stedman's exhibits filed yesterday definitely shows a very substantial percentage of Florida citrus that is delivered at Philadelphia and is not sold on [fol. 1152] auction.

Exam. Brown: Well, so far as Mr. Miller's statement there is no possibility of this occurring, I do not believe that is supported by the record. All we know is what the present practice is. I will permit the witness to answer. Objection is overruled.

Mr. Fitzgerald: Will you answer the question, Mr. Ward? Do you wish it read?

The Witness: I think I can make an answer. If the cars now normally unloaded on auction—citrus and other fruits —were to be placed in the yard along with the vegetables that normally are handled at that point, it would tax the facility of the yard. There would be some days when the yard would not hold all of the cars handled at both the yard and the platforms, and it would create—it would throw probably twice as much trucking, trucking from two cars, into the yard. The facilities would definitely not accommodate such a method of delivery without great delay and handicap to the receivers and buyers.

Q. Now, Mr. Ward, what is the present attitude with respect to the receivers in Philadelphia who formerly, as you testified, in many cases unloaded their own cars at B platform? Are they satisfied with the present arrangement by which they must either unload at team track or have the railroad unload?

A. No, they are not satisfied. They object to the charge [fol. 1153] and likewise request the privilege of performing their own unloading if they desire to do so.

Exam. Brown: Now, don't you have the privilege of unloading now on team tracks?

The Witness: We do, Mr. Examiner.

Exam. Brown: What would be your purpose of unloading on platform when you can unload on team track?

The Witness: Certain commodities are best merchandised —by nature of the commodity and custom in our market, are best merchandized from unloads on the platform.

Exam. Brown: And you are referring to those types of vegetables?

The Witness: Yes, sir.

Exam. Brown: You would not mean potatoes, for example?

The Witness: Potatoes are one of them and one of the greatest—potatoes and onions, and other commodities, such as tomatoes and crated melons in season, turnips and cabbage, not top-iced, celery which comes from the South without top ice are other examples.

Exam. Brown: Is what?

The Witness: Is an example.

Exam. Brown: Do you get much celery from the South which is not top-iced?

The Witness: Yes, quite a bit in the southern season.

Exam. Brown: Florida?

[fol. 1154] The Witness: Yes, sir. Incidentally, we do not get as much now as we used to.

By Mr. Fitzgerald:

Q. Have receivers, to your knowledge, requested that the railroad permit them to unload their own cars at platforms since November 1, 1948?

A. The receivers represented by the Association have made such a request of the railroads right after the unloading charge was put into effect and we were denied the privilege of doing so.

Q. Was that request oral or in writing?

A. The request was made in two meetings which are known as contact committee meetings between the Association Board of Directors and officers of the Pennsylvania Railroad.

Q. And did the Pennsylvania Railroad deny that request?

A. They did, and at a later date I reintroduced the sub-

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ject by correspondence to see if they had not changed their mind on it and got a written answer to that effect.

Q. Did you then write a letter to Mr. I. T. Marine of the Pennsylvania Railroad?

A. I did.

Q. Do you have a copy of that letter?

A. Yes, sir.

Q. Will you read into the record the letter that you wrote to Mr. Marine?

Exam. Brown: Ordinarily, the best way of introducing [fol. 1155] this type of material is to introduce it by exhibits, but I understand, or assume, that you do not have them prepared?

Mr. Fitzgerald: That is correct.

Exam. Brown: You had better display those letters to counsel. We will have a short recess.

(A short recess was taken.)

Mr. Fitzgerald: Mr. Examiner, may I proceed?

Exam. Brown: Proceed.

Mr. Fitzgerald: I understand that counsel for the Pennsylvania Railroad offers no objection to the reading into the record of the letter testified to by the witness.

By Mr. Fitzgerald:

Q. Will you read the letter that was written by you to Mr. I. T. Marine on March 16, 1949?

A. (Reading) "Dear Mr. Marine: It has been some time since our contact committee meeting of November 17th at 30th Street Station, and your visit of November 23, 1948, to the office of Mr. P. J. Cancelmo in the interest of discussing possible means of relief to the Philadelphia carlot fruit and vegetable receivers from the exhorbitant unloading charges imposed on November 1, 1948, through Tariff 1233E, Supplement 107. As you know, various interests of the industry have since petitioned the Interstate Commerce Commission for reopening and reconsideration of the unloading charge and your railroad, as well as others involved, have filed a brief with the Commission against such reopening and reconsideration.

[fol. 1156] "At time of the above-mentioned meetings, we of the trade were of the opinion that the Pennsylvania Railroad recognized this unloading charge as a detriment to merchandising receipts at the terminal platforms and was sympathetic of our problem to the extent of making further study towards the possibility of adjusting said charge to a more reasonable figure. Most recent events seem to indicate that such was not the case or that you have since decided to rest until such a time as the Commission takes action.

"You will recall that at the time this unloading charge was effected, the Pennsylvania ruled that consignees could not perform their own unloading. This decision ignored the fact that certain receivers of potatoes and onions were and had for some time past either delivered direct from cars placed adjacent to "B" depot or unloaded such contents on the floor with their own employees. Such a ruling forced the receivers to pay the $1.95 per ton unloading charge or change their established custom of doing business by making deliveries direct from cars located on team tracks.

"These receivers feel that the present-day margin of profit does not justify the unloading charge, and at the same time find that it is detrimental to their business to be forced to team-track delivery.

"I find it difficult to understand the seemingly arbitrary position taken by the carrier in refusing these consignees [fol. 1157] the right to continue operating in the customary and established manner since such unloading incurs no expense to the carrier. These receivers have found both the unloading charge and team-track deliveries detrimental to their own interests as well as to the welfare of the industry. This is to appeal for further consideration on your ruling that such receivers cannot perform their own unloading as they did before the effective date of this unloading charge.

"We trust that you can now find causes to justify a reversal of your previous ruling or give adequate and just reasons why you must continue with your present policy."

Signed by D. W. Ward, General Manager.

Exam. Brown: I might state at this time if in the future

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any counsel has material of this kind, it is much better to put it in the record as an exhibit rather than reading it in. I am permitting an exception of our usual practice in this case. Go ahead.

By Mr. Fitzgerald:

Q. Now, did you receive a reply to that letter, Mr. Ward?
A. I did, on March 30th, from Mr. Marine.
Q. Will you read that letter?
A. (Reading) "I have noted with a great deal of interest your letter of March 16th regarding unloading charges on fruits and vegetables published late last year.

"There has been no change in our position, this matter [fol. 1158] being now before the Interstate Commerce Commission. I believe you will agree that our position was made entirely clear when this matter was discussed at the contact meeting, also in the office of Mr. Cancelmo."

Q. After this exchange of letters, has any Philadelphia receiver been permitted to unload his own cars at B platform?
A. No, sir.
Q. Now, Mr. Ward, as general manager of the Philadelphia Terminals Marketing Association, what effect, if any, has the unloading charge had upon the business of the carlot receivers?
A. The 10-month period following the imposition of the unloading charge, the carlot receivers have suffered a 7 percent decrease in rail receipts.

Exam. Brown: Now, that 7 percent is as compared with this same period?

The Witness: As compared with the period of November 1, 1947, to August 31, 1948, or corresponding period. In that same period, in carlot equivalents, truck receipts in the Philadelphia market have increased 11 percent.

Exam. Brown: Are you referring only to the commodities you are testifying about or does that include citrus fruits?

The Witness: I am referring to all fruits and vegetables —figures from the authority of the Federal State Market News Report.

[fol. 1159] Exam. Brown: Be careful when you testify. Tell us exactly what you are talking about.

The Witness: Yes, sir.

Mr. Wells: May I ask, Mr. Ward, the 7 percent decline was in rail receipts?

The Witness: Yes, sir.

By Mr. Fitzgerald:

Q. Now, you have testified, have you not, that the members of your Association deal only in receipts by rail?

A. That is right.

Q. So that a reduction in rail receipts is a reduction in business to the members of your Association?

A. That is correct.

Q. Now, has there been any other diversion of business from the receivers due to this unloading charge, in your knowledge?

A. In my work for the Association, I spend a great deal of time contacting wholesalers outside of our terminal market, within a radius of 150 miles. My interest is to become acquainted with these people, find out their reaction to our terminal, and to stimulate business in our particular area, and if they are not dealing with us, why. If they once did, why they left. I have ran across a great number of such wholesalers who state that one of the reasons, or the reason as having left the Philadelphia market is that they now purchase certain commodities direct by trucks [fol. 1160] because of the imposition of the unloading charge.

Q. Can you name some of the wholesalers to whom you have talked and from whom you have received that answer?

A. Well, there is R. W. Strickler and Yorktown Wholesale, in York, Pennsylvania; I. Silverman in Wilmington, Delaware; Harrisburg Banana and J. W. Feeser in Harrisburg; A. Greco in Williamsport; Aggressive Merchants Association, Lehighton; and there are others that do not come to my attention at this time.

Q. Now, Mr. Ward, in the case of Idaho potatoes, for example, the Philadelphia receiver now pays what freight charge to have a bag of Idaho potatoes delivered in Philadelphia, that is, transported to Philadelphia?

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A. I once knew that figure, but it has slipped my mind.

Q. Well, to refresh your memory, is it approximately $1.50 per bag?

A. That, I think, is the figure I developed.

Q. Now, what charges, in addition to that transportation charge, must the receiver pay for that bag of Idaho potatoes before he can sell it?

A. The first charge is the unloading charge, which on a 100-pound bag amounts to, within a mile, 10 cents per bag. The second charge is a sorting charge which the receiver pays to his employees at a minimum rate of $7.50 per car or 2½ cents per bag. The third charge is a de-
[fol. 1161] livery charge which the receiver pays to his employees, known as delivery clerks, which is at a minimum of $7.50 per car or two and a half per bag, and a third charge, which is paid by the buyer, is a trucking charge from the terminal to his place of business, which in the case of Idaho potatoes at the nearest point of distribution in Philadelphia would be 15 cents a bag.

Q. To Dock Street?

A. To Dock Street area, and at greater amounts as you bypass and reach into farther areas.

Exam. Brown: When you said two and a half per bag, you meant 2½ cents per bag?

The Witness: Yes, sir.

By Mr. Fitzgerald:

Q. Now, this total additional cost of 30 cents, as I add it up, is in competition with receivers of merchandise by truck who have no such charge, is that correct?

A. That is correct, and it is also in competition with receivers in the Philadelphia district who have private sidings or are permitted to perform their own unloadings.

Q. And who are those people to whom you refer?

A. That includes mostly the chain store organizations.

Q. Now, it is true, is it not, that this additional charge is constant regardless of whether the commodity is selling at a profit or loss?

A. That is a fixed charge which must be added on to the
[fol. 1162] purchase price and the freight rate.

Q. Now, Mr. Ward, will you explain to the Examiner the competitive relationship as respects your Association and its commodities between Philadelphia, Baltimore and Pittsburgh?

A. An area of competition exists between Philadelphia and all of its surrounding major terminals, that is, that group of receivers who are midway between. Those dealing on the Pittsburgh market, which comes from the Williamsport, Altoona, Lockhaven, Harrisburg area, can obtain delivery of their commodities by railroad unloading on the platform at a charge of $1.25 per ton.

The same competition exists in the area to the south, in the Baltimore market, whereby the railroads have arranged to lease their terminal to the consignees of fruits and vegetables who perform their own unloading, at a charge which they tell me in contacting them runs about 2 cents a package.

As far as the auction in Baltimore is concerned, there is only one charge for the unloading and delivery of the commodity to the buyer's truck tail gate of 5 cents as against our charge of at least 15 cents.

Exam. Brown: Five cents per what unit?

The Witness: Per package.

By Mr. Fitzgerald:

Q. Now, in your opinion, do these discrepancies between unloading charges that you have testified exist between Philadelphia and the two markets of Baltimore and Pitts- [fol. 1163] burgh adversely affect our competitive advantage with receivers of those Cities?

A. I am told that it does by direct contact with those wholesalers in the competitive areas, who deal at both places or prefer Pittsburgh or Baltimore to our market.

Exam. Brown: What do you mean by competitive area? Be specific, please.

The Witness: Wholesale markets between Philadelphia and Pittsburgh, such as Altoona, Williamsport, Harrisburg, Lockhaven and Sunbury; wholesale dealers between Philadelphia and Baltimore, such as Harrisburg, Wilmington, Delaware, York, and some other smaller points.

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Exam. Brown: How do these points get their produce from Philadelphia?

The Witness: By trucking, coming to the market and trucking back to their place of business.

Exam. Brown: You mean they personally come to Philadelphia and take their own truckload back?

The Witness: Yes, sir. They send their own trucks in and either come in person or are represented on the market by big brokers.

Exam. Brown: It is not any question, then, of members of your Association shipping outbound by truck to these competitive points?

The Witness: No. We do not do that type of business. [fol. 1164] Exam. Brown: Does Baltimore do that type of business, do you know?

The Witness: No, sir. I do not think that that type of business is conducted by either Baltimore or Pittsburgh.

Mr. Miller: Mr. Examiner, I move to strike the witness's answer to counsel's last question and his answer to your first question on the ground that the testimony is entirely hearsay.

Exam. Brown: That information was gathered in the course of this witness's line of business, was it not?

The Witness: It was by visits to the market and to the receivers on those markets.

Exam. Brown: Hearsay rule does not cover a situation like that. Objection overruled. Proceed.

By Mr. Fitzgerald:

Q. Mr. Ward, you have testified as to the letters exchanged between you and Mr. Marine. Was this the opinion of the members of your Association, after the unloading charge had been put into effect, that the opportunity for them to unload the cars at platform, at their own expense, would be of advantage to them?

A. It was, if we had either to unload our own cars or pay the exhorbitant rate that was charged by the railroad.

Q. On what did your Association members base that conclusion?

A. Among our Association members are members who had done their own unloading prior to the denial of the

right to unload, and they knew exactly what it cost them [fol. 1165] to do such work.

Q. And they felt that if the unloading charge were imposed they could do it much cheaper with their own employees?

A. They knew they could.

Q. Now, Mr. Ward, have you in the recent past had occasion to make observation of the unloading operation at B platform of the Pennsylvania Produce Terminal?

A. I have.

Q. Will you state at this time what you observed, fixing the dates, hours, and so forth?

A. Well, on September 18, 1949, I witnessed the unloading of a car containing 565 crates of Persian melons from car ART22681. The railroad approached this car at 8 p.m. with five men, two loaders and three truckers. They completed unloading of the car at exactly 9 p.m., or in a period of one hour or at a total consumed time of five man hours.

Q. Do you have the bill that was rendered by the railroad for the unloading of that car?

A. I do.

Q. What was the charge for unloading as rendered by the railroad?

A. $27.95, 94 cents tax, total $28.79.

Q. For five man hours?

A. That is right.

Q. That, I take it, is at a rate of approximately $6 per hour?

[fol. 1166] A. Close to $6.

Q. Based on man hours, what other observations have you made, Mr. Ward?

A. At 9 p.m., September 18, 1949, I observed the unloading of a car containing 600 bags of onions in car PFE-76142. Here again, the railroad employed five men, two unloaders and three truckers. Unloading was completed at 10:05 p.m.; total time consumed, 1 hour and 5 minutes, or a total of 5 hours and 25 minutes man hours. There also I observed the unloading. There was a certain amount of sorting of spotted bags from this car, yet there was no delay incurred to the truck.

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Q. You have the bill for the unloading of that car as rendered by the railroad?

A. I do.

Q. What is the unloading charge?

A. $29.25 plus 88- tax, total $30.13.

Q. I understand, then, that the unloading charge was $30.13 for 5 hours and 25 minutes of actual man hours?

A. That is right.

Q. Did you make any other observation, Mr. Ward?

A. I have other observations. I have one here on December 21, for example. Here are two cars of onions, PFE-66171, and PFE-62251. They both contained 600 50-pound bags of onions, both cars' unloading started at 5:40, [fol. 1167] and here they use less than two gangs. They were short one trucker and the foreman stepped in. Unloading was completed at 7 a.m. Time consumed, an hour and 20 minutes per car, total man hours six.

Q. And what was the unloading charge assessed in that case, if you have the bill?

A. In both instances the unloading charge was $29.25, plus 88 cents tax, total $30.13.

Exam. Brown: What was the unloading charge per ton, $1.95?

The Witness: $1.95 is the rate.

By Mr. Fitzgerald:

Q. Now, Mr. Ward, I direct your attention to the fact that in Mr. Hampton's testimony in the prior hearing previously referred to—and I am now able to give the page reference—at page 288, he stated: "This unloading operation in Philadelphia requires from a minimum of approximately 1¼ hours to a maximum of approximately 2½ hours per car," and I ask you, based upon your observation on the occasions you have mentioned, and other occasions, if there have been such, and on your knowledge of the operations at the Produce Terminal, what is your comment on that testimony?

A. I think that the maximum time stated in that testimony is much too great and that the minimum should be

considered more as the average, for all commodities.

Q. In other words, in your opinion the average time for unloading all commodities would be not in excess of 1¼ hours?

[fol. 1168] A. On dry vegetables, meaning potatoes.

Q. That is all we are speaking of.

A. Onions and melons and the like.

Exam. Brown: You are talking about actual unloading time now, are you not?

The Witness: Yes, sir, from the time the car was opened, light installed and plate laid down, to the time that the plate was removed and the lights removed after the bags were completely—or the packages completely removed from the car.

Exam. Brown: It has nothing to do with overtime, does it?

The Witness: No, sir.

Exam. Brown: In other words, the unloading is the actual consumer time that you are talking about?

The Witness: That is right, the time that it would take the consignee if he were performing the load himself on the basis of the railroad's performance.

Exam. Brown: It has nothing to do with employees who might be waiting to unload a car or being paid for waiting?

The Witness: No, sir.

Exam. Brown: All right.

Mr. Fitzgerald: Now, that concludes direct examination of Mr. Ward. I at this time would like to state for the record that the first reference to Mr. Hampton's testimony refers to pages 289 and 290 of the record.

Exam. Brown: What are the predominant vegetables you [fol. 1169] receive at Philadelphia from a tonnage standpoint?

The Witness: Potatoes, onions, tomatoes, crated melons, lettuce, carrots, or mixed vegetable shipments.

Exam. Brown: I am not talking about citrus fruit at all, now.

The Witness: Not from the Association viewpoint.

Exam. Brown: All right. Now, of those commodities, how do potatoes stand from a tonnage standpoint.

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The Witness: I can refer and give you more accurate statements if I look at the Government figures, if you would like me to.

Exam. Brown: Well, the Government figures cover all of Philadelphia.

The Witness: That is rail receipts. I can tell from them on rail receipts.

Exam. Brown: Well, you can refresh your memory or verify your ideas from it. It does not have to be exact. I just want the approximate situation.

The Witness: Well, potatoes are one of our heaviest commodities from a tonnage viewpoint.

Exam. Brown: 50 percent?

The Witness: No. I would say around 20 percent.

Exam. Brown: Onions?

The Witness: They will run around from 15 to 18 percent.

Exam. Brown: Almost as much as potatoes?

[fol. 1170] The Witness: Yes, sir.

Exam. Brown: Tomatoes?

The Witness: I certainly would like another book so I could be more accurate. It has to do with the 1948 summary as far as Philadelphia is concerned, and I have a good acquaintance with that book.

(The witness referred to a document.)

The Witness: Well, here, some are heavier. Potatoes, I was right, that is the heaviest, and my percentages are fairly accurate. Onions are, I would say, 10 percent. Peaches are in about the same category as onions. Crated melons account for about 15 percent. Lettuce, 9 percent. Carrots and mixed vegetables, speaking of beets and combination lots, around 8 or 9 percent. Cabbage, around 5 percent.

Mr. Fitzgerald: Does that answer the Examiner's question?

Exam. Brown: Of these commodities, do potatoes move under top-ice ventilation or refrigeration or a combination of all of them?

The Witness: Most of the potatoes move under ventilation. Those coming from the South may have some refrigeration at time of shipment. Those coming from Maine

during the winter may travel under another service known as heater service, shippers' protective service.

Exam. Brown: Any top ice in connection with potatoes?

The Witness: No top ice on that commodity.

[fol. 1171] Exam. Brown: When refrigeration is used, if at all, it would be in the bunkers of cars at origin?

The Witness: Yes, sir.

Exam. Brown: How about cabbage? Any top ice on cabbage?

The Witness: Cabbage from the West carries top ice, from west of Texas. Some cabbage from Florida also carries it. Others, at times, will come in dry, and cabbage coming out of New York State and northern points is without top ice.

Exam. Brown: How about tomatoes?

The Witness: Tomatoes, no top ice.

Exam. Brown: Melons?

The Witness: Honeydews, Persians, and mixed melons, no top ice. Cantaloupes, many times top-iced at point of origin, but the ice is usually melted at destination.

Exam. Brown: Lettuce?

The Witness: Top-iced.

Exam. Brown: Always?

The Witness: Yes, sir.

Exam. Brown: Peaches?

The Witness: No top ice.

Exam. Brown: Never?

The Witness: No, sir.

Exam. Brown: Now, what is the proportion of your shipments from various points of origin, including California, Florida, Texas and the remainder of the southeast and [fol. 1172] southwest? Just an approximation?

The Witness: Which are top-iced and which are not, do you mean?

Exam. Brown: No, the commodities themselves. Forget the top ice situation. Take potatoes, for example; where do you get most of those?

The Witness: I would say now that equal quantities come from Maine, from the southern tier States and from the western tier, cut in about three parts.

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Exam. Brown: The potatoes that you get at Philadelphia are pretty well divided as between origin?

The Witness: Yes, sir.

Exam. Brown: How about cabbage?

The Witness: That commodity probably 60 percent, from the West, and the balance from the South or Northern States. I am speaking of rail receipts now.

Exam. Brown: Onions?

The Witness: 75 percent from the Western States.

Exam. Brown: 25 percent from where?

The Witness: From nearby Western points such as Ohio and New York State.

Exam. Brown: You are referring to 25 percent now?

The Witness: Yes, that come from nearby points, but mostly from the West.

Exam. Brown: Your melons come from the West mostly? [fol. 1173] The Witness: Exclusively, you might say, as far as rail is concerned.

Exam. Brown: And lettuce from Florida and California?

The Witness: Most of the lettuce comes from the West.

Exam. Brown: You do not get any Florida lettuce?

The Witness: Very little comes by rail out of the Eastern States.

Exam. Brown: Could you give us an overall percentage and estimate as to shipments moving in ordinary box cars, in ventilator cars, and refrigerator cars, in heater service?

The Witness: We no longer receive shipments in box cars. The ventilated box car is only used in the case of watermelons. I am speaking now of Philadelphia arrivals. And there has been a trend to the use of refrigerator cars as far as watermelons are concerned. That resolves the use of the refrigerator car to practically all commodities, and I would say that as far as vegetables are concerned, 50 to 60 percent are top-iced; the balance either bunker-iced or under ventilation. Heater service probably would not involve more than 10 or 15 percent of the receipts.

Exam. Brown: Is there a separate charge made for top-icing and for ice in the bunkers of cars, that is, in addition to the charge for the refrigerator car, if there is such a charge.

The Witness: I understand there is a charge for the

[fol. 1174] refrigerator car and also a separate charge for the ice furnished, depending on the type of service that is ordered by the shipper.

Exam. Brown: And separate charge for top icing?

The Witness: Yes, sir.

Exam. Brown: I think that is about all along that line. Now, with respect to your distribution, your maximum, as I understand it, is about 150 miles from New York?

The Witness: That is right. From Philadelphia.

Exam. Brown: I mean from Philadelphia. Probably——

Mr. Fitzgerald: May I ask, Mr. Examiner, if——

Exam. Brown: If you will permit me to finish my question.

Mr. Fitzgerald: I am sorry, sir.

Exam. Brown: Probably the majority of that moves to points close to Philadelphia and as it spreads out, the percentage becomes less and less, is that right?

The Witness: That is right. I think that roughly 40 percent of our sales go outside the Metropolitan area and the further the distance the lesser the amount of volume to those points.

Exam. Brown: What percentage would you say is distributed in Philadelphia at points considered as a part of Philadelphia?

The Witness: 60 percent.

Exam. Brown: And how about the other 40 percent? Break that down.

[fol. 1175] The Witness: To outlying cities outside of Philadelphia that are not considered in the Metropolitan area.

Exam. Brown: Break that 40 percent down to points close to Philadelphia and points at some distance.

The Witness: Breaking the 40 percent down, 60 percent within a radius of 60 miles; the balance in the radius of 60 to 150 miles.

Exam. Brown: What percentage would you say went to points over 100 miles?

The Witness: Not over 10 percent.

Exam. Brown: Do you have any water transportation in connection with your shipments?

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The Witness: Not since the war. Prior thereto we were receiving waterborne citrus.

Exam. Brown: How about waterborne vegetables, potatoes, for example?

The Witness: We had waterborne Christmas trees in quite some quantity last year, coming out of the north Nova Scotia area.

Exam. Brown: I am talking about fresh vegetables.

The Witness: Potatoes—we are not receiving many imports of any nature there now.

Exam. Brown: When you speak of imports, you are speaking of imports coastwise, mostly coastwise?

The Witness: Coastwise.

[fol. 1176] Exam. Brown: But you get potatoes from Maine by water?

The Witness: Not to my knowledge.

Exam. Brown: Was it customary to get some shipments from Maine by water?

The Witness: I think that there have been shipments so received, but I am not well acquainted with that.

Exam. Brown: At the present time you are not receiving any commodities by water?

The Witness: That is right.

Exam. Brown: Now, sir, you may continue.

Mr. Fitzgerald: I did not intend to interrupt the Examiner, but I felt that a misunderstanding might be created by his answer to your question, the maximum distance of 150 miles. I believe that the witness has testified that perhaps the average distance would be 150 miles. It has been testified that the Williamsport-Altoona district is an area served by the Philadelphia market, and that is, I believe, as a matter of geographical fact, approximately 185 miles.

Exam. Brown: The exact words used by the witness were "distribution was up to 150 miles." He said nothing about average. Is that right, Mr. Ward?

The Witness: That is right. We have distributed to further points, but it is not general.

Exam. Brown: Any further questions on direct?

Mr. Wells: Mr. Examiner.

[fol. 1177] Exam. Brown: Mr. Wells.

By Mr. Wells:

Q. Mr. Ward, near the beginning your examination, you refer to the establishment, about 1947, of the B&O Produce Terminal and a little later the Pennsylvania Produce Terminal in Philadelphia. Prior to that time, was delivery of Florida fruits and vegetables primarily at the B&O float?

A. I think it was. I think that—I know that all of the fruit, all of the Florida fruit, was delivered at the rail heads or out on the piers along Delaware Avenue, opposite the Dock Street area.

Q. In other words, prior to the establishment of the particular produce terminals to which you have referred, there was a floating and an unloading by railroad on to the pier similar to the situation that now exists in New York?

A. That is right.

Q. Was there any change in the rail rate, either up or down, incident to the substituted service that was provided by the Produce Terminal?

A. No. The rate remained the same and the unloading service, as performed by the railroad at the piers, was also continued when the produce was transferred, and the fruits were transferred down to the terminals.

Q. In other words, while the delivery was made on the pier at Philadelphia, the delivery included the unloading by [fol. 1178] the railroad at the line-haul rate?

A. That is right.

Q. And after the change of the point of delivery to the Produce Terminals, the railroads continued until November 1, 1948, to unload that produce at the line-haul rate?

A. That is right.

Q. And the method of unloading was the same as it had been at the pier?

A. Right.

Mr. Wells: That is all.

Exam. Brown: Cross examine. Off the record.

(Discussion off the record.)

Cross examination.

By Mr. Miller:

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Q. Mr. Ward, as I understood your testimony, you disagree somewhat with the testimony of Mr. Hampton, first in his description of the delay incident to unloading on B platform, and, secondly, it was your testimony that now consignees are no longer unloading their own fresh vegetables on that platform. Is there any other circumstance in which the situation has changed or in which you disagree with Mr. Hampton's testimony?

Mr. Fitzgerald: I object to the question. It has not been pointed—Mr. Hampton's testimony has not been read to this witness.

Mr. Miller: Oh, he has not read it?

[fol. 1179] Mr. Fitzgerald: You haven't read it to him. I directed his attention to specific points.

By Mr. Miller:

Q. Have you read Mr. Hampton's testimony given at the previous hearing in this proceeding?

A. No, I have not.

Q. Now, you testified that the receivers of vegetables in Philadelphia had some difficulty in marketing their produce when it was unloaded at the team track. Can you tell me why it is they do not have it unloaded at the platform?

A. Yes. The unloading charge adds sufficiently more to the selling price that they are obliged to unload by team track to interest buyers.

Q. In other words, it is your contention that the railroad should perform its unloading service in order to permit these consignees to get the benefits which would accrue to them by reason of having the produce unloaded on the platform?

A. We have asked to be permitted to either——

Q. Will you answer the question, please?

A. No, not exactly the way you have worded it. We have indicated our willingness to perform our own unloading, but we have been denied that right and we have shown that.

Mr. Miller: I will withdraw the question.

By Mr. Miller:

Q. Well, you are here opposing the unloading charge?

A. That is right.

[fols. 1180-1207] Mr. Miller: That is all.
Mr. Smith: No questions, sir.
Exam. Brown: Redirect.

Redirect examination.

By Mr. Fitzgerald:

Q. Is it correct, from your testimony on direct, Mr. Ward, that an effect of the unloading charge has been not only dislocation of the business of the receivers, but a diversion of business from the railroads to trucks?

A. That is right. I have actually shown by our receipts that our business has decreased 7 percent, whereas in the same period, truck receipts have increased—of the same commodities—by 11 percent.

Q. Then, is it correct to say that your studies indicate that it is in the interest of the railroad, as well as the receivers, that the unloading charge be abolished?

A. Definitely.

Recross examination.

By Mr. Miller:

Q. Is your opinion, as to your statement as to diversion, based wholly upon those figures which you refer to?

A. No. My contact with a great many, practically all of our out-of-town buyers has convinced me of the facts that have been substantiated by the figures.

Mr. Miller: That is all.
Mr. Fitzgerald: That will be all.

[fol. 1208] Louis D. Goldstein was sworn and testified as follows:

Direct examination.

By Mr. Fitzgerald:

Q. Will you state your name, address and business?

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A. Louis D. Goldstein, fruit and produce, southwest corner of Second and Dock Streets.

Exam. Brown: Philadelphia?

[fol. 1209] The Witness: Philadelphia.

By Mr. Fitzgerald:

Q. How long have you been engaged in the fruit and produce business in Philadelphia, Mr. Goldstein?

A. My own business, 31 years, and I have been in the produce business for 39 years.

Q. And during that 39 years, what part of your life has been spent in the Philadelphia market?

A. The entire 39 years in the produce market in Philadelphia.

Q. You are at the present time, I believe, the president of the Philadelphia Terminals Marketing Association, is that correct?

A. I am, sir.

Q. And the Philadelphia Terminals Marketing Association, its constitution and its membership, I believe, has been testified to by Mr. Ward earlier today.

A. It has 54 members, receivers in the Philadelphia market.

Q. And it is your understanding, is it, that the members of your association handle the overwhelming proportion of the receipts of carlot vegetables in the Philadelphia market other than chain stores?

A. I think our membership handles 97 percent of the vegetables in Philadelphia, with the exception of the chain stores.

Q. Now, Mr. Goldstein, prior to November 1, 1948, you as an individual receiver handled some cabbage, I believe, did you not?

[fol. 1210] A. Yes, sir.

Q. And that cabbage was unloaded at B platform?

A. That is correct, sir.

Q. What effect, if any, has the unloading charge had on that portion of your business?

A. It has practically eliminated the handling of southern cabbage into the Philadelphia market at the terminal.

Q. What other parts of your business have been similarly affected?

A. Well, that is one of the chief commodities that we have handled from the south, and that has been practically eliminated, and of course, on tomatoes, there is another commodity that puts us in an unfair competitive basis due to the unloading charge.

Q. As a matter of fact, Mr. Goldstein, it is true, is it not, that your business, as an individual receiver, is not principally affected by this unloading charge, and you are here as a witness on behalf of your association?

A. That is correct.

Q. And in your official capacity?

A. That is correct. I am here to represent our association and not primarily as an individual.

Q. And in your official capacity, and based on your long experience, you are familiar with the effects of the unloading charge within the Philadelphia produce industry?

[fol. 1211] A. I am, sir.

Q. What is your opinion, Mr. Goldstein, of the effect of the unloading charge on the Philadelphia produce market?

A. Well, I think the Government records speak for themselves. I think that the receipts by rail have now decreased or did decrease approximately anywhere per month from 10 to 20 percent in the first six months after the first of November when this unloading charge went into effect, and I think after that, the decrease was considerably less due to a continuous growth, I believe, in the Eastern seaboard, that naturally kept the nearby receipts of produce lighter, and then I think our receipts have gone down anywhere from five to ten percent, or an average of seven percent.

Q. Then, I understand you to say that an effect of the unloading charge has been a diversion of receipts from the carlot receipts by the receivers and where, in your opinion, have those receipts gone?

A. Well, they went through a different form of distribution, naturally. Economic conditions would make it so, that if a man had to pay anywhere from 25 to 50 cents or a dollar per car more for the handling of his produce that in itself, on some commodities, is a great profit.

Q. What do you mean by that, Mr. Goldstein?

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A. Well, I just say, as an illustration, we represent—the Association does—members that handle chiefly potatoes, [fol. 1212] onions and cabbage. Well, there I am only speaking from what the average is. I used to handle them myself, and I figured the average would be 10 cents a package on 400 bags, or $40 per car. That in itself would be a good profit, but now with this unloading charge of approximately 10 cents a bag in itself, plus a condition that we have in Philadelphia that the railroad just really gives them to you at the door, they do not make delivery, they do not stack them, we have to pay a man to go ahead and stack these cars, which is another approximate 2 cents a bag.

Then we have a checking cost. That has always been in effect, though, and that is another 2 cents a bag—approximately 14 or 15 cents a bag for the handling of a product that the men would be glad to average 10 percent.

Or I might even say further, I came over with a potato man that said he would be glad to average 8 cents a bag over a period.

Q. Mr. Goldstein, when you said 10 percent——

A. I meant 10 cents a bag.

Q. Then the gross margin on that type of commodity, as I understand from your testimony, would be approximately $40 a car?

A. That is my testimony.

Q. What would be the total value of that car on which that margin is realized?

[fol. 1213] A. That would depend on market conditions. Naturally, sometimes potatoes are worth 2½ dollars a bag, sometimes less. Sometimes they go as high as $5 a bag.

Q. As of today, what would you say?

A. Well, as of today, I think potatoes are selling three to three and a quarter a bag.

Q. Then, it is your position that the imposition of this unloading charge in many cases will actually amount to an elimination of the entire margin that the dealer, the receiver of potatoes, would ordinarily realize in Philadelphia?

A. Absolutely. And I might answer that, that it will bring a condition that will cost the producer, I mean the farmers of this country, an untold amount of money. They will eliminate a lot of people that handle these potatoes

because of the competition that will not allow them to compete with people. That will enable them to have little sheds or anything where they can have a cart of potatoes backed against it, and sell it for even less than these people will actually cost them.

When you eliminate the customers from the farmers, the farmers will have less customers and they will naturally take less for their products.

Q. Now, Mr. Goldstein, in your opinion, has the unloading charge resulted in a substantial diversion of business from the normal channels of trade in the Philadelphia [fol. 1214] market to chain stores, for example?

A. Well, it eventually will. I cannot tell you exactly, but I have already testified here that the receipts by our receivers have been anywhere from 10 to 20 percent the first six months, and approximately 7 percent after that.

Exam. Brown: Less?

The Witness: Less, yes. There has been a decrease of receipts by the receivers. We are handling less and we will eventually, no doubt about it, handle still less.

By Mr. Fitzgerald:

Q. And is it your opinion that a substantial portion of those receipts not now received through us are going to chain stores? Am I to understand that from your testimony?

A. Well, it is going to other sources.

Exam. Brown: Let us have facts here. We do not want the witness's opinion in this respect. That is a factual question. The question was where are they going now. That is not an opinion answer. It does not call for an opinion answer. If you asked him, "In the future, what is your opinion," that is something else. Perhaps as an expert he can state that. Let us stick to facts here.

By Mr. Fitzgerald:

Q. Do you know of your own knowledge that some of this loss of business has been taken up and is now being taken up by increased receipts by chain stores?

A. I would say yes.

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[fol. 1215] Q. And is it your opinion that in the future it will continue as a result of this unloading charge?

A. Economics, itself, will tell you that the man who can sell the cheapest, even if he buys the products at the same price—if our potato men today would buy potatoes for $3 delivered to Philadelphia, and our chains would buy them for $3 at Philadelphia, eventually the cost to our people will be $3.15. Who would get the business?

Q. Now, Mr. Goldstein, I believe it has been testified here that there was a recent rate increase of 30 percent in addition to the imposition of this unloading charge.

In your opinion, does this 30 percent increase represent the true extent of the recent freight increase as its impact is felt upon your business?

A. As far as the rates are concerned, you mean?

Q. Yes.

A. Oh, no. There are additional charges besides this 30 percent that is to be allowed to them by the Commission at various times. For instance, in celery, which we handled in great volume, they have increased that to, I would say, over 50 percent.

Q. Now, explain what you mean by that.

A. Well, the same package that was billed by the carriers up until here recently of 50 pounds has now been increased to 60 pounds.

[fol. 1216] Exam. Brown: Didn't that occur two or three years ago?

The Witness: No, sir. That only occurred here in the last three or four months, Mr. Examiner.

Exam. Brown: I understood that at least two or three years ago there was some question about these estimated weights. Weren't those estimated weights changed at that time? Mr. Wells?

Mr. Wells: Some estimated weights on Florida celery were changed about the time of I&S 4577, which was back in 1940, but the reference which the witness is making here is on a package of celery from California.

Exam. Brown: You are not talking about Florida celery?

The Witness: No. I am talking about California, that the increase in weight has in the last three or four months,

I can definitely say it has not been any more than four months, has increased to 60 pounds.

Exam. Brown: I was referring primarily to the southern estimated weights. I knew that there was some time ago a change in the estimated weights on several vegetables.

Mr. Wells: That was in connection with I&S 4577.

Exam. Brown: So that did result in somewhat the same change in the southeast as of that date as you talk about now from California, did it not?

The Witness: No. The Florida increase on rates was considerably before this new increase in California.

[fol. 1217] Exam. Brown: Well, I am saying the increase was somewhat similar, wasn't it? They recognized the fact that the packages, the estimated weights were not correct?

The Witness: The weights were not the same as increased in Florida. This 20 percent increase for California was in excess of the weight increase in Florida.

Exam. Brown: Well, they use a different type of package on celery from California.

The Witness: That same increase in weight, Mr. Examiner, was for the same Howard crate that they use in Florida. Naturally, we try to handle as many Sturdees and they do not have as many Sturdee Crates in Florida.

Exam. Brown: All right.

By Mr. Fitzgerald:

Q. Now, do I understand, Mr. Goldstein, that this package you are referring to is the same package now at 60 pounds estimated weight or published weight as it was at 50 pounds?

A. That is correct. In fact, it is even a little more. They have now eliminated a certain percentage of the bulge, and it is a little smaller package. I mean, the same size container but not the bulge they used to allow them to have at the 50 pounds.

Exam. Brown: Who is responsible for the bulge situation?

The Witness: Of course, Mr. Examiner, the shippers all try to do a better job, and everyone tries to get out a

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[fol. 1218] better package and, naturally, they do that so that their brands can outsell the others; they are for the bulge. I think the carriers now, to eliminate some breakage, which they claim is due to this bulge in the crates, have asked them to cut down their bulge; not only in celery did I talk about, but also in lettuce and carrots and any other commodities they have.

In other words, they used to allow about a two or three inch bulge, and they now cut it down to an inch, an inch and a half bulge.

Exam. Brown: There is no tariff provision requiring that, is there? It is voluntary action on the part of the shipper?

The Witness: No. I understand that if they do not conform with the bulge regulations, they will put on a special rate, what they call a penalty rate.

Exam. Brown: Is that in the tariff?

The Witness: Yes.

Mr. Wells: Wasn't that as a result of the decision in the carrot case, Mr. Goldstein?

The Witness: Would you repeat that, please?

(The reporter read the pending question.)

The Witness: No, I do not know, but I think it is Docket 29645.

By Mr. Fitzgerald:

Q. Well, now, Mr. Goldstein, let us see what the effect of this increased estimated weight is. You have said now [fol. 1219] it is the same package?

Mr. Miller: Mr. Examiner, I should like to object at this time to any further testimony on estimated weights or other factors along a line haul rate.

Exam. Brown: It being your theory, perhaps, that the line haul rates are not involved in this proceeding?

Mr. Miller: That is right.

Exam. Brown: I do not believe anybody has ever made a definite ruling on that, have they?

Mr. Wells: Mr. Examiner, we have contended all the

way through there cannot be a justification of the proposed unloading charge without a justification of the through charge consisting of the line haul rate and the unloading charge.

Exam. Brown: At the prior hearing, we received numerous exhibits showing rates from the various origins, the various destinations. Those are in evidence in this case. I do not believe that I would reach any different conclusion so far as my ruling is concerned with respect to that type of evidence. The estimated weights are a part of the rate. You have rate evidence in this case. I am not going to exclude any evidence of this type. By that ruling, I do not mean that I am taking the position one way or the other as to whether or not the rates are a part of this case.

Mr. Miller: I had forgotten about that prior testimony and therefore withdraw the objection.

[fol. 1220] Exam. Brown: All right. You may proceed. Answer the question. Do you recall the question, or would you like to have it repeated?

(The reporter read the pending question.)

By Mr. Fitzgerald:

Q. It is the same package today that you have always bought, is that correct?

A. That is right. I answered that question.

Q. Now, in 1944 a car containing 504 Sturdee Crates at 50 pounds would give a total weight to the car of 25,200 pounds. That is correct, is it not?

A. That is right.

Q. And at the rate of $1.84, which is the line haul rate, the actual rate per package would be $1 to you, is that correct?

A. Well, depending on the class of the refrigeration. If it was just a dry top-iced car, it would be a cheaper rate.

Q. Well, consider the 242.

A. Well, the rule 242, that is just the top-iced, and you pay the carrier for the use of the car, besides the top ice that is injected into the car, inserted in the car. Of course, if you have them on the rule 247, that is two icings in transit, why naturally there would be an additional increase

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in that because the carriers now are charging you more for your ice than they did at that time. The same applies to standard refrigeration. The rates have increased so that would make it more per package.

[fol. 1221] Mr. Fitzgerald: May I go off the record a moment?

Exam. Brown: Off the record.

(Discussion off the record.)

By Mr. Fitzgerald:

Q. That 504 crate car received by you in 1944 would average what amount of freight per crate?

A. $1.06.

Exam. Brown: What car are you talking about?

The Witness: PFE-24495, containing 504 crates, total freight paid was $537.97.

Exam. Brown: Received when?

The Witness: That car was received on December 26, 1944.

Exam. Brown: At Philadelphia?

The Witness: At Philadelphia, sir.

Exam. Brown: Go ahead.

By Mr. Fitzgerald:

Q. And the published weight per crate was 50 pounds?

A. 50 pounds.

Q. And the transportation rate was $1.84?

A. That is correct, sir.

Q. And what refrigeration?

A. That had two refrigerations at 242 and 247.

Exam. Brown: You are talking about rules now?

The Witness: The rules now, yes, sir.

By Mr. Fitzgerald:

Q. Now, what do you have to say about the shipment of a similar car of celery under similar conditions at the [fol. 1222] present time, under the present estimated weight?

A. We received PFE-43913 on September 16 containing 417 crates of celery at a cost of $712.82 or $1.70 per crate.

Q. Now, what is the total weight of that car as you were billed for it?

A. Well, this car only contained 417 crates. The total weight was 25,020 pounds.

Q. And how does that billed weight compare with the billed weight of the previous car?

A. Well, the billed weight of the previous car was 504 crates and 25,200 pounds.

Q. But in effect, you have received only 417 crates of the same merchandise as to which you formerly received 504 crates?

A. That is correct.

Q. But the railroad has received a transportation charge based upon what, in effect, is a 30 percent increase over and above the increase in their tariff?

A. Yes. The rate, of course, today is $2.26 a hundred. Of course, you are talking about 30 cents. It is really $1.84, which was previously $1.75.

Q. I said 30 percent, Mr. Goldstein.

A. Yes, 30 percent. The present rate is $2.26 a hundred.

Q. Now, Mr. Goldstein, without going into them, do you know of your own knowledge that the same situation exists to a varying extent in the other commodities, for example, carrots?

[fol. 1223] A. There was an increase here, I think, a year or more ago on Texas carrots. That was increased from 68 pounds to 80 pounds.

Exam. Brown: Same type package?

The Witness: Same type package, sir, and just recently, the last ten days, there was an increase on lettuce from California from 76 pounds to 78 pounds.

Exam. Brown: Were these changes estimated weights—did they result from an order of the Interstate Commerce Commission?

The Witness: I would say so.

Exam. Brown: Do you know?

The Witness: I do not know, but I would naturally think that they could not increase any weights without the

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authority of the Interstate Commerce Commission.

Exam. Brown: Well, it is just a guess on your part. All I want to know is whether the carriers did this on their own volition or whether the Commission required them to do it.

Mr. Fitzgerald: It is conceded that this was a matter of tariff revision.

Exam. Brown: I grant you it would be a matter of tariff revision. All I am trying to find out is whether or not the carriers initiated the changes in the estimated weights or whether the Commission required it. The witness does not know. That is all we can do about it.

[fols. 1224-1234] Mr. Fitzgerald: No further questions.

Exam. Brown: Cross examine.

Cross examination.

By Mr. Miller:

Q. Will you state, Mr. Goldstein, how many carloads of produce you received a year?

A. I judge our receipts would vary between 12 and 15 hundred cars. You are talking about me, individually, Mr. Miller?

Q. Yes.

A. Yes, that would be our total.

Exam. Brown: No truck shipments are mixed up in that now, are they?

The Witness: No, sir. We are not in a position to handle any trucks.

Exam. Brown: What I mean is we have been translating carlots and truck lots.

The Witness: No. These are all carloads that either arrive at the produce terminal or were diverted in transit and sold to other markets.

Exam. Brown: All right.

Mr. Miller: No further questions.

Exam. Brown: You are excused, sir.

(Witness excused.)

[fol. 1235] Exam. Brown: On the record. Mr. Dougherty has been previously sworn.

CHARLES J. DOUGHERTY having been previously sworn, testified as follows:

Direct examination.

By Mr. Montgomery:

Q. Will you state your name and address?

A. Charles J. Dougherty; reside at 181 Chandler Street, Philadelphia 11; business address, Delaware Avenue and Wolf Street, Philadelphia 48.

Q. And what is your business?

A. I am vice-president and treasurer of the Philadelphia Terminals Auction Company.

Q. And you are appearing here today as a witness on behalf of the auction receivers of Philadelphia?

A. That is correct.

Q. And how long have you been connected with the produce industry in Philadelphia?

A. In the past thirty years.

[fol. 1236] Q. And how long have you been connected with the auction receivers and familiar with their type of business?

A. Since February of 1944.

Q. Since that time, you have been with the auction company?

A. That is correct.

Q. Prior to that, did you have any experience or contact with the auction receivers, as such, in the City of Philadelphia?

A. I operated my own business on Dock Street and naturally came in contact with those who are members of the auction receivers, but never participated in any of their meetings.

Q. But you are familiar with the situation as it has existed for a great many years in Philadelphia?

A. That is correct.

Q. Will you describe briefly the facilities available to and being used by the auction receivers in Philadelphia as to the railroads in question?

A. Well, on the Pennsylvania Railroad we use A platform for the unloading of fruit for auction with the excep-

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tion of the lower end which is used by the railroad for construction of platforms for their cars, while the A platform is used practically for the display of auction commodities. The extreme end, the salvage freight from the produce terminal is sold, but there is no private sale merchandise unloaded on their A platform. And at the B&O, B&O Reading Terminal at Delaware Avenue and Wolf, the auction commodities are unloaded on the front portion [fol. 1237] of the platform. The rear of the platform is used for hardware or less than carlot freight, and I believe a portion of it is leased to a forwarding company, but the front part of it is exclusively for auction commodities.

Q. Is that the extent of the railroad facilities used by the auction receivers?

A. That, plus the track alongside of these terminals where a partial unload is sometimes ordered and the contents and the car remains at the side of the terminal, not for truck delivery, but for awaiting further order to complete the unloading or to put back the samples in the car. That is the extent of that.

Q. Are these facilities to which you refer facilities from which the merchandise is delivered to a platform known as the auction platform?

A. That is correct.

Q. And there are no team tracks in that location?

A. No, sir.

Q. And how long has that situation prevailed of practically the same facilities?

A. Well, since the construction of the present produce terminals about 23 years ago there has been no change in the method of unloading the fruits which our company sells, neither has there been any change in the facilities of any of the three delivering carriers at Philadelphia.

[fol. 1238] Q. You have a memorandum there, Mr. Dougherty. Will you just give us the contents of the memorandum? I furnished a copy to the Examiner and one to counsel for the railroad. Then we will develop in some more detail from it.

Exam. Brown: Off the record.

A. (Reading) Since the construction of our present pro-

duce terminals about 23 years ago, there has been no change in the method of unloading the fruits which our Company sells, neither has there been any change in the facilities of any of the three delivering carriers at Philadelphia. The fruit is unloaded and piled in the very same manner. In cases of fruit that is sold according to sizes, the sizes are segregated as per manifest, and in the case of straight lading, such as grapes, it is piled in lots of 101 packages, but never is it piled to conform with our sales unit, which is 20 packages.

In piling, the carriers use a standard pattern for each commodity and they do not perform any special services as the samples are opened by the auction company employees, and only during the past two years has the adjective "special" been applied to any of these services.

The fruit, prior to 1926, was unloaded on piers from floats, and on many occasions it was necessary to cancel our sales as the weather would not permit the unloading of the cars and the railroads had to pay many claims due to delay and market decline. The piers on which the fruit was unloaded [fol. 1239] were adjacent to the Dock Street and Callowhill Street markets and the railroads, for their own protection, decided to build produce terminals quite some distance from these markets and continued to do the unloading as a part of the line haul rate.

While we have team track facilities for a large number of cars, these will not accommodate the larger tractor trailer trucks which haul a large percentage of our fruit to distant points, neither will these tracks hold the number of freight cars as formerly, as the length of the cars has been increased. These tracks were laid our nearly 25 years ago, when horse-driven vehicles were used generally, but with the changeover to modern tractor trailers, the team track is inadequate as two of these trailers oftentimes make it impossible for any other vehicle to enter a driveway and causes considerable congestion and confusion.

The manner in which the fruit is unloaded for auction is a great advantage to the carriers as the cars are released immediately and all broken or bad order packages are immediately repaired and put back in their proper lines, and those impossible to repair are removed from the lading.

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This method of handling the repairing is much more economical for the carriers as it would be physically impossible for the carriers to do such an efficient job on team track and would increase the amount of the claims considerably.

Since the assessment of their unloading charges in No-
[fol. 1240] vember of 1948 to August 31, 1949, we have handled 8123 cars, and for the same period, November 1, 1947, to August 31, 1948, we handled 8496 cars. This shows quite a decline in spite of the fact that fresh fruits were in much greater volume during the last ten-month period. The approximate amount of the unloading charges assessed on the 8123 cars sold at auction is $325,000. During the same ten-month period, the carriers have been unloading cars for the Railway Express Agency at a cost of $15.70 regardless of the commodity, whereas the trade has been assessed an average of $40 per car and in several instances an express car has been unloaded alongside of a freight car which contained the same number of packages and which were piled in the same manner by the same labor, and this we feel has always been discriminatory.

We have, however, been advised by the local agents of the carriers that effective with shipments of September 23, the Railway Express Agency will no longer charge for the unloading but that the delivery carrier will render a separate bill for the unloading, thereby increasing this charge in some instances by more than 300 percent.

After the inception of these charges many conferences were held with the officials of the carriers, protesting these charges and endeavoring to make some arrangement whereby we could rent the facilities we were using and turn the unloading over to an outside contractor. On December
[fol. 1241] 8th the Auction Receivers held a meeting and passed a resolution demanding that our company take over the unloading of the fruit which we sell for their account. This resolution was passed on to the carriers and we were officially denied this privilege.

Q. Mr. Dougherty, will you tell me when the merchandise comes in by train, it comes into these auctions, along the auction platform, tell me just how the cars are handled from the time they come into the yard until there is delivery

made to the auction company on behalf of the auction receivers?

A. Well, the auction company receives the orders from the auction receivers as to what they are going to offer for sale the following morning. The railroads accept these orders from the auction company and not from the individual receivers. The individual receivers, however, do have the right at any time during the night, and prior to the unloading of the car, of cancelling, but they do not have the right of ordering for sale or unload. We have an order clerk who sets orders for the following day's sale up to 4 p.m., on Saturdays up to 2:30 p.m. We in turn notify the carriers, give them the car numbers, the contents in the consignee's name as to the cars which are to be unloaded for sale the following morning.

Q. Now, when is this merchandise delivered or made available to the auction company by the railroad?

A. The following morning.

Exam. Brown: What following morning? After receipt? [fol. 1242] The Witness: The following morning after we order. We order and our order will go in this afternoon for unloads, and they are made available to the auction company tomorrow morning or some time in the interval.

By Mr. Montgomery:

Q. And how are they made available to you?

A. They are made available after they have performed the recoopering and put the recoopered packages back in the line, in their proper lines, and we feel as though the recoopering has always been considered as part of the transportation and, therefore, until these packages are recoopered and put back in the lines, we contend that they are not available to us. In fact, we are not presented with a bill of lading until after this repairing has been completed.

Q. Then the railroad by railroad labor does unload and recooper the packages on to the auction platform, is that right?

A. That is correct.

Q. And until it is unloaded on to the platform and re-

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coopered, you have not had access to it or no means of access to this fruit, is that right?

A. That is.

Q. So that you have, until it is delivered to you, you have no responsibility for or possession or control of that merchandise?

A. That is correct.

Q. After it is delivered to you as you have explained from [fol. 1243] the unloading by the railroad, recoopered, you then sign for it?

A. That is correct.

Q. And from that time on, you are responsible for the merchandise and the railroad has no further responsibility for it, is that right?

A. That is correct.

Q. Or control over it?

A. That is right.

Q. And at that time, you take possession and anything done beyond that time is done by your own labor?

A. Our own labor, and after we take possession, we pay the freight for the account of the employees who present the carriers with a check covering the entire freight. Our night men sign for these cars after they have finished recoopering. The railroad removes damaged packages to a point on the platform away from the lading where they are sold separately for the account of the railroad. Our own night men do the sampling. The merchandise is not unloaded in sales units because our sales unit is 20 packages.

Q. So that is the only thing the railroad does to make a simple delivery on the platform, and any stacking, sorting or anything beyond that point is done by you with your own labor?

A. That is correct. A good many of these cars are ordered, Mr. Montgomery, for unload prior to their arrival in Philadelphia. There has been no arrival notice or anything [fol. 1244] given. The car is due to arrive for tomorrow's market. They are ordered this afternoon at 4 o'clock and some time between now and 6 o'clock tomorrow morning, when the trade is permitted on the dock, the car is unloaded, depending on the time when the various trains arrive.

Q. And is that for the advantage of the auction receivers or the railroad?

A. Well, in my opinion, the railroad gains quite considerably by this operation. Damaged packages are repaired, put back in the pile. We oft times have given form 20's on a car whereas many as 100 are made good. Made good means that that is put back in the line and the auction company delivers them to the trade as a good package, and this "made good" is charged against the car. There could be no such a thing as 100 "made good" nor 10 "made good" which we could deliver at any place other than on the platform.

Q. Doesn't it also have the effect of releasing that car so that the railroad will have the use of it more quickly than they might otherwise?

A. Better than 95 percent of our receipts, the entire car is released immediately and before it has even been placed for the so-called 48 hours of free time which would start the following morning at 7 o'clock.

Q. Now, Mr. Dougherty, has that service of the railroad in any way changed since November the 1st of 1948?

[fol. 1245] A. No, it has not.

Q. It has not?

A. No, sir.

Q. And the practice which you have just given us is a practice which has been in effect since the present facilities were constructed in around 1927, is that right?

A. That is correct.

Q. And from 1927 up until November 1st of 1948 the railroad has performed this service of making delivery, and was there any separate charge other than the line haul charge?

A. There was none.

Q. And none was made?

A. No, sir.

Q. And since November 1st, 1948, they are performing the same service which they performed from 1927 up to November 1, 1948, and no other services, and the only change is that they have segregated the charge from the line haul to an unloading charge, is that right?

A. That is correct. This unloading charge in auction commodities averages approximately $40 a car.

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Q. About $40 a car?

A. On the average.

Q. Well, now, Mr. Dougherty, after this order became effective on or about that time, did you have any conferences with your auction receivers with reference to this unloading charge?

[fol. 1246] A. Well, it just seemed as though when the order came out, there seemed to be a meeting every day or every other day of the auction receivers, at which various conferences were arranged with officials of the various carriers. The auction receivers considered the bringing in of an outside contractor to unload the merchandise, of doing their own unloading, of renting the platform, of renting the platforms from both B&O and the Pennsylvania Railroad, but to no avail, and then when the charges were actually assessed and this 30 percent appeared on the bill, which was wholly unexpected by all receivers and the auction company——

Q. What 30 percent?

A. That was the 30 percent increase which had been allowed in the freight rates which the receivers did not feel applied to this $1.50 or $2.00 a ton which had been asked for unloading, which then increased on $1.50 on citrus to $1.95 and $1.75 on deciduous to I believe it was, to $2.27. So then it started all over again, a series of these here daily or every other day meetings of the receivers as to find some ways and means to offset this.

Exam. Brown: Talking about receivers, you are talking about the auction receivers?

The Witness: Auction receivers.

By Mr. Montgomery:

Q. As a result of this charge having gone on, plus the increase, was there any determination as to the costs of [fol. 1247] unloading, as to what the actual costs were and as to whether or not the auction receivers might be able to unload at a cheaper rate?

A. Well, yes. It was generally agreed that the auction receivers could have this merchandise unloaded for their account by private contractors for less than half of what

the carriers were charging. I attended meetings with the auction receivers between the auction receivers and the contact committee of the Pennsylvania Railroad, and with various officials of the B&O Railroad, at which the receivers advanced this information to the carriers, and at each time, why, the proposition, and various propositions were accepted by the representatives of the carriers with the understanding that they would see what could be done for them.

So finally, these various conferences were not bearing any fruit and the auction receivers held a meeting—I believe it was on December 8 of 1948—at which time they passed a resolution demanding that the Philadelphia Terminals Auction Company take over the unloading of the fruit which we were selling to their account.

This resolution was unanimously passed and the carriers were officially notified of the demand made by the auction receivers and the auction company, and we were officially denied this privilege of unloading this merchandise.

Exam. Brown: You are duplicating your testimony now. [fol. 1248] You have already testified to that.

The Witness: Well, I am culminating the end of the meetings of these various auction receivers which counsel had asked me about.

By Mr. Montgomery:

Q. Did you make that application in writing for leave to unload these cars on behalf of the auction receivers?

A. Yes, we did, by registered mail.

Q. And that application was made to whom?

A. I believe it was Mr. Frank Hoskins, general manager, I believe his title is, of the Baltimore and Ohio Railroad, and the other was some director, Martin Clement, President of the Pennsylvania Railroad.

Mr. Montgomery: Mr. Examiner, I have copies of the letters which were written to the railroads and the replies, which I would like to offer in evidence at this time, sir.

Exam. Brown: Do you have extra copies of that?

Mr. Montgomery: I do not, but I can have them made, sir. Do you have extra copies of those?

The Witness: I do not.

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Exam. Brown: We will have a short recess.

(A short recess was taken.)

By Mr. Montgomery:

Q. Mr. Dougherty, will you explain how the auction receivers received this merchandise, as to how it is consigned and handled by the receivers or the auction company [fol. 1249] on their behalf?

A. Well, the auction receivers, mostly by phone, call the auction company and give the car number and give us the road on which it is, and we list it on the book and we print a catalog and we order that carrier to unload that car for sale the following day.

Q. But the bill of lading, how is that made out?

A. Well, most bills of lading are m*ight* out by J. B. Cancelmo & Company, Philadelphia, Pa.

Q. He is one of the auction receivers?

A. Pennsylvania produce delivery.

Exam. Brown: He will be the originally named consignee on the bill of lading?

The Witness: That is correct.

Exam. Brown: And the consignor will be some firm on the Pacific Coast, you say?

The Witness: That is correct.

Exam. Brown: Does that come on consignment?

The Witness: In a good many instances, yes, and some they own it. We print a catalog—where they own it, they own it in the name of piers, where they are the representative for the shipper, why those cars are on consignment.

Exam. Brown: Now, when this citrus is sold, who gets the money for that, originally? Do they pay it over to the auction company?

[fol. 1250] The Witness: When it is sold? The auction company sells and bills and collects.

Exam. Brown: In other words, you sell a carload or sell a lot of 20, say 20 packages; the purchaser of that 20 lot item will remit to the auction company.

The Witness: That is correct.

Exam. Brown: And then who pays the freight bill?

The Witness: The auction company in most instances

pays the freight bill for the account of the receiver to whom we render an account of sales and deduct the amount of freight we pay to the carrier and give him the receipted freight bill which we receive from the carrier.

Exam. Brown: Now, let us assume that you sell an entire carload made up of lots of 20 packages. You get all the money that represents the sale price of those lots, the auction company, is that right?

The Witness: That is correct.

Exam. Brown: From the gross receipts from that carload, you deduct the freight in your final settlement with the consignee?

The Witness: That is correct.

Exam. Brown: In other words, if Cancelmo were the named consignee on the bill of lading, he would receive for that carload of citrus exactly what it brings in auction minus the freight charges?

[fol. 1251] The Witness: And our selling charges.

Exam. Brown: And your selling charges?

The Witness: Yes.

Exam. Brown: Now, those freight charges will include, at the present time, and have since November 1, 1948, unloading charges?

The Witness: No; no.

Exam. Brown: I should like to have you explain what happens there.

The Witness: The unloading charges, the auction company pays the auction unloading charges, and the buyers are assessed a terminal charge and on a per package basis, depending on the type of package, the range is from three to ten cents.

Exam. Brown: What do you mean a terminal charge?

The Witness: A terminal charge since the inception of this unloading charge.

Exam. Brown: You are talking about a proportionate part of the unloading charge when you use the term "terminal charge"?

The Witness: The terminal charge is on the bill to the buyer as a terminal charge. That is the unloading charge.

Exam. Brown: That is the unloading charge?

The Witness: Yes.

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Exam. Brown: Does he pay a pro rata portion of the unloading charge?

The Witness: The buyer has been, yes.

[fol. 1252] Exam. Brown: Now, if the buyer purchases half of the car, he will pay half of the unloading charge?

The Witness: That is right.

Exam. Brown: The consignee then does not bear that unloading charge?

The Witness: No.

Exam. Brown: It is the purchaser of the goods?

The Witness: The consignees—this charge was carried on to the buyers three weeks or approximately November 22nd, after the assessment of these charges. Up to that point, the consignees had paid their own unloading charges and absorbed them.

Exam. Brown: But the consignees have paid in the final analysis the freight charges.

The Witness: Yes.

Exam. Brown: But he does not, in any event, pay the unloading charge?

The Witness: No.

Mr. Montgomery: Not since November 22, 1948.

Exam. Brown: 1948?

Mr. Montgomery: 1948, yes.

Exam. Brown: November 22nd?

Mr. Montgomery: November 22nd, yes. That is when the change went into effect whereby the buyers were assessed their proportionate parts of a package, mechandise bought.

[fol. 1253] Exam. Brown: Now, between November 1, 1948, and November 22, 1948, how were the unloading charges handled?

The Witness: That was forwarded to the consignee and that was deducted the same as freight, and he paid that.

Exam. Brown: In other words, for a period of approximately 22 days?

The Witness: That is right.

Exam. Brown: The consignee bore the unloading charges?

The Witness: That is right.

Exam. Brown: Thereafter, and up to the present time,

the purchasers at auction have paid that, is that correct?

The Witness: That is correct.

Exam. Brown: And they have paid their pro rata share?

The Witness: That is right. And from the 22nd on or at the time these charges were invoked or passed on to the buyers, the auction receivers and the auction company assured the buyers that they would vigorously oppose the assessment of these charges. They have been paid every day since the inception under protest, and a record is kept, and the buyers have been assured if any relief or any elimination can come, that the fight is being made in their behalf.

Exam. Brown: Has that been developed to your satisfaction, Mr. Montgomery?

Mr. Montgomery: Yes, sir.

Exam. Brown: All right. Continue with the testimony.

[fol. 1254] Mr. Montgomery: Mr. Dougherty, the Examiner has asked that we clear up one question which has been raised by the information, that that is as to whether or not the Philadelphia Terminals Auction Company pays any rent to the railroad for the office facilities or any other facilities which they occupy, and in that connection, Mr. Examiner, we take the position that that question is outside of the question at issue here, and are putting it in merely at your request for the information only.

Exam. Brown: And my request was made solely to clarify the record. We had testimony at the prior proceeding with respect to these auctions. I want the whole story.

Mr. Montgomery: Yes, sir.

Exam. Brown: Mr. LaRoe?

Mr. LaRoe: Mr. Examiner, sometimes a lawyer has to object and get himself in wrong with the court by objecting to a question that the court asks, and in this instance, I respectfully submit that this record, as developed, shows very clearly that anything that is done in the way of auction service or auction facilities takes place after railroad delivery has been effected and after the transportation service has been completed.

I can fully appreciate the attitude of the Examiner in desiring to get complete a portion of the record which he feels is not complete and concerning which the Commission [fol. 1255] may have inquired, but if the Commission itself

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had asked this question, I would have to object and reserve an exception, if I can get it, because this water has been muddied, Mr. Examiner; it has been mud-ied by confusing this unloading service with various facility services that have absolutely nothing to do with unloading. And I regret to do it, but I must make my objection to the answering of this question.

Exam. Brown: Now, would you make the same statement, Mr. LaRoe, with respect to special stacking and sorting for which the shippers pay?

Mr. LaRoe: Yes, sir.

Exam. Brown: You realize that that evidence was introduced, that type of evidence, on behalf of the protestants as well as the carriers?

Mr. LaRoe: I realize that, and even my own witness may have offended in that, and to that extent we, too, are guilty, but I want that line clearly drawn.

Mr. Hoffman: Mr. Examiner, I want to join Mr. LaRoe in that position. In reply to comment which you have made, that protestants introduced evidence in connection with sorting, I might say that it is my belief that we did so only because the carriers in connection with the introduction of their cost studies showed that their costs covered also sorting, as well as the unloading, and the record so shows. They were unable to segregate the sorting charge. It be- [fol. 1256] came necessary, therefore, for the shippers, protestants, to cover that subject.

Now, insofar as the relationship of the auction company to the railroads is concerned, and I speak in behalf of consignors and consignees, it is a collateral matter; it has nothing to do with this issue. We know nothing about it. I, myself, at this time know nothing about the relationship, and we are not interested. We pay the auction company a percentage on the sales, for the service which they render to us, not as a part of transportation, but for the service which they render. We, as consignees and consignors, pay for that.

Now, what relationship the auction can make with the railroads or what bargaining or negotiations they can enter into, I think, is not germane to these proceedings in any way.

Exam. Brown: You take the position, as I understand it, that the evidence at the last hearing with respect to stacking and sorting was pertinent in the light of the cost exhibits which were introduced by the respondents?

Mr. Hoffman: Yes.

Exam. Brown: So, in that respect, that evidence would be pertinent, so we could segregate, perhaps, as between the costs for unloading proper and the costs for special stacking.

Mr. Hoffman: I might say in reply, the question of who performs the sorting services has nothing to do with the auction necessarily.

We find that in Philadelphia, for example, the sorting is [fol. 1257] performed in some cases, at least, by arrangements which the consignee may make through others.

In other words, I see no relationship to an issue of sorting as it relates to the cost studies, and the matter of the relationship between the auction company as lessee and the carriers as lessor.

Exam. Brown: I would say here that this type of evidence is pertinent, but not necessarily conclusive. In other words, it is up to the Commission to determine how much weight should be given to this situation. So far as the particular subject we are talking about now is concerned, namely, the rent paid by the auction company, if any, for their auction facilities, rooms, and what privileges are accorded to them by the railroad, that particular question was asked at the oral argument by the entire Commission, and one or two of the Commissioners at the last oral argument.

I do not know whether they realized that it was pertinent or not pertinent at the time. There was no objection then made to the question.

Mr. LaRoe: Then the Examiner is taking no position one way or other on that issue here?

Exam. Brown: That is it exactly. I am taking no position one way or another. I am going to get a complete story in this case if I can get it. We can cull out later what is pertinent and what is not pertinent. At the present [fol. 1258] time, I am going to rule that that evidence should be received at this time.

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Mr. LaRoe: Will you grant me an exception on that, Mr. Examiner?

Exam. Brown: Yes, sir. You are allowed one on that.

Mr. Fitzgerald: And may I associate myself with the remarks of Mr. LaRoe?

Mr. Augello: I also want to go along with Mr. LaRoe's remarks.

Mr. Van Arnum: I should like to, also, just for a matter of record, appear in that objection. I should like to refer, just as a matter on which to base this exception, to the Commission's order in I&S Docket No. 3596, allowances for stacking fresh fruits and vegetables at New York, where the Commission in its decision says: "On the contrary, it shows that instead of requiring the consignees to unload the shipments from the cars as ordinarily required on carload shipments, respondent undertakes to make delivery to spaces assigned to the consignees on the pier; its stevedores pack the packages in those spaces. It appears from this record that at that point respondent has fulfilled its legal obligation as to delivery."

And on that paragraph we base this exception.

Exam. Brown: You can argue these matters in your brief. I am not saying whether I agree with you or disagree with [fol. 1259] you at this time.

Mr. Wells: Mr. Examiner, I believe my objection was placed in the record earlier in line with Mr. LaRoe's.

Exam. Brown: That is right. Now, if the witness will answer.

Mr. Montgomery: This is also over my objection. As I stated in the beginning, I am offering it under protest. I put the question, but I said I am putting it under protest because I do not see the relevancy of the issue. I take the same position that the others took.

Exam. Brown: I did not understand that there were any strings attached to your question at the present time. So far as Mr. Dougherty is concerned, he need not answer. I will permit the respondents to bring that evidence in at the time they present their case, and at that time I will rule on it, and I will expect them to bring it in.

Mr. Smith: We shall do so.

Exam. Brown: I want a whole story on it, not a half story. That is all on that subject.

Mr. Montgomery: I have no objection to an answer.

Exam. Brown: I am not going to force you to put any evidence in that you do not wish to do.

Mr. Montgomery: I will ask Mr. Dougherty to answer it so we can give our story at Philadelphia.

By Mr. Montgomery:

Q. Will you answer the question, Mr. Dougherty, as to [fol. 1260] what rent we pay for the auction rooms or facilities?

A. We rent from B&O Railroad certain space, including our offices, our printing department, for which I believe we have a lease which was negotiated two years ago. I am quite certain, though, that this lease does not cover the auction rooms as the auction rooms are considered a public produce terminal. I do know that we have a lease in our files covering the auction room at the Pennsylvania Produce Terminal. As to what was tendered in order to negotiate this lease, I do not know. We do have a lease covering that auction room or the facilities we use for auction.

Mr. LaRoe: You mean it may be a free lease?

The Witness: It may be, possibly. I do not know. We have a lease.

Mr. LaRoe: But you are not able to say whether any consideration was paid for the lease?

The Witness: No, I am not, Mr. LaRoe, because that was arranged and consum-ated prior to my association with the auction company, I do know——

Mr. Pettijohn: I submit, if he is going to talk about a lease that the lease be made a part of the record in this proceeding.

Exam. Brown: He says he does not know anything about this lease, so there is no use in putting the lease in.

[fol. 1261] Mr. Goldsmith: It is in the files of the auction company, though, Mr. Examiner.

Exam. Brown: This witness is testifying as to matters within his knowledge. All I want to know is in connection with having this matter developed. If this witness does not

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know, I do not expect him to answer and I do not expect him to develop it further.

The Witness: I do know we have a lease. I am not too familiar with the terms of just what is in the lease. I know we have a lease. I know we have a lease with the B&O Railroad, and to the best of my knowledge, the auction room in that particular lease is not covered. I do know that we have tried to lease property from both these roads and they claim that it is not within their province, that the Commission would not allow them to lease this property. I do know of several instances where platforms at the Pennsylvania Railroad were tried to be leased, and that was impossible. Several trade associations have tried. It has always been referred to as public market places of such stations. Now, that is to my knowledge.

Exam. Brown: In other words, if I were to write a report on this now and determine that this particular type of evidence is pertinent in this case, it would be necessary for me to state that I do not know what, or the record does not show what the situation is with respect to the auction com- [fol. 1262] panies, whether they pay rent for their space or any provision is in the lease or anything else. In other words, we haven't received any information from you, sir, which is helpful.

The Witness: Well, I have testified, Mr. Examiner, that we are not currently paying rent for the use of the auction room. That is a matter of record.

Exam. Brown: Of the Baltimore & Ohio?

The Witness: Of the Baltimore & Ohio, too. I believe and I am positive that our lease covers facilities which we use for our office and our printing department, and naturally, I haven't had occasion to be reading the leases. I agree with counsel that I do not see what bearing it has on the case, but, however, the question was asked, so I am giving you the best, to my knowledge.

Exam. Brown: We are not arguing that point now. That is completed. But your testimony, then, at the present time is that you do not pay rent to the B&O Railroad for auction property, is that right?

The Witness: For the use of the auction rooms, that is right.

Exam. Brown: Well, that is all I am talking about, for the use of the auction property, and is your testimony the same with respect to Pennsylvania?

The Witness: That is right.

Exam. Brown: In other words, you do not pay rent for [fol. 1263] any of your auction facilities to any carrier; is that right?

The Witness: That is right.

Mr. Montgomery: Now, wait a minute now. Your auction facilities, your office rent.

The Witness: At the same building.

Exam. Brown: Well, I am not interested in the office rent. All I am talking about is the auction rooms.

The Witness: Well, I understand——

Exam. Brown: That is why I used auction facilities. I will agree 100 percent that the properties that you rent are not within the scope of this proceeding, except to the extent that they are connected with this transportation, and then I have an open mind on that. But I want this evidence in this case in case somebody finds it is pertinent. I do not want to be criticised for leaving something out that might perhaps be properly in the evidence.

Now, with respect to these letters——

Mr. Montgomery: I wish to offer those in evidence, sir.

Exam. Brown: I understand you will have copies made of them and served upon the respondents and other parties.

Mr. Montgomery: I will, sir.

Mr. LaRoe: Will they be exhibits?

Mr. Montgomery: They will be exhibits. And I wish you would mark them, sir; first will be a copy of a letter dated December 8, 1948, addressed to Mr. Frank G. Hoskins, gen- [fol. 1264] eral superintendent of the Baltimore & Ohio Railroad. That will be Exhibit 109.

The reply from Mr. Hoskins, B&O Railroad, dated December 14, 1948, will be Exhibit 110, and a reply from the Pennsylvania Railroad Company, dated December 22, 1948, which has reference to the same letter. The carbon copy of the letter addressed to the Pennsylvania Railroad I do not have but, Mr. Dougherty, will you tell us whether that is an exact copy, excepting as to the name?

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The Witness: That is correct.

Mr. Montgomery: That will be Exhibit 111.

Exam. Brown: Do you have copies of those in the files so you can leave those with the official reporter?

Mr. Montgomery: I do not have copies of these originals.

Exam. Brown: Off the record.

(Discussion off the record)

Exam. Brown: These letters and copies will be received in evidence, if there be no objection.

Mr. Miller: There is no objection.

Mr. Donadio: I have no objection.

Exam. Brown: I understand that copies will be furnished to respective counsel.

(Protestant's Exhibits Nos. 109, 110 and 111, inclusive, Witness Dougherty, received in evidence.)

Exam. Brown: Any more questions on direct examination?

[fol. 1265] By Mr. Hoffman:

Q. Mr. Dougherty, did I understand you to say that the auction company is the consignee of the cars moving to the auction?

A. No. I do not recall saying that they were the consignee.

Q. The auction company is not the consignee?

A. The auction company acts in behalf of the consignee.

Q. Now, the auction company charges a fee to the consignee for the auction services?

A. That is correct.

Exam. Brown: Mr. Hoffman, in the course of your remarks with respect to the objection you just made, you referred to the fact that we pay a percentage of the cost of the auction fees or that you pay the auction fees. I wonder if you meant that.

Mr. Hoffman: Well, I meant to say that the consignor-consignee pays the auction fee. It is shown as a deduction on the return of the proceeds remitted to the consignor.

By Mr. Hoffman:

Q. Am I correct, Mr. Dougherty?

Exam. Brown: If you know.

A. I did not quite get the question.

(Question read by reporter.)

By Mr. Hoffman:

Q. Take, for example, a shipment of deciduous fruit moving from California to Philadelphia auction, Pacific Fruit Exchange consignor-consignee; Pacific Fruit exchange directing the auction company to sell that car; would, under [fol. 1266] those circumstances, a fee be charged to the Pacific Fruit Exchange as consignor-consignee for the services rendered by the auction company?

A. Yes.

Q. And the fee would show by way of the deduction of the proceeds remitted to the Pacific Fruit Exchange consignor-consignee?

A. That is correct.

Exam. Brown: That is when the consignee and the consignor are the same party.

Mr. Hoffman: That is right.

Exam. Brown: What happens when the consignor and consignee are not the same party? In other words, let us say a company on the Pacific Coast bills a carload of goods to Cancelmo. The auction is made. You bill Cancelmo your auction fee or take that into account with him, is that right?

The Witness: Yes. We deduct it from the account of sales which we render to Cancelmo, if that is the method used in that.

[fol. 1267] Exam. Brown: You do not know what happens after that as between Cancelmo and the consignor?

The Witness: No, I do not.

Exam. Brown: This is not a reparation case, so we are not interested in that feature.

By Mr. Pettijohn:

Q. Is that charge published in any tariff by the railroads?

A. Are auction charges published in the tariff by the railroads?

Q. That is right.

A. Not that I know of.

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Exam. Brown: Cross examine.

Cross Examination.

By Mr. Miller:

Q. When the auction company prepares these goods for sale, they put out a catalog covering the sale, do they not?

A. That is correct.

Q. On that catalog, the packages are divided into lots of 101 packages, are they not?

A. In the case of a straight lading of grapes, that is the way. If it is a case of a sized article, there is usually a number of various sizes in those lines.

Q. In any case in which any particular size and grade is equal to or greater than 101 packages, the commodity is listed on the catalog in a 101 package item, is that correct?

A. In any case?

[fol. 1268] Q. Yes.

A. No, that is at the discretion of the receiver for whom we sell.

Q. Can you explain to me why it is that you use the unit of 101 packages?

A. Well, it is the unit which has been used prior to my connection with the auction company, to where they consider that selling it in lines makes a better sale, as the buyers call out of line so-and-so. However, that was formerly used, Mr. Miller, before I went with the auction company.

Q. When a unit of merchandise is put up for sale at the auction, is that unit the line on the catalog?

Mr. Goldsmith: Just a minute. Mr. Examiner, I do not know how the sales conduct has anything to do with these charges of loading. I mean, it is all right to go into the question of whether space used for auction purposes is paid for in the station, and so forth, and he is under cross examination and nothing has been brought out about how these sales are conducted or how the fruit is sold after delivery is made. I do not know what all this cross examination has to do with that purpose.

Exam. Brown: You may be right, technically. At the

prior hearing, however, Mr. Dougherty testified definitely with respect to these auction sales. He even introduced in evidence an auction catalog showing various lots of [fol. 1269] produce; is that correct?

The Witness: No, I did not introduce the catalog.

Exam. Brown: You did not introduce a catalog showing the setup of a particular auction day at Philadelphia?

The Witness: I do not believe I personally introduced it.

Exam. Brown: Well, somebody from Philadelphia did that.

Mr. Hoffman: Well, the railroads introduced that.

Exam. Brown: No, somebody from Philadelphia. It might have been Mr. Pease in behalf of the Department of Agriculture.

Mr. Pease: No, Mr. Hampton, in behalf of the railroads.

Exam. Brown: Well, my recollection must be wrong then. I thought that Mr. Dougherty introduced that.

The Witness: No, I did not.

Exam. Brown: But, nevertheless, Mr. Dougherty did testify with respect to the method of selling at Philadelphia. I do not think there is any doubt about that, is there?

The Witness: Oh, no. I answered the questions that were asked of me, I believe.

Exam. Brown: You asked the questions of your own counsel.

The Witness: I am not sure. I think it was on cross examination.

Exam. Brown: You mean to say that on direct examination you did not testify as to how auctions were conducted at Philadelphia?

Mr. Wells: Mr. Examiner, is the witness to be cross [fol. 1270] examined on a former hearing or just on direct examination today?

Exam. Brown: I am trying to develop this situation so I can make a ruling which will be logical in the li-ht of the hearing before. Now, Mr. Dougherty put this type of evidence in at the prior hearing. The evidence certainly would be pertinent now, if it were pertinent then.

The Witness: Well, I did not put any catalog in, I know that, as any evidence.

Exam. Brown: Well, one was put in there. I remember the exhibit very well. I do not know who put the exhibit

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in, but I know that it was in there, and I am fairly sure that you testified as to the methods of selling at Philadelphia. That is why you took the stand, was it not?

The Witness: Well, I do not recall answering any questions under direct examination. I could have under cross examination.

Exam. Brown: Be that as it may, the witness may answer.

The Witness: Will you repeat that again, Mr. Miller, please?

Mr. Goldsmith: May I have an exception?

Exam. Brown: Under the rules of practice, counsel are automatically afforded exceptions.

By Mr. Miller:

Q. When a unit is placed for sale in the auction rooms, is it true that that unit is shown on an individual line in [fol. 1271] the catalog?

A. Yes. In most cases the man who gets the bid has a choice of the catalog, and he calls it out by number. That is his selection when the bid is finally knocked down to him. The catalogs are listed on a board in the order in which they are sold.

Q. Now, when you are selling something in the auction room, aren't you selling a particular line on the catalog of some kind?

A. No. You are selling a choice of the catalog.

Q. When the railroad unloads the packages on the floor of the platform, into what groups are the packages arranged?

A. Into what groups? In the case of citrus, they are arranged into size groups, and in some instances cars have two brands, first choice and second choice, which has, necessarily, two-sized groups.

Q. Aren't they sorters on the platform in accordance with the line shown on the catalog?

A. They are sorters on the platform in accordance with the line.

Q. Shown on the catalog?

A. Well, the manifest—I am not too sure that a car is unloaded before the railroad company has the catalog in a

good many instances. They are assorted according to sizes and brands, and they are catalogued on our catalog accord- [fol. 1272] ing to sizes and brands from the manifest.

Exam. Brown: Is the auction catalog made up with respect to those particular lines in any respect?

The Witness: The actual——

Exam. Brown: The actual catalog?

The Witness: And those lines? No, the lines are placed on the floor with chalk to compare with the printed catalog.

Exam. Brown: Now, wait a minute. Your catalog—you have intimated to me—was prepared after that is unloaded.

The Witness: Oh, no. I said that the railroad does not get the catalog in a good many instances until after they have unloaded it.

Exam. Brown: Is the catalog prepared before the unloading takes place?

The Witness: Yes. The catalog is prepared from the manifest.

Exam. Brown: It is printed in advance in other words?

The Witness: Yes.

Exam. Brown: You get notice that a car is expected to arrive?

The Witness: That is right.

Exam. Brown: And there is no effort made to place the materials on the floor in line with that auction catalog. That is the question of Mr. Miller, as I understand it.

Mr. Miller: I understood the witness to say he did not [fol. 1273] know.

Mr. Pettijohn: Is there a special charge for that sorting at Philadelphia?

The Witness: A special charge for it?

Mr. Pettijohn: Yes.

The Witness: No, not to my knowledge.

Exam. Brown: Is there any charge for it?

The Witness: No, there is not.

Mr. Pettijohn: In other words, that is comprehended in the line haul rate?

The Witness: Yes, sir.

Mr. LaRoe: I am wondering, Mr. Examiner, whether there is a little confusion here. Perhaps the confusion is due to my own ignorance of the details of these deliveries,

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but Mr. Laux testified about diagram loading of a car, with the car being marked so-and-so, and he said that the freight was taken out and put on the pier in accordance with the diagram loading. Is that the way it works with you? Does the manifest show the diagram loading of the car?

The Witness: No. The railroad foreman marks the floor where car so-and-so is going to go, and that starts from there, is sized——

Mr. LaRoe: In other words, is there no division of that car according to grades or sizes marked on the floor of the pier?

[fol. 1274] The Witness: No. The numbers are put on the floor after the car is unloaded and the boxes are marked to conform with the printed catalog which they may get after the entire car has been unloaded. The catalogs are printed at our B&O place, the printing department, and the Pennsylvania Railroad, when they unload on Oregon Avenue, one of our men at a later date comes up and gets the catalogs for the cars which have been on the Pennsylvania. Then they mark the boxes in crayon and they mark the floor in chalk to conform with the catalog which we printed the afternoon before.

Exam. Brown: Is this statement in modification of your previous statement that you do not know as to the hookup between the placing on the flor and the auction catalog?

The Witness: I did not recall that I said I did not know. Mr. Miller said that I answered I did not know.

Exam. Brown: That is what Mr. Miller said, and you did not take him to task with respect to his statement. Do you know?

The Witness: Do I know what?

Exam. Brown: Whether there is any hookup between the chalk marks on the pier floor and your auction catalog?

The Witness: Oh, there are marks which are put on the pier floor after the car is unloaded, the numbers, to conform with the catalog which has been printed.

Exam. Brown: Who puts them on?

[fol. 1275] The Witness: Who puts them on? The auction company employees.

Exam. Brown: The railroad does not put the marks on?

The Witness: No. They mark the space where the car of oranges goes here, where it starts, and another one, so

many feet away. If they are going to put a car of lemons in the next spot, that spot is marked.

Exam. Brown: Now, you say the auction catalog is made up prior to the unloading?

The Witness: That is correct.

Exam. Brown: How does the carrier know where to stack these particular lots if he has not received advance information as to where a particular lot is going to be?

The Witness: I answered Mr. Miller in some cases that the car is unloaded at the Pennsylvania before they have the catalog because all catalogs are printed at the B&O. The B&O Railroad employees have access to the printing room and they can get the catalogs out even before the car is put in to start to unload.

Exam. Brown: Now, answer this, and let us get this record straight if we can: are the packages placed upon the pier floor in line with the auction catalog?

The Witness: Are they placed——

Mr. Miller: Are they grouped on the floor in conformity with the lines shown on the auction catalog?

[fol. 1276] The Witness: Yes. The 150's are in one pile, if that is what you mean, Mr. Miller, and the 176's are in the next one, and the 200's are in the next one, and that is the way the catalog is printed and that floor is marked after the car is unloaded and the pile is counted and the pile is marked, so that the same line numbers are on the floor and on the catalog.

Mr. Pettijohn: Are you using the terms "manifest" and "catalog" synonymously?

The Witness: Well, we print a catalog from the manifest which the consignee gives us.

Redirect Examination.

By Mr. Montgomery:

Q. Now, Mr. Dougherty, you have notice of a certain car going to arrive at a certain date; then you make up the catalog, that is, before 4 o'clock today for the sale tomorrow; is that right?

A. Correct.

Q. The railroad receives that car and unloads it on to the pier——

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Mr. Augello: You mean dock or platform.

By Mr. Montgomery:

Q. (Continuing)—on the platform, unloads that on the platform, and each car is kept separate on the platform, the same as before taking off the car?

A. That is correct.

Q. And then after it has been piled on your platform and [fol. 1277] you have taken delivery, your employes then mark the car number and lots on the floor in front of that merchandise?

A. That is correct.

Exam. Brown: Now, your question was after you have taken delivery. Is it conceded in this proceeding that the auction company has taken a delivery prior to its sale?

Mr. Montgomery: Prior to the sale?

Exam. Brown: Yes.

Mr. Montgomery: Yes.

By Mr. Montgomery:

Q. Upon the completion of the unloading on to the platform by the railroad, the auction company at that time takes delivery and possession of that merchandise and it is sold thereafter; isn't that correct?

A. That is correct.

Exam. Brown: You paid the freight charges before sale or afterwards?

The Witness: We sign them and we are responsible for the freight charges. We have the usual 24-hour credit. We pay them that day.

Exam. Brown: In other words, after the material is placed upon the platform, you are responsible to the railroad?

The Witness: After they finish recoopering and putting them back in their proper lines, then our man signs for them and we are responsible.

Exam. Brown: And they look to you for the freight charges?

[fol. 1278] The Witness: In most instances. Some of the consignees pay their own freight.

Exam. Brown: That, notwithstanding the fact that the goods are not consigned to you but to some other consignee?

The Witness: Definitely.

Mr. LaRoe: At the risk of repetition, does the railroad do any grouping of the freight by 150's, 176's, 200's or other sizes, or is that done by your own men?

The Witness: That is done by the railroad.

Mr. LaRoe: That is done by the railroad?

The Witness: Yes.

Mr. LaRoe: As a part of the delivery?

The Witness: As part of the unloading, not the delivery.

Mr. LaRoe: As part of the unloading?

The Witness: Right.

Mr. Pettijohn: Is that grouping based upon a manifest of the car?

The Witness: Yes.

Exam. Brown: You might have answered this question, but if you did, it did not register with me. Are the groups on the car floor, on the platform, rather, that is, after delivery by the carrier, after unloading and placing on the platform, are those groups in strict conformity with your auction catalog?

The Witness: Yes, and in a good many instances there [fol. 1279] are apt to be corrections. One lot will run short, one lot will run over and take care of the bad orders which have been removed.

Exam. Brown: As a general rule, almost uniformly, then, with few exceptions, the materials on the platform coincide with your auction catalog in every respect?

The Witness: That is right.

Exam. Brown: As to line, number and other details?

The Witness: That is the way they come out of the car, too, in most instances. In most every respect, the 150's, the top is what comes out of the car, because that is the way the car is manifested and that is the way it is printed.

Mr. Goldsmith: You mean to say that they are unloaded the way the car is packed?

The Witness: Yes, in a good many instances, in most instances, the 150's, or the top of the car, are the first one

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or two boxes out. In other words, you do not get 188 out and then get that.

Mr. Goldsmith: Then there is actually no separate grouping made by the railroad?

The Witness: No. It is just segregation as to sizes.

Mr. Goldsmith: As they come out of the car, they stack them up right along the platform?

The Witness: There is nothing special about this. It is the same as they have been doing for 50 years.

[fol. 1280] Exam. Brown: Yet you say it coincides in every respect with the auction catalog?

The Witness: No. The catalog is printed from the manifest.

Exam. Brown: I do not care how or when the catalog is printed. I just want to know if the groups on the platform are the same as the groups in your auction catalog. I do not care when it was printed.

The Witness: Yes, that is right.

Mr. Goldsmith: And your catalog is printed from the manifest.

The Witness: Definitely.

Mr. Goldsmith: And the manifest is the way the car is packed.

The Witness: Definitely.

By Mr. Wells:

Q. Where does the railroad get the manifest?

A. The railroad get the manifest?

Q. Yes.

A. Well, the railroad does not have the manifest of the car, I do not believe.

Q. Take, for example, a carload of citrus. That simply says so many boxes of oranges or grapefruit, as the case may be.

A. That is right.

Q. And it does not say how many of each size or how many of a particular grade or brand or anything else, usually, does it?

[fol. 1281] That is correct, it does not.

Q. And the railroad has no information at the time they

unload that car as to how many of a particular size may be in that car, do they?

A. They do if they get our catalog at B&O, yes. They do not have any manifest on it.

Mr. Goldsmith: Assuming they do not get the catalog?

The Witness: They do not get the catalog, they do not have the information.

Exam. Brown: Is it the practice of your company to give the railroads your catalog?

The Witness: Yes, it is available for them there.

Exam. Brown: I asked you if you give it to them; is it the practice?

The Witness: Yes. They have the authority to go into the printing room and get the catalog.

Exam. Brown: In other words, is it understood that they can go into the printing room and get the catalog?

The Witness: It is understood we have a man there. Yes, the catalogs are available.

Mr. LaRoe: Mr. Examiner, I submit that the evidence is confusing because the witness testified a few minutes ago very clearly that the B&O has access to those catalogs because the printing is done at the B&O station, but that the Pennsylvania does not have access to those same catalogs. [fol. 1282] Now, are you changing your testimony on that?

The Witness: No.

Mr. LaRoe: Well, then, the fact is that the Pennsylvania does not have the catalog in advance.

The Witness: Well, I believe, I answered Mr. Miller to the extent that there are cars unloaded on the Pennsylvania prior to their having the catalogs. I believe that is the way I answered it.

By Mr. Wells:

Q. Well, then, Mr. Dougherty, if they do not have the manifest, they do not have the catalog, how in the world can the Pennsylvania stack it on the pier according to the catalog?

Mr. LaRoe: That is the question.

A. Well, it comes out of the car that way, and the 150's

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come out first in most instances, and we have to mark the floor and the boxes afterwards.

By Mr. Goldsmith:

Q. And it does not make any difference whether you print a catalog or you don't print a catalog; that is the way they are laid on the platform, is that correct?
A. That is correct.

By Mr. LaRoe:

Q. The same way they were laid in the car?
A. That is correct.

By Mr. Pettijohn:

Q. Well, the fact is that the auction market gets the manifest and the railroad does not, is that a fact?
[fol. 1283] A. That is correct; that is right.

Exam. Brown: Well, I wish to state right here and now that this evidence is far from satisfactory with respect to the hookup between the auction company and the railroads, so far as putting these packages on the floor is concerned.

Now, whether there is an exception made to this or not, I consider that particular evidence very pertinent in this case, as to what duties the railroads performed prior to delivery.

Mr. LaRoe: Yes, so do we.

Mr. Miller: Mr. Examiner, I will assure you that I will have a witness available hereafter to competently explain exactly how this business is transacted. I would like to ask just one further question, Mr. Dougherty.

Recross examination.

By Mr. Miller:

Q. Do you recall whether or not you previously testified that it would be difficult for auction receivers to operate with a team-track delivery because the various grades and sizes were all mixed up in the car?
A. That they were all mixed up in the car?
Q. I believe that was your testimony at the last hearing.

A. Well, if you have the record and that is my testimony, that is perfectly clear, but may I modify it?

Q. Yes.

A. Because there is no way in which we can take the man who buys the 150 and say, "You must go to the car [fol. 1284] first and get these because the man who buys the 288's is waiting." That is where the confusion comes, after a fellow comes for 288, to break the car, and in front of him is 176—they are then pushed aside until he gets the 288, and if they are pushed aside, then somebody comes for the 150's which have been pushed aside.

Mr. Pettijohn: Who marks the platform for which the different sizes and grades are to be put in at Philadelphia?

The Witness: The auction company employees.

Exam. Brown: Do they mark them before the goods are unloaded?

The Witness: No, sir.

Exam. Brown: Do they, when they take the goods, then mark them?

The Witness: That is right.

Mr. Miller: I have no further questions.

Exam. Brown: No redirect?

Redirect Examination.

By Mr. LaRoe:

Q. Is there any instance where the grouping of the different sizes on the platform are different from what the grouping was in the car? Let me put it this way: suppose you have three sizes of fruit in the car. In one end of the car you have 150's; in the middle of the car you have 176's, and in the rest of the car you have 200's. Now, when the railroad takes those out of the car, that same order is pre- [fol. 1285] served, is it, when it is put on the floor of the pier, or is the order ever changed, the grouping changed?

A. Well, the grouping is changed, Mr. LaRoe. Lots of times the catalogs have to be changed. We oft times have three boxes of 150s listed, and there are none in the car. We have——

Q. Wait a minute now. You say there is a grouping of 150's listed and there are none of those in the car?

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A. Yes.

Q. Well, the railroad cannot put them in there if they are not in the car?

A. Certainly not. That is what I tried to say, that these catalogs are corrected after the car is unloaded.

Q. Is there any instance where the railroad changes the grouping of these commodities as they were in the car, in placing them out on the platform, rearranging the fruit?

A. No; no.

Q. They always follow the order that was in the car?

A. That is right.

Q. And if there is any putting in of 150's to fill out an order or something like that, that is done by the auction company?

A. Put in to fill out?

Q. Yes.

A. No, we do not.

[fol. 1286] Q. Well, who does? You said there might not be 150's and you want 150's. Who does that?

A. Well, the line is crossed through the catalog; that is just erased, and you will find that possibly another size has been increased by three or something. The railroad is concerned with the total account rather than the various sizes, and the catalog is tacked on the car and the correction is made on it. We sign for the total number of packages, not the number of various sizes.

Q. Well, that indicates that some adjustment is made in the grouping on the platform to make it conform to the catalog?

A. Definitely.

Q. Who does that adjusting?

A. That is done by our night men.

Q. And not by the railroads?

A. No, sir.

Mr. LaRoe: That is clear.

By Mr. Pettijohn:

Q. Mr. Dougherty, when the car is placed, you have a manifest of the contents of that car, do you not?

A. Yes.

Q. And when you have a manifest of that car, you mark off on the unloading platform the space according to grades and sizes, do you not?

A. No. We do the marking after the car comes off.

Q. But you mark it from your manifest, do you not?

[fol. 1287] A. Yes, that is right. The catalog.

Q. So the manifest of the car that is submitted to you is the basis upon which the stacking is done?

A. That is right.

Exam. Brown: You mark it from the manifest or do you mark it from your auction catalog?

The Witness: Well, the auction catalog is a duplication of the manifest.

Exam. Brown: Exact duplication?

The Witness: Yes, so far as number and sizes.

By Mr. Van Arnum:

Q. Where do you get the manifest? Does the shipper mail the manifest to the consignee or to you or does he put it inside the car, on the car door?

A. No. We get our manifest from the consignee.

Q. A shipper mails it to him and the consignee gives it to you?

A. That is right.

Exam. Brown: You get your manifest from the consignee?

The Witness: Yes, or receiver.

Exam. Brown: That is sent to him before the car reaches Philadelphia?

The Witness: That is right.

By Mr. Van Arnum:

Q. Doesn't the shipper also personally pin the manifest to the inside of the car door?

A. At times, but that is not generally done.

[fol. 1288] Exam. Brown: Any further questions of Mr. Dougherty?

By Mr. Pettijohn:

Q. There seems to be some confusion as to how this plat-

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form is marked. Do you mark the platform when the cars are received for unloading prior to the unloading or after the unloading?

A. The railroad man spots the platform where the car starts. That is one mark down the center. The lines are marked by the auction company employees.

By Mr. LaRoe:

Q. When?

A. After the car has been unloaded and delivery has been made to us.

Mr. Donadio: What kind of a mark does the railroad put on the floor?

The Witness: White chalk mark, where the car starts.

Mr. Donadio: Does he put a car number?

The Witness: He puts some number there, I am pretty sure.

Mr. Donadio: Does he put a car number down?

The Witness: I believe he does put the car number down.

Exam. Brown: Do you know? Do you know whether he puts the car number down?

The Witness: No.

Exam. Brown: Testify to facts within your knowledge, please.

The Witness: Well, he marks the floor as to where the car starts and he knows the number of cars that has to [fol. 1289] unload that night.

By Mr. Pettijohn:

Q. Well, is there a space provided or set out for the number of different packages according to commodity and sizes by the auction company or by the railroad?

A. The spaces are marked that should take care of the entire lading and that is all, and then the car is stacked sideways from the center, each center towards the doors. In other words, the unloading starts at the center of an aisle, and that is stacked toward the door, and in the same manner for the length of the platform. Now, the night foreman of the railroad knows that he has 10 cars of oranges or 20 cars of oranges and he so marks the spots, each mark for a car, not for the individual lines in the car.

Q. Well, who assumes the responsibility for grading and sizes, the railroad company or the auction company?

A. The railroad company lines them up as to sizes and as to brands. The auction company employees put the mark on the box and on the floor as the line.

Q. The auction company simply designates the total amount of space necessary for unloading the car?

A. The railroad designates the total amount of space necessary.

Exam. Brown: That is all, Mr. Dougherty. Thank you.

(Witness excused.)

Mr. Augello: How about a recess, Mr. Examiner?

Exam. Brown: All right.

[fol. 1290] (A short recess was taken.)

ALFRED SHAPIRO was sworn and testified as follows:

Direct Examination.

Mr. Montgomery: Mr. Examiner, I have a statement here from which Mr. Shapiro will read in reference to his cost studies of unloading at the B&O pier. I have furnished a copy to Mr. Miller, and I will have to get additional copies of it.

Exam. Brown: Will you see that I get one?

Mr. Montgomery: I will, sir.

Mr. Donadio: I should like to have a copy of that statement.

Mr. Montgomery: Yes, I will have more of them made up tonight.

Mr. Donadio: I should like to have it now, if it is to be offered in evidence.

Exam. Brown: Off the record.

(Discussion off the record.)

Exam. Brown: On the record.

By Mr. Montgomery:

Q. State your full name and address.

A. Alfred Shapiro. I live at 22 Delaware View Avenue, Trenton, New Jersey.

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Q. And what is your business and business address?

A. I am a member of the firm of M. Rosen Company, 2nd and Dock Streets, Philadelphia.

[fol. 1291] Q. And what is the nature of their business?

A. We are receivers of fruits, deciduous fruits mostly from the west coast, mainly the northwest, Washington and Oregon.

Q. Auction receivers?

A. Auction receivers.

Q. How long have you been in this business?

A. I have been with the firm of M. Rosen Company since its inception, which was in December, 1938. Well, it is practically January 1, 1939.

Q. And are you familiar with the handling of the fruit produce at auction at Philadelphia terminal?

A. Yes, I am.

Q. A while ago the question was raised as to why there is 101 lots named in the catalog. Can you explain that?

A. Yes. That was just a custom of procedure in the sale. As Mr. Dougherty has testified, the auction unit is twenty or multiples of twenty. Some years ago we used to list items such as grapes in 100 lots and when we sold these, when 70 was sold in a line and there would be 30 remaining, it was very hard to get a buyer to take 30 lots, 30 boxes, and usually the price would drop so that you had to drop your price on your other fruit that you had already sold. So the receivers adopted the custom of 101 in a line, so that if there were 70 sold, there would be 31, and the buyer would take 20 and you could sell 11, the remaining 11. [fol. 1292] That is just a custom of sale.

Q. Mr. Shapiro, have you made a study of the unloading costs at the B&O pier or B&O auction platform?

A. Yes, I have observed the unloading and I have analyzed what I think is the cost of unloading.

Q. Will you give the Examiner the results of your time study on the unloading of 25 cars, I believe it was, on——

A. September 18th?

Q. September 18, 1949?

Exam. Brown: Can't we put this in as an exhibit?

Mr. Montgomery: Yes, sir.

Exam. Brown: We have a considerable amount of statistics.

Mr. Montgomery: Yes, sir.

Exam. Brown: I think it would be much more preferable to put it in as an exhibit.

Mr. Montgomery: I will so offer it as an exhibit.

Exam. Brown: That includes the explanation as well as the table on the second sheet?

Mr. Montgomery: It does.

Exam. Brown: Do you have the original there, sir?

The Witness: I have the original, but I have figures on mine, pencil figures.

Exam. Brown: Then we will accept this copy as an exhibit, provided there are no exceptions to it. That will be 112.

[fol. 1293] (Protestant's Exhibit No. 112, Witness Shapiro, marked for identification.)

Exam. Brown: Now, it is understood that you will serve copies of this exhibit on counsel of record in this case?

Mr. Montgomery: Yes, sir.

Exam. Brown: And do that within ten days.

Mr. Van Arnum: Is that also understood as to these other documents that have been used here?

Exam. Brown: It is understood as to the documents as to which it was agreed that copies be made. So far as these photographs are concerned, I understand that the parties haven't asked for additional copies of those.

Mr. Van Arnum: That is what I want to know, whether we have to find out what these are, write and ask for them, or whether they are going to be furnished automatically.

Exam. Brown: The copies of this exhibit will be furnished automatically. I have handled each exhibit as I have gone along. Copies of this exhibit will be served upon the parties within ten days, all counsel of record.

Now, this is an explanation of your cost figures on the second sheet?

The Witness: That is right.

Exam. Brown: Have you had time to read that, Mr. Miller?

Mr. Miller: Yes, sir.

Exam. Brown: Have you any objection?

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[fol. 1294] Mr. Miller: No, sir.

Mr. LaRoe: Just for information, Mr. Examiner, is my understanding of this correct, that it comes out with a total cost per car of $11.29?

The Witness: That is what we figure that to be, the cost of the labor involved.

Mr. LaRoe: That is just labor cost?

The Witness: Labor cost.

Mr. Pettijohn: It does not purport to show the excess cost of cars moving to team-track delivery over, or the excess cost of cars moving to auction market over team-track delivery?

The Witness: No, it does not. We did not analyze the team-track delivery.

Exam. Brown: This is all with respect to the platform delivery?

The Witness: This is all the auction platform delivery.

Mr. Montgomery: At the B&O?

The Witness: At the B&O Reading Terminal.

By Mr. Montgomery:

Q. Have you any further explanation to make as to this statement?

A. I think this statement is self-explanatory, and I think it shows the actual labor costs involved in unloading a car of fruit.

Exam. Brown: There being no objection, Exhibit 112——

Mr. Donadio: Well, I do not know.

[fol. 1295] Exam. Brown: Well, I asked Mr. Miller if he had any objection. I heard no objection from any other counsel. We will entertain objections now if you have any to make, sir.

Mr. Donadio: Well, I am sort of a representative of the B&O at this proceeding, as well as one of the respondents, and I have not had an opportunity to object, if I feel that it should be objected to.

I should like to ask some questions about it first.

Exam. Brown: You have completed the direct examination of this witness?

Mr. Montgomery: Yes, sir.

Exam. Brown: Any other questions on direct?
Mr. LaRoe. Well, only for clarification.

By Mr. LaRoe:

Q. Did you observe personally the unloading of these cars?

A. Yes, I did.

Q. Did the railroad labor that was unloading these cars arrange the boxes or group them on the platform according to any size or grade?

A. There being no platform, they group them according to the manifest, to the catalog, the catalog which they secured that particular night.

Exam. Brown: Read that answer, please.

(The reporter read the last answer.)

Exam. Brown: Which was it, the manifest or the catalog? [fol. 1296] The Witness: Well, it is the catalog which is similar to the manifest, which the receiver gives to the auction company.

Exam. Brown: I do not know whether it is similar or not. I want to know what your testimony is on it.

The Witness: Well, as a receiver, we call the auction company, we give them the manifest and they in turn print a catalog from the manifest that we submit to them.

By Mr. LaRoe:

Q. Well, it would seem to follow from that that the catalog always is the same as the manifest. Is that a fact or isn't it?

A. I would say it is.

Q. Well, the manifest does not show anything except the makeup of the car, does it?

A. The manifest shows the sizes and the quantities of each size, car number and the brand, and the grade. It is a shipper's manifest.

Q. Well, if there are 100 boxes of one kind and 150 boxes of another kind or size, doesn't the railroad at Philadelphia, in placing them on the platform, group them or arrange them according to such sizes as shown in the manifest?

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A. Yes, they do.

Q. Without charging anything extra for it. That is included in the delivery, isn't it?

A. In the delivery, that is right; always has been.

By Mr. Pettijohn:

Q. Not having a copy of the exhibit, I should like to [fol. 1297] ask the witness if his costs were predicated upon a time study and the wages paid for the different classes of labor?

A. It is. This is a time study, and the labor costs per hour paid to these different types of help, and that is what this exhibit shows.

Mr. Donadio: Now, you do not mean that that is the pay that was paid to these men?

The Witness: Well, if you will read this, you see, we say in here the average pay of railroad labor of this type did not exceed $1.50 per hour.

Mr. Donadio: But, that is different than your answer that you just made to Mr. Pettijohn that that is what is paid these men.

The Witness: No no. He asked me if this is based on a time study and wages paid.

Mr. Donadio: And wages paid.

The Witness: Well, not the actual wages paid, no.

Mr. Donadio: That is what I am trying to get at.

The Witness: No, not actual wages paid.

Mr. Donadio: The whole thing is assumed, isn't it? You are assuming that.

The Witness: Well, the times are not assumed. It is actual timing.

Mr. Donadio: The actual time?

[fol. 1298] The Witness: The assumption of the rate is assumed. The rate is assumed.

Mr. Donadio: The rate is assumed?

The Witness: That is right.

Exam. Brown: And the pay is assumed?

The Witness: Well, the rate of pay is assumed, naturally.

Mr. Donadio: Well, don't you know? Is it my turn to

ask questions? Is everybody through? I want to ask some questions.

Exam. Brown: Yes, it is your turn. It is cross examination, that is right. Proceed.

Cross examination.

By Mr. Donadio:

Q. Don't you know that as a matter of fact this unloading is performed on a piece work basis, so much a car, irrespective of the number of hours and the number of minutes it will take to move the car?

A. We know the B&O works on a piece car basis.

Q. That is a fact, isn't it?

A. That is a fact, yes.

Q. And do you know that that is brought about by reason of the labor agreement between the railroad and its employees?

A. I do not know that for a fact. I never saw it. I would not know that.

Q. The same is true about the supervisor—supervisory employees which you have included in your statement. That [fol. 1299] is an assumed figure?

A. That is an assumed rate.

Mr. Pettijohn: What do you mean by assumed; on any percentage or arbitrary?

Mr. Donadio: Just an arbitrary assumption.

The Witness: We assume we can hire men at that rate to do that type of work.

Mr. Donadio: I think that the answers that this witness has made in response to my questions are sufficient to show that the exhibit is invalid; it is not representative of the actual cost of operation; and therefore should be excluded and I object to it.

Mr. Pettijohn: I submit, Mr. Examiner, that the witness has testified that the hours of the different classes of labor employed in this operation are actual. Now, if there is any disagreement as to the rates of pay which are properly applicable to the hours and service, it is encumbent upon

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the railroad company to show what the actual cost performing this service is.

Mr. Donadio: Well, we will do that, but on the time situation, it does not mean a thing because the basis for the cost to the railroad is a per car basis, so much per car.

Mr. LaRoe: Can we not save time by having it agreed that this is not intended as a study of the actual cost to the railroad but rather as an estimate, the best estimate the [fol. 1300] witness is able to make as to what it would cost him if he hired the labor to do it himself at the rate which he assumes would be applicable and applied to the actual hours which he observed? Isn't that an accurate statement?

The Witness: That is right. And I should like to add, if you will read further on, we have worked this down to the per ton basis, which the rate is based on, from our time and from our figures.

Mr. Donadio: Time does not mean a thing so far as the reaching of a proper cost of the railroad's unloading operation is concerned, because it is on a per car basis and it does not matter whether it takes 15 minutes, an hour or two hours to unload that car—so much an hour. So, any cost study based on so much an hour does not mean a thing. It does not help anybody in this case. It just confuses the matter, and I submit that the exhibit is invalid.

Mr. Pettijohn: Well, I submit it goes to the accounting and efficiency of operation at Philadelphia.

Exam. Brown: Any objections to this exhibit? Mr. Miller, do you have any objection now?

Mr. Miller: Mr. Donadio stated my objection.

Exam. Brown: You, a few moments ago, stated you had no objection. Now you have changed that?

Mr. Miller: It has been corrected.

Exam. Brown: You have changed that in accord with Mr. [fol. 1301] Donadio, is that what you mean?

Mr. Smith: As a B&O operation, I think Mr. Donadio should make the objection, and I concur in the objection.

Exam. Brown: Exhibit No. 112 will be received in evidence but will be considered in connection with the remarks

and criticisms of Mr. Donadio. Is that satisfactory, Mr. Donadio?

Mr. Donadio: I will accept the Examiner's rule and course.

Exam. Brown: I asked you if that is satisfactory. I asked you if my ruling is satisfactory, that it would be considered in connection with your criticisms and objections to it.

Mr. Donadio: Perfectly all right.

Exam. Brown: All right, sir.

(Protestant's Exhibit No. 112, Witness Shapiro, received in evidence.)

Exam. Brown: Any further questions of this witness?

By Mr. Miller:

Q. Mr. Shapiro, can you tell me why you chose Sunday to make this cost study?

A. Sunday night is the heaviest unloading for Monday sale and we wanted to get an idea on Sunday night what the heaviest time is that it takes to get the heaviest load out.

Q. Does your study include all the cars that were unloaded that night?

A. No, it does not. We just took the first 25 cars that were unloaded.

[fol. 1302] Q. Do you know how many cars were unloaded that night?

A. Offhand, I do not know the total number that night. We did not work through the whole night.

Q. Then what your study amounts to is a study of the times spent in unloading 25 cars on a particular night, the heaviest night of the week, is that right?

A. Yes.

Exam. Brown: He did not state that. He said it was the heaviest night for unloading for Monday morning deliveries. Now, if he did not mean that, correct it. You did not say it was the heaviest night of the week?

The Witness: No, heaviest for Monday morning delivery.

By Mr. Miller:

Q. Was it the heaviest night of the week?

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A. It usually is the heaviest night of the week, Sunday night.

Q. And that was the reason you chose it, wasn't it?

A. Naturally.

Mr. Pettijohn: Do you know the number of cars unloaded in comparison with the average for the year or the season?

The Witness: The total number of that particular day?

Mr. Pettijohn: Yes.

The Witness: Well, I do not recall the exact number that was unloaded that particular Monday, but that would be—Monday's sale would be the largest, the heaviest sale for any week, and I do not know what it would compare to the average for the year.

[fol. 1303] Mr. Pettijohn: Well, if you do not know what the average unloading for the year is, how do you know whether or not that is greater or less than would be the average?

The Witness: Well, I do not think that is the heaviest night of the week. They have heavier quantities on other Mondays. I do not recall it, though.

Mr. Pettijohn: Do you think it was a typical day?

The Witness: Absolutely.

By Mr. Miller:

Q. Do you know what commodities were unloaded in these 25 cars?

A. Oh, yes. It is in our exhibit: oranges, lemons, two cars of grapes, two cars pears.

Q. Mr. Shapiro, how did you compute the time stated on your exhibit?

A. Well, we quote the time we started each car and the time we finish. We got the number of minutes it took to unload it and we totalled the number of minutes up. It is right on our statement here.

Q. Can you explain in detail how that operation was performed?

A. Yes, I can. It is just reading this whole statement right over.

Mr. LaRoe: Please don't do that.

Mr. Miller: Don't read the statement all over.
The Witness: Our statement explains the operation.

By Mr. Miller:

Q. How did you determine the time of beginning on [fol. 1304] the first car?

A. We were down at the railroad. I, personally, was at the railroad at 6 o'clock that night, an hour before they actually started to work. They started at 7. I actually waited the breaking of the car and the unloading of the fruit by these gangs and I timed it as they were coming out of the different cars. We show where we started one at 7, finished 7:40; another one at 7, finished 7:40; and so on through our statement.

Q. Well, now, on your time started, what time is that? What actually happened at 7 p.m. on the first car?

A. That is when the doors were opened and the plate was put into the car and they started breaking out and unloading the cars.

Q. And what happened at 7:40 p.m. on the first car?

A. That is when they had everything out, the plate was picked up and all the fruit was stacked in the proper groups.

Mr. Miller: That is all.
Mr. Montgomery: That is all.
Exam. Brown: You are excused, sir.

(Witness excused.)

Exam. Brown: Any other witnesses for the protestants?

Mr. Loos: Mr. Examiner, I should like to call Mr. Nosser. In calling Mr. Nosser, Mr. Examiner, I am doing so with the reservation that I think has been spaciously discussed, [fol. 1305] to present evidence with respect to what happens after the unloading is completed, and which we think is not relevant or material to the real issues in this case but which, however, we think is proper testimony to submit in view of the state of the record here so far, and particularly with respect to the rental of the pier in view of the questions asked in oral argument. And in connection with that, I would like to say on the record that that question was asked of me, and in answering it I answered it in error.

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I was evidently thinking of the time early in my practice when the first case of this kind, of identically the same character of this case, was before the Commission, namely, the unloading at Duane Street, and prior to that time, there had been a rental for the piers.

However, I am sure my error in answering the question that was asked in oral argument did no harm, because at that time Mr. Von Miller corrected the error and gave the correct answer.

We are calling Mr. Nosser to clear up the record on that one point, and in addition, I will ask him regarding another point which my remarks about irrelevant and immaterial do not apply.

Exam. Brown: Have you been previously sworn?

Mr. Nosser: Yes.

Exam. Brown: You testified in a prior proceeding?

[fol. 1306] Mr. Nosser: That is right.

Charles Nosser, having been previously sworn, testified as follows:

Direct examination.

Mr. Loos: Mr. Examiner, not being sure what the prior record is with respect to Mr. Nooser's previous testimony, I may be asking some questions which are repetitious, but I am doing so to be sure that there is no omission.

By Mr. Loos:

Q. How long have you been connected with the New York Fruit Auction Corporation?

A. I have been connected with the New York Fruit Auction Corporation since 1933. I would like to say, Mr. Loos, that the New York Fruit Auction Corporation is an outgrowth of the Connolly Auction Company, which company I was connected with since May of 1919.

Q. And does the service of the New York Fruit Auction Corporation and its predecessor in this market go back even before that date?

A. Yes, 1907.

Q. Now, will you explain where the auction rooms are located?

A. The auction rooms on the Erie Railroad pier at Duane Street are located on the upper floor or second floor over the platform. They are across the hall from the Erie Railroad Company's offices at Duane Street.

Q. And where are they located on the Pennsylvania piers?

[fol. 1307] A. They are identically at the same place, on the second floor of the Pennsylvania Railroad piers in 28 and 29.

Q. Do the auction rooms decrease in any way the space on the pier platforms?

A. None whatever. They are not on platform.

Q. What is the distance between the pier platform and the floor of the auction room, approximately?

A. Oh, I imagine about 50 feet above it.

Q. What auction rooms does your company use?

A. Well, I do not remember the exact number of rooms, Mr. Loos. There are two auction companies operating in New York, as I remember it. To the best of my knowledge, on the Pennsylvania Railroad piers there are eight rooms. We have four and the other auction company has four or the use of four rooms. In other words, we each have four rooms. On the Erie I am not quite sure. I think we still have four and four apiece. He (indicating) said I was right, so I will say that is a definite answer, four and four.

Q. And you say there are two auction companies now operating on these piers?

A. In New York, yes.

Q. Does your auction company pay any rental for these auction rooms?

A. No, sir, we do not.

Q. Has the auction company at any time in the past paid [fol. 1308] rental?

A. Yes, sir, we did.

Q. What was the occasion for the change and the discontinuance of the rental?

A. Well, we paid rent as Connolly Auction Company for the auction rooms on the piers until 1922. At that time

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there were three auction companies in New York. In 1922, shortly after the first of the year, the event of the fourth auction company took place, and all the rooms were under lease, all the auction rooms on the pier were under lease to the previous three auction companies. The fourth auction company asked for space and there wasn't any additional space for them. The three auction companies then in existence refused to give up any of their space because they had it under lease from the railroad. So the railroads required the auction companies to give up their leases at their expiration and did not lease any of the space, did not lease any space to any auction company thereafter, the reason for it being to make room for any and all auction companies that were then in existence or might later come into existence.

In other words, the eight rooms, while there were three auction companies, they had the use of the eight rooms, or they were leased. At that time, I think there were six. There was later some other rooms added, room for the four auction companies was provided. At the present time, [fol. 1309] there is only two auction companies, so that the railroads allow us to use them the way the two auction companies can best get along.

Exam. Brown: I think there is enough evidence along that line now, Mr. Loos. All I am interested in is finding out whether they paid any rent, pertinent or not pertinent.

Mr. Loos: Well, as long as we are developing the situation, I should like to develop it all.

Exam. Brown: All right.

By Mr. Loos:

Q. Have you ever indicated, Mr. Nosser, the willingness of the auction company to pay rent for this auction space?

A. Yes. As a matter of fact, I have not only asked, but at times it sounded like a demand. I have been very anxious for many years now to rent the auction rooms from the railroad. The purpose in my wanting to rent them is to improve them and to wire them for sound and put the proper acoustics in, and one thing or another, to suit my own convenience in operation. But, the railroads have

given me the reason for their lack of desire for a lease that they want to remain in complete control over their premises, which I think is a perfectly good reason.

Q. Why haven't you made the improvements that you mentioned under present conditions?

A. Well, I do not know how long I would be able to use them, because the railroad might tell me that I might not [fol. 1310] use them after I put these improvements in. In other words, I am a day-to-day tenant.

Mr. Loos: Now, that is all I expect to ask, Mr. Examiner, on that subject. Now, I come to a point that I thought would have been developed in the record heretofore, but which has not been, with respect to New York, and I want to ask Mr. Nosser some questions about that, and my remarks about irrelevant and immaterial do not go to this point.

By Mr. Loos:

Q. Mr. Nosser, following the imposition of the unloading charge on November 1, 1948, I believe, what was done, if anything, in the way of making a charge to the auction buyers?

A. Well, as soon as the unloading charge became effective, I made a contract with our receivers or the users of our auction company, and I agreed to assume the expense of the unloading as assessed by the Railroad. I then explained to the trade that the auction commission was insufficient to allow me to assume that expense, and that it would be necessary for us as an auction company to pass on that unloading charge, and not only the unloading charge, but also the sorting charge as it is assessed by the railroad company. So that at the present time the auction company, both auction companies, assess to the buyer on a per package basis the cost of sorting and unloading.

Q. And what is that assessment called?

[fol. 1311] A. It is called a terminal charge.

Q. And how is that billed?

A. It is billed right on the auction bill as the charge at the end of the extensions, or the calculation for the amount of fruit each buyer bought is added, the amount of his fruit

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is added as one total, the number of boxes on his bill and the rate according to the weight of each package, and there is an added charge termed as a terminal charge—this additional amount appears—and then his bill is totalled as one bill.

Q. And for illustration, what is the rate of the terminal charge on a box of citrus fruit from California, for example?

A. California citrus, all citrus, grapefruit, lemons and oranges, is 10 cents per package.

Q. And that rate is sufficient to approximately equal the unloading charge and a sorting charge on that box, is that correct?

A. Well, I do not want to be technical with you, Mr. Loos. It is just short of sufficient. The auction company comes out with a little red ink on it, but on the per car basis, it is so small that it does not warrant charging another penny.

Mr. Loos: That is all.

Exam. Brown: Cross examine.

Mr. Miller: I have no questions.

Mr. Smith: I have just one question, Mr. Nosser. I [fol. 1312] would be obliged if you could answer it for me.

Cross examination.

By Mr. Smith:

Q. You referred to the eight auction rooms on the Erie Railroad piers.

A. Yes, sir.

Q. Could you tell us approximately, if you know, what the seating capacity of those rooms is?

A. Well, they vary. There is one room that is larger than the others. The others are approximately the same size. I would imagine the larger room, which we use for California citrus, will seat around 300, and the other rooms, my judgment is that they run anywheres from 150 to possibly 180 or 190, 200, maybe.

Mr. Smith: Thank you, sir; that is all I have.

The Witness: (Continuing) Something of that size.
Mr. Smith: That is all.
Exam. Brown: That is all, Mr. Nosser, thank you.

(Witness excused.)

Mr. Loos: That is all, Mr. Examiner. Mr. Examiner, may I say this: Mr. Nosser suggested that I ought to make this clear. I think it is perfectly clear on the record, that the testimony by Mr. Dougherty with respect to what happens at Philadelphia does not necessarily have any application to what happens in New York. I think the record is clear enough on the New York end.
[fol. 1313] Exam Brown: Let the record speak for itself in that respect. Does that conclude the protestants' case in chief?
Mr. Loos: So far as I know, that concludes protestants' case.
Exam. Brown: No other protestants wish to offer evidence at this time?

(No response.)

Exam. Brown: The respondents will proceed.
Mr. Smith: The respondents' first witness will be Mr. Hodkinson, whose exhibits are now being distributed.
Exam. Brown: Off the record.

(Discussion off the record.)

E. A. Hodkinson, having been previously sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Kindly state your name and business address.
A. E. A. Hodkinson, 1 Park Avenue, New York City.
Q. Are you the Mr. Hodkinson who testified at the previous hearing in this docket?
A. I am.

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Q. What is your present position in the railroad industry?

A. I am manager of the Commerce Bureau Truckline, the Commerce Bureau of the Eastern Railroads.

Q. Have you prepared or had prepared under your direct [fols. 1314-1316] supervision certain exhibits marked for identification 113 through 126, inclusive, which have been distributed?

A. I have.

Q. Kindly proceed to identify each of the exhibits that you just referred to and explain them to the extent that they do not speak for themselves.

Exam. Brown: Let the record show that these exhibits were numbered, distributed and identified off the record and have been marked for identification accordingly.

[fol. 1317] PROCEEDINGS OF SEPTEMBER 29, 1949

E. A. HODKINSON resumed the stand and testified further as follows:

Direct examination (continued).

By Mr. Smith:

Q. Mr. Hodkinson, will you kindly explain your exhibits 113 to 126, inclusive, to the extent that they are not self-explanatory?

A. This series of exhibits is designed to bring up to date the information shown on similar exhibits which I introduced on the prior hearing. Exhibit 113 makes a simple comparison of the percentage of the total United States carload shipments of fruits and vegetables terminated in the eastern district. We use 1946 to 1948 inclusive.

Exhibit No. 114 is confined to the four roads that were interested in these unloading charges in New York City and the three roads that were interested in them at Philadelphia. It shows for the period November 1, 1947, to August 31, 1948, and for the same period, November 1, 1948, to August 21, 1949, the total rail receipts at New York City

and at Philadelphia; the unloads by the rail carriers at their facilities; and the unloads by the consignees on team tracks and private sidings.

Q. Mr. Hodkinson, will you kindly refer to the second line of the heading of Exhibit 114 and state whether there [fol. 1318] is a typographical error, and, if so, what is it? The last figure in the second line.

A. The last figure in the second line should be 1949. The heading should read: "Statement showing railroad and consignee unloadings for period November 1, 1947, to August 31, 1948, and November 1, 1948, to August 31, 1949." That corresponds with the body of the exhibit.

Exhibit 115, consisting of 21 pages, brings up to date the prices shown in exhibit No. 14, which I introduced at the prior hearing.

Exam. Brown, With respect to exhibit 114, are those carloads?

The Witness: Yes, sir.

Exam. Brown: Does that include express shipments?

The Witness: Express shipments excluded.

Exam. Brown: Excluding?

The Witness: Yes, sir.

A. (Continuing) This Exhibit 115 illustrates, as did the prior exhibit No. 14, the price variations from day to day and from week to week.

Mr. Wells: May I ask one point? Are all of the prices therein auction prices, as you indicate in your heading, or are not some of them not auction prices?

The Witness: They are all auction prices, Mr. Wells, taken from the New York Daily Fruit Reporter or the Pro- [fol. 1319] ducers Price, current.

A. (Continuing) Exhibit No. 116 shows the auction prices at Philadelphia on vegetables for the period June 11 to 17, 1948. This is similar to Exhibit No. 15 which I introduced in the prior hearing.

117 is similar to 116, except as to the period. 117 covers the period June 10 to 16, 1949. This is similar to our old exhibit 15, and here again it shows the price variations from week to week and month to month.

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Exam. Brown: What does the figure "S" mean under the heading "Washington Apples, Dollars per Box"?

The Witness: One hundreds to two hundred sixteens. That is the sizes.

Exam. Brown: What does "S" mean?

The Witness: Size.

Exam. Brown: And "NS" means no sales?

The Witness: No sale.

Mr. Augello: Mr. Hodkinson, before you go any further, on the first page of Exhibit 115——

The Witness: I was up to 117, Mr. Augello.

Mr. Augello: I know, but I want to get this clear. Mr. Wells tried to get the answer, but I do not think he got it. You say "auction prices."

The Witness: Yes.

Mr. Augello: Is that true of all commodities shown on [fol. 1320] that page?

The Witness: Which page?

Mr. Augello: The first page of Exhibit 116.

The Witness: There are no prices on the first page of the exhibit, Mr. Augello.

Mr. Augello: Yes, but prices are shown in the other pages.

The Witness: Yes. These are all auction prices.

Mr. Augello: Do you want us to believe that all these prices shown on letters, for instance, are auction prices?

The Witness: Yes.

Mr. Augello: Don't you know that lettuce is not sold at auction or any other vegetables outside of tomatoes sold at auction? You have heard the testimony here of the witnesses, the vegetable witnesses.

The Witness: Perhaps you misunderstood the question. These prices that I have shown here are either the auction prices or the sales prices as taken from the sales publication.

Mr. Augello: In other words, auction or private sales.

The Witness: Yes.

Mr. Augello: That is different. Now, with that explanation, you can go ahead.

The Witness: But the point remains, the fact remains, that whether they are auction or private prices, there is a

wide fluctuation from day to day and week to week, and that is the purpose of the exhibit.

[fol. 1321] Mr. Augello: Well, just a minute, Mr. Hodkinson. I think that your first sheet should be amended to read: "Auction prices and private sale prices."

The Witness: I would be very glad to do it that way.

Mr. Augello: Will you do that and eliminate confusion?

The Witness: Yes, sir.

Exam. Brown: You used the words auction or private sales prices.

Mr. Augello: There is enough confusion in this case now, and we do not want to get any more. We do not want the Commission to get the idea that all these fruits and vegetables are sold at auction and then look at Exhibit No. 22 with all these fancy photographs that the railroads put in and give them the idea that everything is sold at auction.

Exam. Brown: Let us go off the record for the purpose of correcting these exhibits.

(Discussion off the record.)

A. (Continuing) I think I had commented on Exhibit 117. That covers the auction or private sales prices at Philadelphia on fruits and vegetables for the period June 10 to 16, 1949.

Exhibit 118 is similar to 116 and 117, but it covers the period August 10 to 16, 1949.

Exhibit 119 is similar to Exhibit No. 16 in the prior case and it shows the retail price range, New York City, fresh vegetables, for the second weekly release of each month, [fol. 1322] and here, for convenient reference, I have gone back and reproduced a lot of the figures shown in old Exhibit 16. The high and the low prices are indicated by a dash underneath the figure.

Page 2 of the exhibit, for illustration, under "beans, snap," the last block on the exhibit, the high price for 1949 was 35 cents. That was in January, January 19. The low price was 10 cents, which was reached in August. These exhibits show a wide fluctuation in retail prices just as the prior exhibit did.

Exhibit 120 is a partial reproduction of Exhibit 17 with the later figures as shown. The system followed in making

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up the exhibit is the same as that that I explained in connection with Exhibit 119.

Exhibit 122 is similar to old Exhibit 119, and this exhibit is designed to show the prices for the period shown, namely, March, 1939, up to January 17, 1939, and in the last column of the exhibit I have shown the percentage which the column reprises, that is, the March 15, 1949, prices are in the column 9 prices, that is the reason before the war, January 17, 1939. These percentage increases range from 63.4 percent in the case of lettuce to 210.3 percent in the case of sweet potatoes.

Mr. Miller: Mr. Hodkinson, I think a moment ago you referred to an old exhibit No. 119. Is that what you meant?

The Witness: No, it should be 19.

A. (Continuing) 123 is similar to the initial exhibit No. [fol. 1323] 20, which shows the rate of return for the carriers involved in this proceeding, for the New York—the four New York carriers and the three Philadelphia carriers.

Exhibit No. 124 brings up to date the figures shown in Exhibit 66. Exhibit No. 125 brings up to date the figures shown in Exhibit No. 21. I have shown in the last right hand corner block the figures for January to July, 1949, inclusive. There were no figures for the corresponding period in 1948 shown on Exhibit No. 125, so I have shown those figures for comparative purposes in Exhibit 126. The figures in Exhibit 126 should be contrasted with the figures shown on the block in the lower right hand corner of the exhibit, January to July, 1949.

By Mr. Smith:

Q. Does that complete your explanation of Exhibits 113 to 126, inclusive?

A. It does.

Q. Were these exhibits prepared by you or under your direction and supervision?

A. They were.

Q. To the best of your knowledge and belief, do they correctly and accurately show what they purport to show?

A. Yes, sir.

Mr. Smith: I offer them in evidence.

Exam. Brown: Any objection?

(No response.)

[fol. 1324] Exam. Brown: Exhibits Nos. 113 to 126, inclusive, are received in evidence.

(Respondent's Exhibits Nos. 113 through 126, inclusive, Witness Hodkinson, received in evidence.)

Exam. Brown: Any further questions of Mr. Hodkinson?

Mr. Smith: No, sir.

Exam. Brown: Cross examine.

Mr. LaRoe: Mr. Examiner, so far as I am concerned, there will be no cross examination, and I would like to state why. The exhibits dealing with prices we claim to have no relevancy whatsoever to the proceeding, and as to railroad earnings, we claim that they should be taken care of in general investigations and not in cases of this character. That being our position, it will not be consistent for us to cross examine the witness, as I see it, and I shall have no questions.

Exam. Brown: Any cross examination from other protestants?

Mr. Hoffman: Mr. Examiner, I should like to ask Mr. Hodkinson a question which pertains to clarification of an answer he gave on the occasion of the last hearing. It does not deal directly with these exhibits, but deals with another matter. I take it I am privileged to do that, am I?

Mr. Smith: We have no objection.

Exam. Brown: You go ahead and ask the question and I will rule upon it.

[fol. 1325] Cross examination.

By Mr. Hoffman:

Q. Mr. Hodkinson, at page 13 of the transcript of the prior hearing you testified as follows: "In this connection, I wish to introduce Exhibit No. 1. This exhibit reproduces Rule 27 of the Consolidated Freight Classification and it provides, as I have just stated, for the unloading by the consignee of all carload freight, and that is the rule generally

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with but very few exceptions. At various points where the carriers hold themselves out to perform either a loading or an unloading service, the carriers are published"—which I take it you meant "tariffs" but it says "carriers"—"are published, which carries a charge for the service. Specific charges are published at Baltimore, Pittsburgh and Chicago for the unloading of fresh fruits and vegetables."

Mr. Hodkinson, do you recollect so testifying?

A. Yes.

Q. Now, referring to Baltimore, Pittsburgh and Chicago, where you stated specific charges are published for the unloading of fresh fruits and vegetables, is the shipper or consignee at those places permitted to unload carload freight?

A. Most of the unloads at those points are performed by the consignees.

A. Well, I am not asking you at this moment the practice. I am asking you now whether shippers or consignees are permitted by the carriers to unload carload freight under the rule?

[fol. 1326] A. Yes, they are permitted to unload and, as a matter of fact, they do unload.

Q. Is it your statement, then, that this would apply also to carload fresh fruits and vegetables arriving at carload rates at the terminal auctions at the cities referred to by you, to wit, Baltimore, Pittsburgh and Chicago?

A. My understanding is that all cars of fruits and vegetables arriving at those markets, for whatever delivery, are unloaded by the consignee except when the consignee requests the railroad to unload, in which event we charge for that service.

Q. And the consignee or shipper is permitted to unload under the rule, if he so desires?

A. Oh, yes.

Mr. Hoffman: That is all.

By Mr. Van Arnum:

Q. Mr. Hodkinson, I want to ask you one question about Exhibits 119 and 120. The retail prices. The commodities

shown there are commodities arriving in New York by all classes of carriers, are they; that is, truck, railroad, teamtrack unloads and terminal unloads? Is that true?

A. Oh, yes. They apply to all the receipts at these retail markets.

Mr. Van Arnum: I agree, then, with Mr. LaRoe's observation. There is no point in any further questioning on these exhibits.

Exam. Brown: Any other cross examination?

[fol. 1327] Mr. Goldsmith: Mr. Brown, I would like to take the same stand as Mr. LaRoe, but I have just one or two questions of clarification of Exhibits 123 and 124. I should like to know whether the rate of return as figured out by Mr. Hodkinson for the Baltimore & Ohio Railroad includes the Staten Island Rapid Transit Railway.

The Witness: I am not sure.

Mr. Smith: Is your recollection at all refreshed, Mr. Hodkinson, by Exhibit 125?

The Witness: 125 and 126—the figures shown in that exhibit, the Staten Island figures, are incorporated in the Baltimore and Ohio. As to rate of return, I think it is logical to assume that the figures do include the Staten Island Rapid Transit's operation.

Mr. Goldsmith: Then, if the Staten Island Rapid Transit operation were included or were excluded, rather, from the Baltimore & Ohio rates, the rate of return would be different; is that true?

The Witness: I do not think it would, because taking the Staten Island's total operating revenues into consideration in the revenues, with relation to the large B&O system, it would be too small to have any appreciable influence on the rate of return. I do not think it would disturb the figure at all.

Mr. Goldsmith: Do you know what the net loss to the [fol. 1328] Staten Island Railway was during this period of time?

The Witness: No, I do not. I think 1949 it was somewhere in the neighborhood of $600,000.

Mr. Goldsmith: That is all I have.

Exam. Brown: Any further cross examination?

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(No response.)

Exam. Brown: Concerning the statements made by Mr. LaRoe and the concurrence therein of other counsel, I wish to call attention to the fact that similar data were included in exhibits at the prior hearing and to which no objection was made. I take it now that there is an indication, at least, on the part of the protestants that they have changed their position in that respect.

Mr. LaRoe: Well, I can only say as to that that it was not my privilege to be at the former hearing and that the only reason why I did not object to these prices and so on is that the similar evidence was received before and I assumed that your Honor would be consistent with the record previously made. You received the material over objection, and I could not criticize you too much, if you did, because it is already in the record.

But my position is very strong that this evidence has no bearing on the unloading charges, and that explains the reason why I did not cross examine.

Exam. Brown: You may argue that point in your brief if [fol. 1329] you consider it appropriate.

Mr. Goldsmith: Mr. Examiner, if I might, I will explain the City of New York's position, which is actually the same as Mr. LaRoe's, with the exception we were not a party at the prior hearing, therefore, we had no opportunity either to object or consent to anything going into the record. But, we certainly do expect to urge before the Commission that this was improper even at the earlier hearing.

Mr. Loos: Mr. Examiner, your Honor made reference to a question of whether or not counsel who appeared at the prior proceeding had changed their position. I have felt from the beginning of this case that this kind of evidence was without any value and had no bearing upon the real issues, in this case. I except from that one of the exhibits, Exhibit 114, which refers to the carload deliveries. We did not object to that evidence in the earlier proceeding because it was introduced at the very opening of the hearing, and at that time we did not have too clear an idea what the issues were and how the carriers were proceeding.

As I look back on it, I think I would not object to it

even in my own present position, and I do not object to the receipt of the evidence now.

However, I do think it has no bearing at all and is of no value at all in determining the real issues in this case.

Exam. Brown: You are talking about Exhibit 114?

[fol. 1330] Mr. Loos: No, I am talking about all of the exhibits except 114.

Exam. Brown: Except 114?

Mr. Loos: Yes, sir.

Mr. Wells: Mr. Examiner, I do not recall that there has been any change in the position taken by the parties represented by me since the inception of the proceeding. I do not see where a retail price or retail prices have any bearing whatever on the question involved here. There are so many other factors involved, it is just useless to try to develop those on cross examination.

But I do not think there has been any change in our position.

Exam. Brown: You made no statement with respect to the retail prices having no bearing in your brief, Mr. Wells, nor did you at the prior hearing. I am not ruling at all that these matters are pertinent. I am not ruling in any respect concerning that. The exhibits have been received and they will stand received. They will be considered, however, in connection with the remarks made by all counsel appearing.

Mr. Fitzgerald: Mr. Examiner, if I may make my position clear in a brief statement: my client was represented at the prior hearing but not by me, and for that reason I did not previously enter my objection. I would, however, like at this time to have my objection to the admission of [fol. 1331] Exhibits 113 and 115 to 126, inclusive, noted on the record on the ground that they are irrelevant and immaterial in this proceeding.

Exam. Brown: Aren't your objections coming rather late? I asked if there were any objections and there was no statement made as to that, and I received them. Mr. LaRoe's statement was not in the nature of an objection, but merely a statement after they were received that he did not consider them pertinent, therefore, he had not objected.

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Mr. Fitzgerald: Well, sir, I offer that motion and ask that it be noted on the record, if you will permit.

Exam. Brown: Your remarks are noted on the record. Let us get ahead now.

Any other cross examination?

(No response.)

Exam. Brown: Redirect?

Mr. Smith: No.

Exam. Brown: Mr. Miller?

Mr. Miller: I have one question, Mr. Examiner, if you please.

Redirect examination.

By Mr. Miller:

Q. In these cases at other points in official territory, Mr. Hodkinson, where the carriers unload or load carload freight, is it correct that that service is provided only at station houses of the carriers?

[fol. 1332] A. That is correct, yes.

Q. And at such station houses it is only the carriers who may perform the loading or unloading, is it not?

A. At station houses, the carriers can only unload it, but I do not think that you and I are in accord. Let me more clearly understand the question.

Q. You are perfectly correct.

Exam. Brown: It is not clear to me, so you may go ahead.

The Witness: It is not clear to me either.

Exam. Brown: Go ahead, Mr. Witness, and explain it.

The Witness: Well, I want to understand his question a little clearer.

Exam. Brown: All right.

By Mr. Miller:

Q. My question was whether or not these station houses at which the carriers performed the loading or unloading, the consignees are permitted to perform that operation?

A. At station houses the consignees would not be permitted. We cannot have them on our property, no.

Mr. Augello: Mr. Examiner, just to clear that point.

Recross examination.

By Mr. Augello:

Q. Does Rule 27 just cover the loading and unloading by the railroads at station houses or does it provide for the railroad loading or unloading at team track?

A. According to Rule 27, it provides, in connection with [fol. 1333] carload shipments, that it is the consignor's obligation to load and the consignee's obligation to unload.

Q. Carload shipments—period.

A. Carload shipments, yes.

Q. Period, is that right?

A. That is correct.

By Mr. Hoffman:

Q. Mr. Hodkinson, I am not familiar with the term "station houses." Would you define that for me, please?

A. Well, I understood Mr. Miller to refer to freight stations, where the freight is loaded from the freight platforms to cars.

Q. Loaded?

A. Or unloaded from cars to freight platforms.

By Mr. LaRoe:

Q. Well, does it follow from your answer that where there are similar platform situations at Baltimore, Pittsburgh and Chicago, that the consignees are denied by the tariffs the right to unload, and, if so, where does that appear in the tariff?

Mr. Miller: Objection, Mr. Examiner.

Exam. Brown: Overruled.

A. The situation, I think, will come particularly into play with forwarded traffic.

By Mr. LaRoe:

Q. Forwarded traffic?

A. Yes.

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Q. We are not dealing with forwarded traffic here.

A. You are dealing with the broad general questions, as I [1334] understand it, wherever we had a charge and it provided in the tariff for the loading of carload, for the unloading of carload freight.

Q. Well, let us stick to our knitting and deal only with fruits and vegetables unloaded at platforms at Baltimore, Pittsburgh and Chicago. Is it or is it not a fact that under the tariffs the consignees are permitted to unload?

A. That is the fact; they are permitted to unload at Baltimore, Philadelphia and Chicago.

Q. And at the railroads' platforms, isn't that right?

A. Well, I do not think it would be your railroad platforms. I am not sure as to the exact physical layout.

Q. Well, then, how can you answer regarding station houses? Is this a station house or isn't it?

A. Well, you are dealing with a specific situation in one case and a general situation as touched upon by Mr. Miller.

Q. Then the answer to the question is you do not know whether at Baltimore, Pittsburgh and Chicago these delivery facilities would fall under the designation "station houses" or not?

A. I do know that the Baltimore, Philadelphia and Chicago—by far, the preponderance of the fruits and vegetables arriving there are unloaded by the consignees, but it is only in specific instances where they request the carriers to perform the unloading that we come into the picture, in which event we have a charge published in the tariff for [fol. 1335] the service we perform.

Q. And don't you know, also, that they are unloaded at railroad facilities?

A. Well, I assume they are unloaded at railroad facilities.

Mr. LaRoe: All right, that is all.

By Exam. Brown:

Q. Are you drawing any distinction in your testimony with respect to team tracks and station houses, station platforms?

A. Well, team-track fruits and vegetables, I suppose, would be covered by the unloading tariff of fruits and

vegetables, just as any other facility would be covered.

Q. I do not know. I am asking you. You say you suppose, and that isn't very good evidence.

A. Well, I haven't testified at any time as to any familiarity with the physiscal layout at any one of these stations. I do know that as a practical proposition that we could not allow people to come into our freight house and interfere with our own employees when it comes to the loading or unloading of carload freight. Mr. Miller's question, as I understood it, dealt with the railroad stations.

Q. You do not know definitely, then, when shippers unload, whether they unload at station houses?

A. I would say definitely that when consignees unload, they do not unload at station houses.

Q. Well, do you know?

[fol. 1336] A. Well, yes. I do not know of any instance where the consignee would unload at the station house, and I have been around station houses all of my life practically.

Q. A moment ago you said that the carriers would not allow the shippers to come into the station house to unload. At least, that was the thought I gained from the statement.

A. That is the answer I just gave you, that I cannot conceive of any situation under which a consignee unloads in the station house.

Q. In other words, he would unload at a team track, according to your testimony?

A. He would unload at team track or his own private siding.

Q. He would be permitted to do that in any event?

A. Exactly.

Q. Where does this charge come in, then?

A. The charge comes in when we supply labor at the team track. If the consignee does not want to supply labor at the team track, it would apply at the team track.

Q. In other words, it is your testimony that the carrier could supply labor and unload the car on a team track and make the tariff charge for it?

A. Yes, it is provided. We have two charges in our general exceptions tariff, with two types of service. One is a partial service and one is a complete service. That was all gone into in the I&S case that we had recently where we

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[fol. 1337] were seeking to get these loading and unloading charges increased, and they came into play particularly in connection with forwarded coverage. You do not have the forwarding companies unload freight on the station platforms. We make a charge for that.

Exam. Brown: What I&S case are you talking about? As long as you refer to it, give us the citation.

Mr. Miller: Charges for loading and unloading carload freight. I understood you to say 5466.

The Witness: Yes, 5466 I think it is.

Exam. Brown: That is enough.

By Mr. Augello:

Q. Mr. Hodkinson, have you ever been in the Baltimore produce terminal?

A. I cannot recall that I have, no.

Q. How about the Pittsburgh produce terminal on the Pennsylvania Railroad?

A. I have been there, yes, but I have only got a very hazy recollection of the physical layout there.

Q. Do you recall seeing that the Pittsburgh produce terminal is a terminal that has a house and a platform extending about a thousand or fifteen hundred feet?

A. My hazy recollection is that the cars are switched into this terminal and that you can unload from the terminal to some platform, but they are set wholly apart for this fruit and vegetable traffic. That is my recollection. I am [fol. 1338] not giving it to you as the exact physical outlay.

Q. It is a covered freight house, isn't it?

Mr. Smith: Mr. Examiner, may I make an observation, that Mr. Hodkinson said while he has been in Pittsburgh, his memory is somewhat hazy. Later on in this case there will be on the stand a witness from the Pennsylvania Railroad who really knows what the physical situation is in Pittsburgh. I might suggest that such questions be reserved for him rather than directed to Mr. Hodkinson, whose recollection is hazy.

Mr. Augello: All right.

By Mr. Fitzgerald:

Q. Mr. Hodkinson, you are aware, are you not, that the Pennsylvania Railroad has a facility in Baltimore called the Pennsylvania Produce Terminal?

A. It is the produce terminal of Pennsylvania in Philadelphia, but whether it is Philadelphia, Pennsylvania, and B&O or wholly Pennsylvania, I do not know.

Mr. Fitzgerald: I do not believe the witness understood my question. Can it be reread to him?

Exam. Brown: I think it would be better for you to restate the question. It takes time to go back and read this over.

By Mr. Fitzgerald:

Q. You are aware, are you not, Mr. Hodkinson, that the Pennsylvania Railroad has a facility in Baltimore called the Pennsylvania Produce Terminal?

A. No, I am not. I know that there is a produce terminal at Baltimore, but I do not know whether it is jointly oper-[fol. 1339] ated for the benefit of the B&O and the Pennsylvania or whether it is purely Pennsylvania. I do not know anything about it.

Q. It is a fact, though, isn't it——

Mr. Donadio: Just a moment, Mr. Examiner; I should like to interpose an objection to asking questions about the physical situation of the Pennsylvania Railroad, Baltimore, or any other place, of this witness, in view of Mr. Smith's statement that there will be a witness of the Pennsylvania Railroad who will be well-informed and can give him all the answers he wants along that line.

Mr. Fitzgerald: May I say, Mr. Examiner, that this line was opened up by Mr. Miller's question which the witness purported to give very precise answers to.

Mr. Donadio: It was opened up to a very limited extent, I think, and not to the broad extent to which counsel are indulging.

Mr. Miller: Well, now, Mr. Fitzgerald, it is perfectly obvious that this witness is not well-informed and it would seem to me just in the light of keeping a clear record, that

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you should hold your question until you have a witness before you who does know. Isn't that a reasonable proposition?

Mr. LaRoe: We are willing to do that, but we submit that you should not have asked him if he is ill-informed.

Mr. Miller: I asked him as to the general proposition throughout official territory. He is informed as to that.

[fol. 1340] Exam. Brown: I would make the statement at this time that the cross examination is proper, but probably futile.

Mr. LaRoe: We agree with you.

Mr. Hoffman: I should like to ask——

Exam. Brown: And when I say futile, I am referring to the lack of knowledge on the witness's part with respect to the physical layout of these particular stations. I think it would be well for you to reserve your questions along this line. Mr. Hodkinson will be available throughout the hearing and if you are not satisfied with the answers you get from the other witness, we will recall Mr. Hodkinson. You will be here, will you not, sir?

The Witness: I will be here.

Mr. Fitzgerald: In view of the Examiner's remarks, I will hold further questions at this time.

Mr. Hoffman: I should like to ask Mr. Hodkinson a question on a subject which I think he is familiar with, and that is not the operating practice, but the actual rule in the tariff itself.

Mr. Donadio: Is this cross examination of this witness on the testimony that he has given at this hearing? If not, I am going to object ot it, unless you want to call him as your own witness. You opened up the other situation, and look what it got us into.

Mr. Augello: You opened up the other situation.

[fol. 1341] Mr. Donadio: No, you opened it up by cross examining on matters which are not testified to on direct by this witness.

Exam. Brown: You ask your question.

Mr. Donadio: I made an objection.

Exam. Brown: I do not know how to rule because I have not heard the question. I must hear the question before I can rule. Go ahead and ask the question.

Mr. Donadio: You have got a pretty good idea. He told you what he is going to ask him.

Exam. Brown: I cannot imagine what he is going to say. It is beyond my scope. You go ahead and ask your question.

By Mr. Hoffman:

Q. Mr. Hodkinson, with respect to carload fresh fruit and vegetables moving into auction terminals at carload rates at Baltimore, Pittsburgh and Chicago, is the shipper or consignee under the rule or tariff permitted to unload the cars?

A. Yes.

Mr. Donadio: Just a moment. I object to the question insofar as cross examination of this witness is concerned. It deals with nothing that was testified to on direct.

Exam. Brown: I am constrained to overrule the objection because Mr. Miller raised those points in his questions. I cannot exclude any evidence in the way of questions or, rather, I cannot exclude questions along the lines which Mr. Miller asked, so you may answer.

[fol. 1342] Mr. Donadio: Well, now, the questions that opened up the proposition were improper cross examination, and just because they were improper and not objected to, that does not make these subsequent questions proper.

Mr. Goldsmith: Mr. Examiner, if I might be heard on this question, as I understand it, a lot of the testimony that has gone in this hearing at the present time is going in because it was previously admitted in one form or another at the previous hearings. As I understood, an earlier question of Mr. Hoffman's was with relation to some tariff schedule or rule that Mr. Hodkinson had submitted or offered in evidence at the previous hearing, and if he has offered in evidence at the previous hearing that matter, I submit that the question is perfectly proper on any rule or tariff.

Exam. Brown: Just a minute.

Mr. Donadio: You know that that is not good law.

Exam. Brown: I wish it understood that I made my ruling on this. I am permitting you to make your statements, but I do not expect them to be extended. Now, for

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the purpose of the record, I am going back to this situation to show you that my ruling is correct.

Mr. Hoffman asked if he might ask the question along the lines of testimony introduced by Mr. Hodkinson, or given by Mr. Hodkinson at the prior hearing. Mr. Smith made the statement, we have no objection, Mr. Examiner.

[fol. 1343] Mr. Smith: That is correct.

Exam. Brown: Therefore, that evidence went in. Mr. Miller, on redirect examination, asked questions along the lines of the questions that Mr. Hoffman is asking now. I have ruled that Mr. Hoffman may ask the question, and I rule that the witness may answer. I do not expect any more controversy about this particular evidence.

Now, Mr. Hodkinson, will you answer?

The Witness: Well, the question is on the record and the answer is on the record.

By Mr. Hoffman:

Q. And what is the answer?

A. The answer is yes. There is nothing under the tariff that prohibits the consignees from unloading at Chicago or Pittsburgh or Baltimore.

Mr. Matson: Mr. Examiner, I move that the question asked by Mr. Miller with respect to station houses and the answer by the witness be stricken from the record inasmuch as the witness is incapable of making a proper answer on that subject.

Exam. Brown: The question and answer will stand in the record and be considered in connection with your statement that you just made.

Mr. Matson: Thank you.

Mr. Miller: Mr. Examiner, I was out of the room at the time Mr. Hodkinson finished his testimony, and therefore I [fol. 1344] missed making the request at that time. I would like Mr. Hodkinson to furnish, within such time as the Examiner decides, the breakdown monthly figures which are totalled on Exhibit No. 114.

Exam. Brown: Now, what form will that breakdown take?

Mr. Miller: It will give a figure for each month for each of the items on the exhibit.

Mr. Wells: Well, Mr. Examiner, if the additional breakdown is to be furnished, will it be possible in the time that he is breaking it down to give us some additional information regarding that as between the piers, Jersey——

Mr. Augello: And commodities.

Mr. Wells: As was done at the former hearing?

Mr. Miller: I do not think we have figures available. I am sure we do not have figures as to commodities. We do have figures as between team tracks, Manhattan, and team tracks, Jersey City, piers and the private siding figures—we could produce those.

Mr. Wells: While he is breaking it down, I request it be broken down in addition to those.

Mr. Augello: Mr. Miller, may I ask that the figures be broken down as to fruits and vegetables?

The Witness: Vegetables, we cannot do it.

Mr. Augello: Fruits, citrus and deciduous in one column, and vegetables in the other, regardless of the commodities [fol. 1345] of vegetables?

The Witness: We cannot do it.

Mr. Miller: Mr. Augello, we do not have those figures, and to get them would involve an enormous quantity of work. We would have to go through all the bills to get them.

Mr. Augello: I am informed that the Pennsylvania Railroad has those figures.

Mr. Miller: I did not ask Mr. Hodkinson to bring us any figures for the Pennsylvania. I asked him to break down the total figures. I do not want him to furnish any individual figures for any individual line.

Mr. Augello: Well, I think that the Commission would be interested to know just how many cars of vegetables, as distinguished from the total number of cars of fruit, are unloaded by the four railroads at the New York piers. They are not interested in what was unloaded at the Bronx terminal freight house that you have included in your Exhibit No. 114.

Mr. Miller: Mr. Examiner, in reply to Mr. Augello's statement, I can say that I would like very definitely to have those figures, and if I could get them at a reasonable

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expenditure of money, I would have them but I cannot.

Exam. Brown: Well, as I understand it, you wish Exhibit 114 supplemented so that each of the items in there be broken down as to month?

Mr. Miller: That is right.

[fol. 1346] Exam. Brown: Now, how about the request Mr. Wells made? Can you comply with that?

Mr. Miller: I can comply with that.

Exam. Brown: What exactly is that?

Mr. Miller: That is to break down the——

The Witness: Team-track delivery as between Jersey City and New York.

Mr. Miller: (Continuing) Team-track deliveries and private siding deliveries as between team tracks Jersey City, team tracks Manhattan, and private sidings.

Exam. Brown: Can you do that, Mr. Hodkinson?

The Witness: Yes.

Exam. Brown: You will be allowed 10 days in which to do this; that is, 10 days after the close of the hearing.

The Witness: All right.

Exam. Brown: Any further questions of this witness?

(No response.)

Exam. Brown: You are excused, Mr. Hodkinson.

(Witness excused.)

Mr. Smith: I call Mr. Root.

Exam. Brown: Mr. Root was a witness at the previous hearing, and you may proceed with the direct examination of Mr. Root. Go ahead, Mr. Smith.

Mr. Smith: Mr. Root's testimony is being distributed.

[fol. 1347] E. S. Root, having been previously sworn, testified as follows:

Direct examination.

By Mr. Smith:

Q. Kindly state your full name and business address.

A. Eugene S. Root, Midland Building, Cleveland, Ohio.

Q. Were you a witness in the previous hearing in this docket held at New York City, July 29, 1947?

A. I was.

Q. What is your occupation?

A. Chief of Research, Erie Railroad Company.

Q. Is that the same as it was when you gave your previous testimony?

A. Yes, sir.

Q. And at that time you introduced Exhibit No. 23 consisting of three sheets, summarizing a study made by you of the cost of unloading fruits and vegetables at the Erie's Duane Street piers. Have there been any changes since that study in the operation or in the costs thereof which would substantially affect the results shown on that Exhibit No. 23?

A. I made an investigation and found that there has not been any substantial change in the operation as described by Mr. Hart, our Agent at Duane Street, in his testimony at the hearing in July, 1947. However, there have been certain changes in compensation paid employees of the [fol. 1348] Seaboard Terminal and Refrigeration Company which affect the costs as shown by Exhibit No. 23. On September 1, 1947, the wages of employees of the Seaboard Terminal and Refrigeration Company involved in the unloading operation were increased 15-½ cents per hour.

On November 29, 1948, their wages were again increased 10 cents per hour, making a total increase of 25-½ cents per hour above the wage levels in effect at the time of our original study. In addition, there was a change in vacation allowance. At the time of our original study, employees with one year's service who had worked for 165 days within the year preceding April 15th were allowed one week's vacation with pay. At the present time employees with five years or more service are allowed an additional week's vacation with pay.

Q. Have you prepared an exhibit consisting of three sheets to show the effect of changes in compensation paid on the costs per ton for unloading fruits and vegetables as shown in your Exhibit No. 23?

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A. I have prepared an exhibit consisting of three pages to show current costs of unloading headed "Erie Railroad Company—Cost of Unloading Fruits and Vegetables, Duane St., Piers, New York City."

Mr. Smith: Mr. Examiner, may such exhibit be marked No. 127 for identification?

Exam. Brown: Yes.

[fol. 1349] (Respondent's Exhibit No. 127, Witness Root, marked for identification.)

Q. Will you please describe Exhibit No. 127?

A. Sheet 1 of Exhibit No. 127 is the same as Sheet 1 of my original Exhibit No. 23 in these proceedings and shows separately for citrus fruit, fresh fruits (other than citrus), fresh or green vegetables—top-iced, fresh or green vegetables—not top-iced, and cantaloupes and melons, the number of cars unloaded, and unloading gang minutes required for the test period covered by my original study. On Sheet 2 of Exhibit No. 127 I have shown in column 2 the contractor's cost for the test period as shown on Sheet 2 of my original Exhibit No. 23. Column 3 shows the per cent increase of current wage rates over the rates in effect during the test weeks, and in Column 4, the test weeks' costs have been restated to current levels. The revised percentage used for computing insurance and taxes on line 11 is based on the year 1948.

Revised cost per unloading gang minute of 26.80 cents compared with 21.55 cents during the test weeks is shown in line 15. In restating these costs, I have not given effect to the increased vacation allowance as the complete costs are not yet available for a representative year to make an accurate computation. The restated cost per unloading gang minute is, therefore, understated to this extent.

On Sheet 3 of my Exhibit No. 127 there is shown in [fol. 1350] Column 2 the gang minutes per ton for the various commodity groups as shown on Sheet 1 of this exhibit. I have applied to the gang minutes per ton the cost of 26.8 cents per minute as computed on Sheet 2 of this Exhibit to determine the total unloading cost per ton in

Column 3. As stated in my testimony at the first hearing, the unloading gang minutes per ton include the time of assorting fruits and vegetables. Under present tariff provisions, including the final increase in Ex Parte 168, the consignee is charged $4.48 per car on cantaloupes and melons, and $4.63 per car for all other fruits and vegetables for assorting. This tariff carload rate has been divided by the average number of tons per car in the test weeks for each commodity group and the averages per ton shown in Column 4. These amounts have been deducted from the total unloading cost per ton shown in Column 3 to determine a net cost per ton for each commodity group in Column 5.

Q. Mr. Root, at the first hearing you testified that not all fruits and vegetables were asserted; however, that the method of computation that you used in your Exhibit No. 23 assumed that each car was assorted, and as a result the net costs per ton were understated. Are these statements true with respect to your present Exhibit No. 127?

A. They are true. I would like to emphasize that most cars of vegetables are not assorted, and for this reason the total cost per ton shown in Column 3 for fresh or green [fol. 1351] vegetables—top-iced, and for fresh or green vegetables—not top-iced, more nearly represents the actual cost of unloading than the net cost shown in Column 5.

Q. What are the net costs per ton for unloading in each of the selected commodity groups as shown in Exhibit No. 127?

A. The average net cost per ton for citrus fruits is $1.4917; for other fresh fruits, $2.1092; for fresh or green vegetables—top-iced, $2.5055; for fresh or green vegetables—not top-iced, $1.4645; for cantaloupes and melons, $2.2165.

Q. In your testimony with respect to your original Exhibit No. 23, you mentioned certain items of expense that you had not included in the unloading cost. Have any of these omitted items of expense been included in your present exhibit?

A. They have not.

Q. Earlier in your testimony you stated that you made

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an investigation and found there had not been any substantial change in the operation as was described by Mr. Hart at the previous hearing in this docket. Did your investigation disclose any changes which, in your opinion, might affect the costs as shown by your present Exhibit No. 127?

A. My investigation developed that there has been a change in the method of display of part of the citrus fruit handled for the account of the California Fruit Growers Exchange. This change in method of display applied only to space on the north side of Pier 21 (except for isolated [fol. 1352] instances), which has a capacity of 50 to 55 carloads. The purpose of this change was to increase the efficiency of the operation. It was estimated we saved approximately 15 gang minutes per car displayed by the new method. There also has been a change in the average load per car, particularly for oranges. At the time of our previous study the normal load was 561 boxes, or 47,685 pounds per car. With the cancellation of O. D. T. orders 462 boxes are now loaded per car, or 39,270 pounds. This means that to handle an equivalent amount of tonnage it is necessary to handle 21.4 percent more cars, tending to decrease the efficiency of the unloading operation.

The exact effect of these two changes could not be determined except by a detailed study covering representative periods throughout the year. Furthermore, it is uncertain whether the new method of display will be continued indefinitely because it always has been our policy to adapt the display system to the wishes of the trade so far as reasonably possible. Accordingly, we did not feel justified in undertaking an extensive study to determine exactly the effect of these two relatively minor changes currently in effect. However, my best estimate is that the combined effect of these two minor changes would not reduce the costs of citrus as a whole by more than ten cents per ton.

Q. Mr. Root, have you any information as to the number of carloads of fruits and vegetables unloaded on piers 19, [fol. 1353] 20 and 21 during the year 1949?

A. I have such information for the first eight months of 1949 and for comparative purposes have similar informa-

tion for the first eight months of 1948. The unloads for these periods were as follows:

	First Eight Months	
	1948	*1949*
Citrus fruit	5,342	5,131
Fresh fruits (other than citrus)	6,476	6,731
Fresh or green vegetables (top-iced)	1,742	148
Fresh or green vegetables (not top-iced)	581	92
Cantaloupes or Melons	1,878	2,024
	16,019	14,126

Q. I call your attention to the small number of cars of fresh vegetables—not top-iced, and fresh vegetables—top-iced, in the first eight months of 1949 as compared with 1948, and ask if you know the reason for the substantial reduction.

A. I have investigated the cause for this reduction in cars and find that such traffic was diverted to team track delivery and is now being handled on Manhattan team-tracks of the New York Central and Baltimore and Ohio Railroads. Earlier in the year this traffic also was affected by the heavy freeze in the west and southwest.

Q. Mr. Root, since your testimony was prepared and since [fol. 1354] your exhibit No. 127 was prepared, have you learned of an additional wage increase which you did not know about at the time you prepared Exhibit No. 127?

A. The union representing the labor of the Seaboard Terminal and Refrigeration Company has recently asked for an increase in wages due to the 40-hour week which affected railroad employees, but did not affect their organization—they were already on a 40-hour week. But, due to the increase in the hourly rate for railroad employees, they have asked for additional compensation. The Seaboard Terminal and Refrigeration Company have offered them—and it is my understanding that they have accepted —20 cents per hour increase, but this has not been finally agreed to as there are other considerations involved. But the minimum will be 20 cents per hour increase.

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Q. And do you know to what date that 20 cent increase will be made retroactive?

A. That is to be retroactive to September 1, 1949.

Exam. Brown: Is there an agreement to that effect?

The Witness: No agreement has been signed.

Exam. Brown: You mean they have asked for the retroactive effect of it?

The Witness: To September 1, 1949, yes, sir.

By Mr. Smith:

Q. Well, what was the offer that Seaboard made, Mr. Root? Will you state that?

[fol. 1355] A. The Seaboard offered the union an increase of 20 cents per hour effective September 1, 1949.

Q. This 20 cent increase is in no way reflected in your Exhibit No. 127?

A. It is not.

Q. What would the effect be upon the unloading cost of the 20 cent increase?

A. It would increase the cost in column 3 of my Exhibit No. 127, shown on sheet 3, by approximately 16 percent.

Q. Was Exhibit No. 127 prepared by you?

A. It was.

Q. To the best of your knowledge, does exhibit No. 127 correctly and accurately show what it purports to show?

A. It does.

Mr. Smith: I offer the exhibit in evidence.

Exam. Brown: Any objection?

Mr. LaRoe: I should like to have the record show, Mr. Examiner, that we make the same objection to this sort of testimony that we did to the other on the ground that all of this is cost and must, as a matter of law, be included in the line-haul rates. For that reason I shall have no cross examination on the cost figures. I realize that this evidence was admitted over objection before, but I must adhere to my objection since this is a rehearing.

Mr. Fitzgerald: May my objection be noted on the record [fol. 1356] for the same grounds.

Exam. Brown: Any other objections?

Mr. Goldsmith: My objection is on the same grounds.

Exam. Brown: Do I understand that Mr. LaRoe's statement was not an objection?

Mr. LaRoe: Yes, my statement is an objection.

Exam. Brown: It is an objection to this evidence?

Mr. LaRoe: Yes.

Exam. Brown: All right.

Mr. Wells: I should like to also object on the additional ground that it is not in rebuttal of any evidence presented at this hearing by the protestants, bearing in mind that at the beginning of the hearing that matter was called to the attention of the counsel for respondents as a matter of order of proof and what evidence would be admissible in the course of this proceeding.

Mr. LaRoe: Before you rule on the objection, may I ask the witness a question for clarification?

Is there any cost included in your study that goes beyond what we have talked about here as simple delivery from the car on the carfloat to the floor of the pier? You have been as careful as you can be, have you, to weed out anything except that simple delivery cost?

Mr. Smith: Well, I do not want to have the witness misled by the words. At the previous hearing he described [fol. 1357] exactly and in detail what costs he put in and what costs he kept out. I do not think he can add anything to that. The rest is argument, isn't it, Mr. LaRoe?

Mr. LaRoe: Well, can you state for my organization—I do not ask you to do it, of course, if you cannot—whether you have included anything in here except the cost of transferring the freight from the car to the floor of the pier.

The Witness: Well, I have described completely in my previous testimony exactly what I included. Now, technically, the operation of unloading from the car to the pier is performed by the Seaboard Terminal and Refrigeration Company. These costs include all costs in connection with that, which, as I have previously testified to, for example, include some proportion of sweeping, cleaning it; it includes some proportion of office expenses; but all expenses in connection and allocated against the unloading gangs' time per minute of unloading fruits and vegetables on to the pier.

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Mr. LaRoe: Well, you haven't apportioned anything to the cost of this service which was not in your judgment properly to be allocated against that simple transfer from the freight car on the float to the floor of the pier; isn't that right?

The Witness: Of the unloading of the car.

Mr. LaRoe: Well, now, Mr. Examiner, just to make my position clear—and I shall argue this in my brief and I will not argue it here—but to make my position clear, that [fol. 1358] simple unloading service has been for half a century included in the rates and it makes no difference from the standpoint of this hearing, as we see here, whether that cost is one cent or one dollar or ten dollars, and therefore I shall not cross examine on the accuracy of the cost study.

Mr. Matson: Mr. Root, did I understand you to say in answer to Mr. LaRoe's question that your exhibit does not include the cost of sorting and stacking, which is another service? Did you put that in, and then attempt to take it out?

The Witness: That is right. Oh, yes, I think the record shows that very clearly.

Mr. Matson: At the original hearing, you referred to a controversy which you were in with the Railroad Retirement Board, as to whether these employees are subject to the Railroad Retirement Act. Can you bring us down to date on that fact, whether they have been decided to be covered by that or not?

The Witness: My understanding is that it has been decided that the particular employees involved in this unloading operation are not subject to the Railroad Retirement Act.

Mr. Matson: They are not subject to the Railroad Retirement Act?

The Witness: They are not subject to it.

Mr. Matson: At the time of the original hearing, a suggestion was made that if they were subject to the Railroad [fol. 1359] Retirement Act, the costs would be higher than if they were not.

The Witness: That is right.

Exam. Brown: As I understand Mr. LaRoe's position,

it is the charges for unloading will not be separate, but should be or are included in the line-haul rate. Is that right, Mr. LaRoe?

Mr. LaRoe: Well, I do not want to be technical. I suppose the railroads would have the legal right through the years to show a segretation of terminal charges from line-haul charges, but they have not done it. They have published a line-haul rate which for half a century included this delivery. Now, our position is that the delivery service must be made under a line-haul rate; that the railroad has not satisfied its common carrier obligation with respect to the delivery until the freight has been made reasonably accessible to the consignee.

The record shows overwhelmingly — we shall argue in our brief—that the freight is not found to be accessible to the consignee on the carfloat; in fact, that the consignee is denied access to the carfloat, and therefore, any service of getting that freight out of the car and on to the pier is a part of the common carrier obligation under the line-haul rate. It makes no difference to us whether that cost is 5 cents or 25 cents or 25 dollars. It is in the line-haul rate and has already been paid for. That explains why I shall not cross examine on the accuracy of this exhibit and why [fol. 1360] I object to the exhibit.

Exam. Brown: The only question for me to rule upon at the present time is whether or not this evidence is pertinent in this proceeding.

Mr. LaRoe: That is right.

Exam. Brown: If the same type of evidence were introduced in connection with the showing by the carriers and the possible admission on their part that the line-haul rate is involved here, then would the evidence as to terminal costs not be pertinent, Mr. LaRoe?

Mr. LaRoe: If the proceeding were one involving an attempt on the part of the carriers to show the reasonableness of the line-haul rates and what should be charged for that service and what would be reasonable for the terminal service, the whole terminal service, that would be an issue that we do not have here at all. To make my position still clearer, if they should come in here now and show what their terminal expenses are in Florida and ask that that

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be included, added to the line-haul rates, I feel sure that the Examiner would rule it out because it has always been included in the line-haul rates.

In other cases, they have claimed that those terminal operations in Florida are extensive, but they are in the line-haul rates.

Now, here in New York they are proposing to collect again [fol. 1361] for a service which for half a century has been in the line-haul rates. I do not think the Commission should have permitted it and I am hoping that this Examiner will overrule the majority of the Commission, even though that may seem to be quite a task, and we think that here the ruling should be that this evidence is improper, immaterial, and incompetent because the line-haul rates have always included this service.

Mr. Smith: Mr. Examiner, I do not want to make an argument, but on the question of the admissibility of the exhibit, the Commission's decision in this case referred to the cost studies which were put in at the prior hearing, and devoted quite a bit of discussion to it, as a matter of fact, and there seemed no doubt in my mind that the Commission would want to have the up-to-date information on the costs.

Exam. Brown: I am going to admit these exhibits or this exhibit, rather, and all other exhibits of this type to be offered, and I wish my ruling to be understood as applying to other similar evidence to be offered, so we won't have to go over the same ground. As I say, I am going to permit the receipt in evidence of this exhibit, and I want to call attention in that connection to the fact that a similar exhibit and similar exhibits were introduced at the prior hearing, and whether or not Mr. LaRoe is correct, I think for the information of the Commission that I would receive this in any event.

[fol. 1362] Now, with respect to the statement made by Mr. Wells as to the fact that this has not been followed, I am going to make a ruling now that will cover the rest of the respondents' evidence. Strictly speaking, it may not be rebuttal of everything that the protestants have offered. However, it might well be considered rebuttal of some of the evidence. You will recall that there were some rather general statements made by protestants' witnesses, that

these charges resulted in discrimination, prejudice, unreasonableness, and there were various other appellations in that connection.

Now, these exhibits could be taken to rebut those statements. However, aside from that fact, I think this is largely procedural. It really does not make any difference when we get these in, so long as no party is seriously prejudiced by this. In other words, I do not think any court would say it would be prejudicial error for me at this time to permit the respondents to go ahead as they evidently intend to.

I am going to receive this in evidence, and do receive in evidence Exhibit No. 127; that Exhibit and the testimony in connection with it will be considered in connection with the statements and objections made by counsel.

(Respondent's Exhibit No. 127, Witness Root, received in evidence.)

Exam. Brown: I wish it to be understood that similar rulings will be made in connection with other similar evi- [fol. 1363] dence which I understand is to be offered by respondents and to save argument, I will have it understood, also, that similar objections will be made by protestants to the same type of evidence, and the same ruling will apply.

Mr. LaRoe: And it will be understood, then, that it will not be necessary to object to each such item of evidence as introduced by respondents and that we get an automatic exception by reason of the objection we have already made?

Exam. Brown: That is right, Mr. LaRoe.

We will have a short recess.

(A short recess was taken.)

Exam Brown: Let the record show that the direct examination of Witness Root has been completed and by agreement of the parties, cross examination of Mr. Root will be deferred.

(Witness excused.)

WALLACE C. JARVIS having been previously sworn, testified as follows:

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By Mr. Brown:

Q. State your full name and address, please.
A. Wallace C. Jarvis, 466 Lexington Avenue, New York.
Q. By whom are you employed?
A. New York Central Railroad.
Q. And in what capacity?
A. Accountant.
Q. And how long have you been so employed?
A. 19 years.
[fol. 1364] Q. Mr. Jarvis, did you make a study in connection with the unloading of fruits and vegetables at pier 17 and at Bronx Terminal Market?
A. I did.
Q. And did you also reduce that study to exhibit form?
A. I did.
Q. And do you have that exhibit before you at the present time?
A. I have.

Mr. Brown: I offer that exhibit for identification.
Exam. Brown: Exhibit No. 128 is received in evidence, subject to the remarks I made with respect to objections to Exhibit 127, and they will apply equally to 128, and the ruling will be the same.
(Respondent's Exhibit No. 128, Witness Jarvis, received in evidence.)

By Mr. Brown:

Q. Now, Mr. Jarvis, will you tell us what that exhibit shows?
A. This exhibit shows the cars, tons, man hours and labor cost of handling perishable freight at pier 17 and Bronx Terminal Market, New York City; test week July 25 to July 30, 1949, inclusive. The first 19 lines of this exhibit show a breakdown of the unloading costs according to their class of employees, as indicated in the second column headed "Classification," and then subdivided as to the direct labor and supervision. Lines 20 to 25, inclusive, of [fol. 1365] this exhibit is a breakdown according to the type of commodity as shown in the second column headed "Commodity." This exhibit is broken down, as shown in the

third and fourth columns headed "Vegetables other than top-iced," and "Cantaloupes, melons and vegetables, top-iced," respectively.

Under each of these columns is shown the man hours and labor costs for the individual class of employee as shown in the second column; also the cars and tons of each item of commodity.

On Line 18 of this exhibit is shown the total direct labor and supervision. This item, when divided by the total tons shown on line 25, will give the total cost per ton as shown on line 19.

For vegetables other than top-iced, as shown on line 18, it costs $774 to unload 450 tons, or an average cash of $1.720 per ton.

For cantaloupes, melons and vegetables, top-iced, it cost $302 to unload 112 tons, and an average cost of $2.697 per ton.

Mr. LaRoe: For information, Mr. Jarvis, is there nothing handled at these terminals except the commodities shown in lines 20 to 24?

The Witness: Why, merchandise is handled on pier 17.

Mr. LaRoe: Are these commodities exclusively handled at the Bronx Terminal?

[fol. 1366] The Witness: Not all of them. Some are pier 17 and some are Bronx Terminal.

Mr. LaRoe: No, I mean does the Bronx Terminal handle anything except these commodities?

The Witness: No, sir.

Mr. LaRoe: So that the only breakdown as between these commodities in general freight that would be required would be at pier 17?

The Witness: That is right.

Mr. LaRoe: That is all. That is just for information.

By Mr. Brown:

Q. Now, Mr. Jarvis, how were these figures obtained?

A. From a time study during—well, a time study from the actual labor that was involved during the unloading.

Q. Was it actually made on the pier, pier 17 and Bronx Terminal Market, while the work was going on?

A. Yes.

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Q. And were those figures obtained by you personally and by men under your supervision?

A. Yes.

Mr. Brown: I offer that exhibit in evidence.

Exam. Brown: It has been received.

Mr. Brown: I thought it was marked for identification.

Exam. Brown: I stated that it had been received.

By Mr. Brown:

Q. Mr. Jarvis, at the time that this study was being [fol. 1367] conducted, did you observe the method of unloading at Bronx Terminal Market and Pier 17?

A. I did.

Q. And did you appear as a witness in the original hearing in this case?

A. I did.

Q. And at that time you introduced a similar exhibit?

A. Yes, sir.

Q. And at the time that this study was made for the original hearing, did you also observe the method of unloading at Pier 17 and Bronx Terminal Market?

A. Yes, sir.

Q. And did you hear the testimony of Mr. Richard May on behalf of the New York Central?

A. I did.

Q. Now, has there been any change in the method of unloading at either of these points since the original hearing?

A. No, sir.

Q. So that the method of unloading at the present time is the same as that testified to by Mr. May at the original hearing?

A. Yes, sir.

Mr. Brown: That is all.

Exam. Brown: Any further questions on direct examination?

(No response.)

Exam. Brown: Cross examination of this witness will be [fol. 1368] deferred temporarily in line with the agreement made off the record.

You are excused, for the moment, sir.

(Witness excused.)

J. L. Heywood was sworn and testified as follows:

Direct Examination.

By Mr. Miller:

Q. Will you please state your name, business address and position with the Pennsylvania Railroad?

A. J. L. Heywood, assistant comptroller of the Pennsylvania Railroad.

Q. Are you acquainted with a man named Dilks at the Pennsylvania?

A. Yes, sir.

Q. Is he one of your subordinates?

A. That is correct.

Mr. Miller: Mr. Examiner, I should like to offer for identification, an exhibit marked Pennsylvania Railroad Unloading Costs at Piers 27, 28, 29, New York.

Exam. Brown: This Exhibit No. 129 is similar to the two prior cost exhibits. It is received in evidence subject to the same objections and subject to the same ruling as made with respect to the prior cost exhibits.

(Respondent's Exhibit No. 129, Witness Heywood, received in evidence.)

[fol. 1369] Mr. Miller: And also exhibit identified as Pennsylvania Railroad Unloading Costs at Produce Terminal, Philadelphia, July 17 to 23, 1949.

Exam. Brown: Has that been distributed?

Mr. Miller: Yes, sir.

Mr. Loos: I do not have a copy, Mr. Examiner.

Mr. LaRoe: We have only one over here.

Exam. Brown: I have no copy of the exhibit and the reporter has no copy of it.

(The exhibit was distributed.)

Exam. Brown: The exhibit is No. 130 and is received in

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evidence subject to the same comments I made concerning Exhibit No. 129.

(Respondent's Exhibit No. 130, Witness Heywood, received in evidence.)

By Mr. Miller:

Q. In preparing this exhibit, Mr. Heywood, did you follow the same methods used in the preparation of Mr. Dilks' previous exhibit?

A. Yes, sir.

Q. Will you explain for me what you mean by "cost per unloading gang productive man hour" and how that figure is obtained?

A. That is the actual time of the man productively unloading the perishable traffic.

Q. And how was it obtained?

A. Obtained from a time study, by actual check for the [fol. 1370] week of July 10 to the 16th, 1949.

Q. Is it correct that to obtain that figure, you divided your unloading gang productive man hours, shown on your exhibit, into the total unloading costs to Pennsylvania Railroad, shown on the exhibit?

A. That is correct.

Q. Is it correct that in making payments to the Penn Stevedoring Corporation the contract provides that certain payments shall be made on a tonnage basis and that other payments shall be made on a different basis?

A. That is correct.

Q. And how does your exhibit show the breakdown of the computation of the payment to Penn Stevedoring Company?

A. The total payment to the Penn Stevedoring Corporation for the period covered was $7,394.67, and the breakdown of that is shown at the bottom of the exhibit, shown on a tonnage basis as $5,081.53, and the balance covering both wages and workmen's compensation and payroll tax covered the rest of the five remaining items at the bottom of the page, making the total of $7,394.67.

Q. I notice at the foot of the exhibit you show a figure of $4,370.50. Can you explain the difference between that

figure and your total figure of $7,394.67 of your payment to Penn Stevedoring Corporation?

A. Yes. The payment to the Penn Stevedoring Corpora- [fol. 1371] tion, beyond straight wages of the cleaners and car movers, lampmen, repairmen, etc., covers the workmen's compensation and also in the amount of tonnage basis it includes an overhead charge by the contracting company. It covers such things as rental of their office, etc., supervision, and so forth.

Q. Does your figure of cost for unloading gang productive man hours reflect in any way the efficiency of the operation of the pier?

A. Yes. It shows an improvement in the efficiency.

Q. I do not think you understood my question, Mr. Heywood. Referring to your figures shown on Exhibit No. 129 of costs for unloading gang productive man hours——

A. Oh, that particular item?

Q. Yes.

A. I beg your pardon. I was thinking of the entire exhibit. No, that does not show any gain in efficiency in the operation of unloading.

Q. Is it correct that any difference between that figure and the figure shown on Mr. Dilks' Exhibit is purely an increase in the cost to Penn Stevedoring Corporation as computed on the basis of the number of man hours expended?

A. Not only Penn Stevedoring, but also our own employees at the station.

Q. Now, do you have a figure which shows whether or not there has been any increase in efficiency on the pier? [fol. 1372] A. Yes. In taking the previous exhibit presented by Mr. Dilks, it showed that the average tons per man hour were about 1.74, whereas on this exhibit now, Exhibit 129, it shows that the average tons per man hour were 2.61.

Q. Now, turning to Exhibit No. 130, can you tell me whether this exhibit is prepared in the same manner as Mr. Dilks' previous exhibit with respect to Philadelphia?

A. It is.

Exam. Brown: What was that exhibit number, Mr. Dilks' exhibit number? What number is it?

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Mr. Miller: I do not know.

Exam. Brown: Does the witness know?

The Witness: I do not have it here.

Mr. Matson: 30.

Mr. Miller: Mr. Matson, is that the number of the Philadelphia exhibit?

Mr. Matson: Oh, I am sorry. I think that is the New York exhibit.

Mr. Miller: The New York exhibit was No. 30.

The Witness: If you wait a moment, I can get it from the file over there.

Exam Brown: It is not essential. We can look it up ourselves.

The Witness: I haven't got it right here with me.

Mr. Matson: 31 for Philadelphia.

[fol. 1373] Exam. Brown: It would be exhibit 31 you are talking about, when you refer to prior exhibit of Mr. Dilks' concerning Philadelphia. All right.

By Mr. Miller:

Q. Can you give me similar figures based on your Exhibit No. 130, and Mr. Dilks' Exhibit 31, as to whether or not the operation in Philadelphia is more or less efficient?

A. Exhibit 31 showed that the average tons per man hour were 1.96, whereas on Exhibit 130, it shows the average tons per man hour to be 2.46.

Q. In connection with both of the exhibits, do they reflect any increase in cost incurred by the Pennsylvania as a result of the change to a 40-hour week effective September 1st?

A. They do not.

Q. Did the Penn Stevedoring Corporation increase the wages of its employees on that date?

A. September 1st there was an increase in their charge through the contract.

Q. And were the wages of the Pennsylvania employees at Philadelphia similarly increased?

A. Yes, sir.

Q. If your exhibits were restated, to reflect the addi-

tional cost resulting from those wage increases, can you tell me what percentage of increase it would show generally in the costs shown on your exhibits?

A. Insofar as railroad labor is concerned, our own, it [fol. 1374] would be approximately 20 percent per hour increase, and insofar as the Penn Stevedoring contract at the present time, the increase is only effective September 1st, effective on the overtime. The tonnage rate, itself, has not been increased, but the overtime rate has, which comes about always on Sundays when there is overtime. The entire period is an overtime rate.

Mr. Fitzgerald: Is the witness referring to Philadelphia now?

The Witness: New York he said.

By Mr. Miller:

Q. Is it expected that the tonnage rate paid to the Penn Stevedoring Corporation will be increased in the near future?

A. I am not in a position to say whether that is under negotiation at this moment or not.

Q. In your statement that the increases were applied solely to the overtime, were you referring to increases applied to the payments by the Pennsylvania to Penn Stevedoring Corporation?

A. That is right.

Q. Now, was there a general increase in the wages paid by Penn Stevedoring Corporation to its employees?

A. Yes, there was an increase. They got an increase at the same time the railroad employees got an increase.

Q. That increase applied to all their wages and not solely to overtime, did it not?

A. That is correct.

[fol. 1375] Q. Now, you have said that the increase at New York amounts to 20 percent per hour. You attempted to determine what effect that increase would have on the figures in your Exhibit No. 129 showing cost per ton?

A. No, sir, I have not.

Q. Now, when you made your cost studies, did you include in your computation of time any of the time which the men spent in sorting the boxes of freight on the pier?

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A. No, sir.

Mr. Miller: That is all, Mr. Examiner.

Exam. Brown: Any further questions coming under the head of direct examination of this witness?

Mr. Smith: No, sir.

Exam. Brown: You are excused temporarily; cross examination to be conducted later.

(Witness excused.)

Exam. Brown: Off the record.

(Discussion off the record.)

Edwin M. Talbott, having been previously sworn, testified as follows:

Direct Examination.

Mr. Donadio: Mr. Talbott testified at the original hearing in this case and submitted two exhibits, 35 and 36, received in evidence at page 439 of the record. His testimony which deals with those exhibits is found beginning at pages [fol. 1376] 433 to 513. Mr. Talbott is here this morning to bring his cost records or his cost figures up to date.

By Mr. Donadio:

Q. Mr. Talbott, have you made a new study with respect to the out-of-pocket or actual cost of unloading at New York and Philadelphia for recent months or weeks?

A. New studies were made under my supervision for the period July 17 to July 20, 1949, at both Philadelphia and New York.

Q. Are you familiar with the present operation, unloading operations at both New York and Philadelphia?

A. I am.

Q. And is the situation with respect to the unloading operation any different now than what it was back in '47 as testified to by witnesses for the B&O Railroad at that time?

A. Based on our investigation, there has been no change in the operations.

Exam. Brown: You are referring to Baltimore and Ohio only now, are you not?

The Witness: I am referring to Baltimore and Ohio only.

By Mr. Donadio:

Q. Now, did you prepare, as a result of your cost study at New York, an exhibit reflecting the result of that study?

A. I did.

Mr. Donadio: May we have that exhibit identified, Mr. Examiner, as respondent's Exhibit No. 131?

Exam. Brown: Off the record.

[fol. 1377] (Discussion off the record.)

Exam. Brown: Exhibits 131 and 132, Witness Talbott, are received in evidence, subject to the same comments I have made with respect to other prior exhibits of this type.

(Respondent's Exhibits 131 and 132, Witness Talbott, received in evidence.)

Mr. Donadio: 131 will relate to the New York situation and 132 to Philadelphia.

Exam. Brown: They have both been received in evidence. Proceed, Mr. Donadio.

By Mr. Donadio:

Q. Mr. Talbott, will you take up the New York exhibit, 131, and describe what that exhibit shows, how you arrived at the figures?

A. This exhibit was prepared to show the expense in connection with the unloading of fresh fruits and vegetables at Pier 22, North River, New York, during the period July 7 to July 20, inclusive, 1949.

Now, on our piers, the floats are usually at the pier so the unloading can start at 5:30 p.m. on Sundays and 7:30 p.m. on weekdays. No fruit or vegetables were unloaded on Friday or Saturday night or a night preceding a holiday.

Now, during the two-week test period, in cooperation with the contractor who performed this operation for us, we had a complete record maintained of the time involved in handling each individual car; that is, all the time that could [fol. 1378] be directly assigned to the unloading operation.

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Now, this time was translated into costs as indicated on my exhibit.

Now, as indicated in the upper part of the exhibit, the unloading gangs incurred labor amounting to $3,375.76 which, with the Social Security taxes and the overhead, amounted to $4,017.15. That could be directly assigned to the individual traffic unloaded.

Now, all the other freight on our pier is handled by the B&O forces, so there can be no conflict in costs between our ordinary freight and this particular perishable traffic.

Q. Now, that overhead item, the item of overhead of 15 percent, is that the contractor's overhead?

A. That is what we pay the contractor. There is nothing included in here for any overhead of the Baltimore & Ohio except the foreman, which I will describe later.

Q. Now, the basis for compensation to the contractor is on a cost-plus basis; is that correct?

A. That is correct.

Q. And this 15 percent is the overhead which the contractor charges under the contract?

A. That is correct.

Q. Now, the other part is the railroad employees or labor?

A. Well, you will notice in the second group of figures an item amounting to $2,573.95, which could not be assigned to [fol. 1379] specific cars; that is also furnished by the contractor.

We have an item in there, cleaning floats and docks, of $1,243.09. That includes stand-up time also.

Q. Now, what do you mean by stand-up time, Mr. Talbott?

A. Well, under the labor contract which the contractor had with the labor organizations, we are required to employ a minimum of four eight-men gangs every night, and, of course, we augment those gangs as required.

Q. In other words, these men that are employed by the contractor are longshoremen, union men, are they not?

A. I think that is the union they belong to. They are not affiliated with the railroad unions.

Q. Yes, and under this contract the railroad guarantees to the contractor or the labor organization a minimum of

four gangs per night, eight hours per day, is that it, or eight hours per man?

A. Eight hours per man.

Q. And has to pay on that basis, no matter how long it takes them to perform the unloading service, is that right?

A. That is correct.

Q. And you have included in this cleaning floats and docks the so-called waiting time, the stand-up time, time that is in excess of the actual time of unloading; is that right?

A. That is correct; the time that could not be assigned to the other operations.

[fol. 1380] Q. And during this waiting time or this stand-up time, they performed this cleaning of floats and docks?

A. On some occasions they give them brooms and have them do some cleaning rather than stand around idle.

Q. Go ahead, Mr. Talbott, and explain your other items.

A. Now, during the two weeks of the study—I have before me here the contractors' bills which total $8,269.91. Now, we have excluded from those bills, for this two-week period, $10,707, covering the men who replace or recooper packages back in the piles.

We have also excluded $671.74, covering the additional costs on account of sorting, for which we collect additional revenue under the tariff.

Q. Those items are not reflected in the cost figures which are shown on this exhibit?

A. They are not, but everything else in the contractor's bill we consider a part of the unloading expense. It is just a question of how you are going to separate it in the exhibit.

Now, in addition to the contractor labor, we have some Baltimore and Ohio labor on the pier which amounts to $1,144.67 as shown in the third group of figures, and also an item of $81 for hauling away the rubbish; that is the time of the truck, hauling away rubbish. That makes a total cost of $7,816.77.

Now, in column 4, in the lower part of the exhibit, I have [fol. 1381] shown—I have distributed the $4,017.15 among the various commodities, fresh fruits, melons and vegetables, and so on. In column 5 I have distributed the remaining items of expense on a tonnage basis.

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Column 6 represents a total, the total costs for each commodity, and column 7 we have figured the average cost per ton, for New York.

Q. Anything more?

A. Nothing in connection with this New York exhibit.

Q. Anything more that you want to say about the figures shown on Exhibit 131?

A. Nothing further.

Q. Do any of these figures include any expense for maintaining equipment, lighting, or anything of that sort?

A. They do not. Nothing is included for lighting or heating the piers or maintenance of the trucks or any of that miscellaneous expense.

Q. Now, does that about cover the New York situation, Mr. Talbott?

A. It does.

Q. Now, will you take up Exhibit 132, which deals with the Philadelphia situation?

Mr. LaRoe: Off the record, I do not want to interfere with your presentation, Mr. Donadio, but unless there is something markedly different in the method of making it up, [fol. 1382] it seems to be pretty much the same on the face of it.

Mr. Donadio: You are referring to 132?

Mr. LaRoe: Yes. I mean, does it required detailed explanation?

Mr. Donadio: Not as much as 131, but I do want him to take up the basis for his computations.

Exam. Brown: Go ahead, Mr. Talbott.

A. Well, this exhibit, Exhibit No. 132, shows costs at Philadelphia for the same period. Now, here we have a different proposition in that all the unloading operations performed are by railroad company employees. However, practically all of the expense is incurred by gangs employed at night, and all of them are paid on a separate weekly payroll, apart from our other employees at Philadelphia.

Q. How do you pay the railroad labor at Philadelphia?

A. Well, the night unloading gang which perform nearly all of the operations is paid on a piece rate basis of $12.90 per gang, per car. Each gang consists of six men. Now,

that rate applies when the unloading is performed by a standard gang. In other words, if we have an extra trucker in the gang or an extra piler, we would pay $12.90 plus the salary of this extra trucker or piler, and that happens frequently because we are required to work under the labor agreement all the men on the payroll each night, and we have to have, of course, extra men coming out in order to [fol. 1383] keep the gangs filled up. So we have extra men practically every night in every gang.

Now, also, if a car contains more than the standard number of packages, we are required to pay an excess amount over the $12.90.

Q. That is all covered by the agreement between the railroad company and the union organization of which these men are members?

A. That is correct, and then, in many instances we have to unload a car in as high as three installments. Well, if that car were handled by the night gangs, we would pay $12.90 plus additional charges, as I explained, for each installment.

Exam. Brown: You think. Do you know?
The Witness: I did not say I think.
Exam. Brown: I thought you did. I misunderstood you.
The Witness: No, no.

(The reporter read the witness's last answer.)

Exam. Brown: That indicates a necessity for your speaking up if I cannot get you clearly because it is going to be difficult for the back of the room to get you as clearly. Go ahead.

A. (Continuing) Well, in many instances where we have cars of, particularly, apples to be unloaded, and we would have this installment unloading, we would have an additional, extremely high cost in some instances on account of [fol. 1384] the applies and deciduous fruit unloading. We do not have many cars of citrus fruit which are unloaded in installments. In fact, there were none during this two weeks of the study.

By Mr. Donadio:

Q. Well, now, the result shown on Exhibit 132 is based

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on an actual study that was made of the actual operations there at the Philadelphia Terminal; is that not so, Mr. Talbott?

A. That is correct; for the period of the study we have the complete record where each individual car unloaded, the number of men, each man, the number of men assigned to each car, and the number of excess packages paid for in each car.

Q. These figures are all actual expenditures by the railroad company for performing that service?

A. They are.

Q. Now, will you go ahead, Mr. Talbott, and make whatever explanations are necessary that are not obvious from the face of the exhibit?

A. I might say that we have excluded in these figures any expense in connection with the placing of the recoopered packages in the pile where they belong. Nothing is included for police protection at Philadelphia because of the assignment at the present time of our police forces.

Q. You have left out any police items, right?

A. That is correct, for the Philadelphia study.

Q. Now, Mr. Talbott, you were present yesterday when [fol. 1385] Mr. Shapiro testified, and he introduced Exhibit 112, purporting to show the cost of unloading at Philadelphia.

A. I was.

Q. Do you have a copy of his exhibit before you?

A. I do.

Q. Will you proceed in your own way to make any comments concerning it that you deem necessary?

A. Well, this particular exhibit appears to be of no value in indicating the cost of unloading our perishable traffic at Philadelphia. In the first place, it does not cover as much as a full night's operation. Sunday night is usually the heaviest unloading night during the week and naturally we would have to have at least a complete week's operation. In fact, we went to the trouble to obtain the figures for two weeks' operations in order to arrive at what we thought was more nearly the average costs.

Now, the results are based on incorrect premises. In the first place, Mr. Shapiro determined the minutes involved

in unloading each individual car, that is, each of these 25 cars. Well, minutes has no relation at all to the method we use in compensating these gangs for the work performed. We pay them on a per car basis, as I previously described in connection with my exhibit on the costs at Philadelphia.

Mr. Shapiro assumes a rate of so much, $1.50 per hour. Of course, this has no relation to the cost of unloading. In [fol. 1386] fact, I do not see how you could arrive at anywhere near the approximate cost of handling our traffic from this incomplete study made by Mr. Shapiro.

Mr. LaRoe: Well, I do not want to interrupt, but he explained very carefully that he was not undertaking to show your costs. He was undertaking to show what his costs would be if he used an assumed rate of $1.50. His figures are right according to his own assumption, but he did not try to show what your costs are.

The Witness: Well, his figures are all based on assumptions, and as far as I am concerned, they have no value.

By Mr. Donadio:

Q. Do you have anything else, Mr. Talbott?
A. No, I do not.

Mr. Donadio: That is all.

Exam. Brown: Any further questions of this witness coming under the head of direct examination?

Mr. Donadio: As I understand, Mr. Examiner, the exhibits have been received.

Exam. Brown: That is correct.

You are excused temporarily. Your cross examination will be conducted later.

(Witness excused.)

Exam. Brown: Go off the record at this time for the purpose of discussing procedural matters.

(Discussion off the record.)

[fol. 1387] Exam. Brown: All right, Mr. LaRoe, we will hear from you.

Mr. LaRoe: Mr. Examiner, in accordance with your sug-

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gestion, counsel for the protestants conferred during the recess and concluded that they would not cross examine any of the witnesses.

Exam. Brown: Have you any statement to make in connection with your failure to cross examine?

Mr. LaRoe: Yes. We fail to cross examine, not because we accept the figures as accurate, but because we feel that whether they are accurate or not, they have nothing to do with the issue in the proceeding because it is quite immaterial, as we see the case, what the cost of unloading is.

Exam. Brown: The commission might disagree with you on that point. They might consider that the unloading charges should be considered separately from the line-haul charges. Have you lost any rights in your failure to cross examine?

Mr. LaRoe: Well, that is a risk we have to take, and we are willing to take it.

Exam. Brown: All right, sir. There will be no cross examination of these cost accounting witnesses; therefore, they are now excused.

Mr. Hoffman: Mr. Examiner, am I to understand, then, that all the points that were developed on cross examination at the previous hearing will be applicable here?

Exam. Brown: Yes, sir. It should be understood at this [fol. 1388] time that all the record in the prior hearing will be considered a part of this case, and can be used by any party in their briefs or otherwise.

Your next witness, please.

JOHN L. WEBB was sworn and testified as follows:

Direct Examination.

By Mr. Miller:

Q. Will you state your name and business address and position with the Pennsylvania Railroad?

A. My name is John L. Webb; my business address is room 1442, Broad Street, Suburban Station, Philadelphia; my position is manager of stations and motor service on the staff of the vice-president.

Q. Being on the staff of the vice-president, does that mean that your position as a system officer is distinguished between a regional or divisional office?

A. That is right.

Q. Are you the system officer having jurisdiction over the methods of operations at stations of the Pennsylvania Railroad?

A. Yes, sir, over the stations of passenger and freight stations, and of the motor service for and by the railroad. In that position, the two stations of the Pennsylvania that have been discussed here at New York and Philadelphia come under my jurisdiction.

Q. Can you tell me whether there has been any change [fol. 1389] in the methods of operation of the Pennsylvania at the produce terminal in New York and the produce terminal in Philadelphia, as compared with the description given at the previous hearing by witnesses Pettit and Hampton?

A. There has been no change.

Q. Will you describe in a general way the facilities maintained by the Pennsylvania which are known as Ball Ground and Waldo Avenue yards?

A. Ball Ground team track at Jersey City and Waldo Avenue team track at Jersey City are what might be called normal team tracks with driveways between the series of tracks that patrons can back their equipment up to the truck and take a delivery right from the car. The width of the driveways runs from 50 to 70 feet and are, in every case, as large, as wide as any driveways of any team yards of which I have knowledge, and larger than most, wider than most.

Q. Was Ball Ground team track yard recently reconditioned and improved?

A. Both Ball Ground and Waldo Avenue were recently reconditioned and improved.

Q. Is it correct that watermelons and juice grapes were once unloaded at pier stations by the Pennsylvania and are now unloaded exclusively in Jersey City?

A. Well, quite some years back there was an unloading of watermelons at our Wallabout Station in Brooklyn which [fol. 1390] no longer exists, having been taken over as a

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part of the Navy yard, and there was and has been large unloadings of both commodities on the Jersey team tracks.

Q. Is it correct that the volume of perishable traffic destined for the New York markets which have been unloaded in Jersey City over the course of the years has been generally on the increase proportionately to that volume unloaded at the pier station?

A. Yes, I would say so.

Exam. Brown: You are talking about what commodities now?

Mr. Miller: Perishables.

Exam. Brown: You are talking about watermelons?

Mr. Miller: No, sir.

Exam. Brown: There has been no increase in watermelons, has there?

The Witness: Yes, there has been an increase in watermelons as the population increases.

Exam. Brown: I am talking about the increase as a result of diversion.

The Witness: No, sir, not a hundred percent unloading in Jersey City on watermelons, but on the other traffic there has been an increased tendency to take delivery on the team yards.

Exam. Brown: In Jersey?

The Witness: In Jersey.

[fol. 1391] By Mr. Miller:

Q. It was as a result of that long-time trend, was it not, that the Pennsylvania reconditioned both the Ball Ground and Waldo Avenue yards?

A. That is right, and also built the Manhattan Produce yard out in the meadows, a little farther from the Jersey shore.

Q. Now, did anything happen in the fall of 1948 which gave an added impetus to that trend to take delivery in Jersey City?

A. Yes, sir. For a short period, the traffic, most of the traffic, went to Jersey City.

Q. Now, what change did the Pennsylvania make in its operating practices which induced that shift over to Jersey City?

A. Well, taking delivery from the team yards in Jersey City, you have a wider scope of delivery. In other words, those yards were open 24 hours a day, and there are not the restrictions on the unloading and delivery operations that there are, must necessarily be, on a pier operation.

Q. And it was that advantage in obtaining the freight from the car at any time of the day which induced the gradual flow of the traffic to Jersey City, is that correct?

A. That is right.

Q. Now, did you also establish in the fall of 1948 a cut-off time for deliveries at the pier stations?

A. Yes, sir. There was a cut-off time, as I recall it, that had to be at 2 p.m. in the afternoon in order to get the cars over to New York and unloaded for the following night's [fol. 1392] operation.

Q. Can you tell me, Mr. Webb, whether vegetables are sold on the piers?

A. They are.

Q. Can you tell me whether there is any difference in the method in which you unload this perishable traffic on piers as between freight which is destined for auction sale and that which is destined for private sale on the piers or for delivery to the receiver there?

A. Not of any consequence, no, sir. A certain type of the freight is a little slower to unload and has to be handled with extraordinary care as related to the general performance.

Q. Now, what functions does the Pennsylvania Railroad perform in connection with this traffic after the freight has been delivered to the receiver?

Mr. LaRoe: Objection. Could not possibly have anything to do with the case, if it is performed after the delivery service has been completed.

Exam. Brown: My ruling in that is the same as in connection with the prior rulings with respect to that type of evidence. We have quite a bit of evidence in here with respect to what happened after simple delivery. I am going to permit the witness to answer.

A. Well, I should like to preface that by saying that there is no such a thing as simple delivery on perishable traffic,

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[fol. 1393] for the reason that the actual delivery of the traffic is not accomplished until everything has been taken from the piers. By that I mean that we will unload a car for a market and at the opening of the market the consignee will have signed for that car.

But, if he does not dispose of that, it is not driven off the pier at the end of the day, he turns that back to the railroad.

Now, that is done—that is quite a general practice, and it is done in two ways: one by just a mutual count between the railroad employees and the consignee's representative, or it may be done by an actual signature, but for any freight that is on the pier at the close of the day, the railroad has to assume responsibility until the following morning when the reverse operation takes place. The consignee then signs for the railroad for the freight that was turned back to them the previous day, and there are other factors that get into that same situation. We have to protect that freight that is left on the piers, meaning that outside of the protection of the physical property, we have to furnish heat to see that it is not damaged by the weather, and we also have to take any small lots that the consignee may have left on the pier and consolidate that, to make room for general unloading of other cars.

So that actually there is a continuing delivery process [fol. 1394] until the last package has left the pier.

Now, at New York particularly, it is not unusual on auction freight to pull a car off the auction after it has been advertised; then that is turned back to the railroad and we have the responsibility for that complete car until it is again disposed of.

On refuse traffic—and there is quite a little of that—then we have to take care of the entire car and make some disposition of it.

So really, there is no delivery, no complete delivery, until the last package has gone from the pier.

Q. Will you describe what has been called "delivery on the fly"?

A. Well, at times when a car may be light or there may be ice in the river or something that may interfere with getting the freight over and getting it unloaded, a consignee may be waiting for part of the freight as it comes

out of the car, and what we call delivery on the fly is delivery right from the car to the tail gate of the truck.

Now, that means this: bringing the freight out of the car, it follows trucks, platform truck after platform truck, say, maybe ten of them might go on a truck, and the next ten will go on the pier and be picked up later by the truck. It is a name and a practice to avoid delaying the trucks on the piers. It is convenient.

[fol. 1395] Exam. Brown: Isn't it unusual?

The Witness: No, it is not frequent, but it is not unusual. I presume as between the two categories you would have to call it unusual, Mr. Examiner.

Exam. Brown: Well, I will use the word "frequent" then. I will coincide with your language. It is not frequent, is it, that you do that?

The Witness: It is not frequent, but it is often done.

Exam. Brown: Well, how frequently is it done?

The Witness: Oh, I would say perhaps four or five times a week for various consignees, all depending on the seasons and the volume of traffic and matters of that kind. That is pure conjecture on my part, and I have no records to substantiate that.

Exam. Brown: All right, Mr. Miller.

By Mr. Miller:

Q. Turning now to Philadelphia, Mr. Webb, can you tell me how many consignees at Philadelphia prior to November 1, 1948, performed their own unloading?

A. Well, there was only one consignee that did anything of that type and that was Mr. Tredwell's company, the Smiling Jim Potato Company, that testified here yesterday. Occasionally he did unload a car or more or a part car.

Q. Now, has there ever been a time, to your knowledge, that the terminal in Philadelphia, when your team-track capacity was not such that it could accommodate all the cars [fol. 1396] then being unloaded on the team track, as well as all the cars then being unloaded at the freight house?

A. Not in normal times, no, I mean, other than strike conditions or something of that kind, and if that condition did obtain we would increase those team yards.

Q. Now, the reduction in the capacity of the team tracks

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at Philadelphia was made, was it not, partly because you felt that you did not need all the tracks previously available and also from the standpoint of operating efficiency to increase the ease of your operations at the station?

A. That is right, and also deliveries, patron deliveries in the yards to improve the facilities for taking freight out of the yard.

Q. Now, can you tell me why it was that the Pennsylvania, when the trade asked permission to perform their own unloading at Philadelphia, denied that request?

A. Yes. That was because this is a public facility and we never felt assured that the interests of the entire public would be protected if we carried through with the possible lease to the Association. There are quite a few people who received freight who are not members of the Association.

And then, that brought up the question of possibly having to hold a part of the facility for what I will term the "unusual customer." But perhaps the biggest factor of all is this question of labor. Our employees have been un- [fol. 1397] loading the fruits and vegetables at Philadelphia for many years, and any attempt to take that work away from them, outside of a situation of absolute necessity, we felt would create problems that had better be left unsolved or undeveloped.

Q. Now, was it also true that in considering the proposal to lease the terminal and have the trade pay the cost of railroad labor that the Pennsylvania was of the opinion that any such procedure would amount only to a reduction in the tariff charges without any actual change in the practice or the work performed by the Pennsylvania, and for that reason felt that such an arrangement would be unlawful?

A. Yes. It would be rather difficult to place the entire cost of the operation on that sort of a basis. We would have expense beyond the actual physical unloading of the property that has to be considered in connection with the operation of a facility of that kind.

Q. Now, with respect to this question as to delay in handling the freight on B platform at the terminal in Philadelphia, I believe it was Mr. Hampton's testimony

that when the trucker brought his two-wheel truck from the car, he waited at the location on which the freight was to be piled, while the receiver's men took the freight off the two-wheel truck, inspected it and placed it on the piles on location.

A. That is right. That was Mr. Hampton's testimony, and that is the correct description.

[fol. 1398] Q. Now, on A platform, when the four-wheel trucks come out of the car, is it correct that they are first taken on to the center of the platform?

A. Center aisle dividing the house.

Q. And then in taking the freight off the trucks, the trucks move toward the outside of the platform, do they not?

A. Yes, sir; move to the outside of the platform.

Q. Now, from your observation of that operation, is it true that as individual trucks come out, they can be unloaded at a particular spot on the area covered by a particular car, or do the men have to take out from each four-wheel truckload individual boxes to be placed at separate spaces on the platform?

A. The loaded truck starts from the center of the aisle, the center of the platform, and moves towards the end of the platform or the side of the platform, driveway, and as they pass the spot, as the truck passes the spot that is laid out with individual lines, that line is taken off, and whatever packages happen to be on the truck, and piled with the other freight of that category, so that when the truck reaches the end of the line, it is empty.

Q. And most all of those trucks do not contain packages, all of which are placed on a pier, on a particular line pile on the platform, but contain individual packages for a number of different, separate piles?

[fol. 1399] A. That is right, and that is why I could not understand the testimony yesterday that these packages were loaded together in the car, because that is not our experience.

Q. What sort of a facility, Mr. Webb, does the Pennsylvania maintain for handling perishable traffic at Baltimore?

A. They have a house at Baltimore located at one side of our team yard. That house, however, is not conducted as an ordinary terminal would be, meaning that it is leased

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out to the patrons, to consignees. They lease the platform spaces by doors, with about 20 to 30 feet surrounding platform space for each door, and then they have their offices leased upstairs. The only part of the facility that the Pennsylvania Railroad really keeps for itself is the agent's office.

Q. You described the Pennsylvania Produce Terminal as a public facility. In that terminology, would you say that the Baltimore operation was a public facility?

A. You mean the Baltimore house?

Q. Yes.

A. Well, it is not the same kind of facility as the Philadelphia Produce Terminal is because it is a leased job.

Q. And the Pennsylvania does not perform any unloading at that facility?

A. We have never performed any unloading at that facility.

Q. Have you ever been requested to perform such unloading?

A. We have never been requested to.

[fol. 1400] Q. Now, at the time the Pittsburgh Produce Terminal was built, is it correct that the Pittsburgh trade asked the railroad to institute an unloading service at that point?

A. That is right.

Q. And it was only in response to that request that the Pennsylvania began to unload at Pittsburgh?

A. Yes, sir, with the exception of the auction facility, that part of the house devoted to auction traffic. The auction company unloads its own freight, again except when they got a very low volume of traffic, rather than order out their men, they won't have enough to keep them busy, they ask the railroad to unload the few cars they may have.

Ordinarily, they unload their own traffic.

Q. Can you describe the past handling of perishable traffic in Chicago?

A. At Chicago there is a team yard with a supplementary house that is handled independently. We do not operate that as a Pennsylvania facility. It is a joint facility.

Q. Does the Pennsylvania collect any rental for auction rooms at Philadelphia or at New York?

A. No, sir.

Q. What is the number of the auction rooms in New York?

A. Nine.

Exam. Brown: On the Pennsylvania?

The Witness: Yes, sir.

[fol. 1401] Exam. Brown: Only?

The Witness: Well, there are auction rooms on the Erie Railroad, also, but I am only talking about Pennsylvania.

Exam. Brown: Your figure is with respect to the Pennsylvania Railroad only?

The Witness: That is right.

By Mr. Miller:

Q. Mr. Webb, I cannot recall anything else that we discussed about your testimony. Is there any other matter that you have in mind that you would like to testify about?

A. Well, there is just this one question about this handling of import traffic at New York, and that related to what happened to the traffic after it came off the steamship, and the way it is handled is, it goes on lighters and is floated to the Jersey City piers, and is not handled over the normal produce facilities on piers 27 and 28.

Mr. Miller: I believe that is all, Mr. Examiner.

Exam. Brown: Any other direct examination?

Mr. Smith: No, sir.

Mr. Brown: No, sir.

Exam. Brown: Cross examine.

Cross examination.

By Mr. LaRoe:

Q. I should like to ask you first about the pier station delivery. Let us take first vegetables, those that are unloaded on your pier station. Now, this being a perishable [fol. 1402] food product, it is the general custom to get it away from the piers as soon as the trade can conveniently get it away, isn't it?

A. Well, you have your regular market hours, delivery hours, yes, sir. New York happens to be a little more

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complicated. They have more than the normal number. Usually it is one hour. They have three or four down in New York.

Q. You mean three or four hours?

A. Yes, for delivery.

Q. But, this food generally is taken away from the piers within three or four hours after you put it there, isn't it?

A. No, not always, no.

Q. I did not say always. I asked if that is not the general rule?

A. That is the general practice, yes, sir.

Q. Let us not get into exceptional cases.

A. I am not into exceptional cases. I say it is general, that is the procedure, but we are troubled all the time with this traffic that is left on the pier, that we have to take care of during the night.

Q. I do not expect you to let occasional situations become general. Now, let us deal with the average shipment of vegetables like potatoes that comes into your pier station. How long does the average consignment of potatoes remain [fol. 1403] on your pier station after you put it on the floor?

A. I would be unable to give you that information, except that it generally moves within the free storage period.

Q. Why, certainly.

A. But that is two days, Mr. LaRoe.

Q. You mean to say that the average shipment does not usually move out the same day?

A. No, I did not say that. I say I have no figures, sir.

Q. Well, is the answer to my question that you do not know?

A. No, sir. The answer is not that I do not know. When you asked the percentage, I cannot give it to you. But, there is——

Q. Do you know enough about it to know whether the average consignment of potatoes moves out not only on the same day, but within half a day?

A. I would not know, no, sir.

Q. You do not know. Then the answer to the question is that you do not know. Would your answer be the same if I ask you regarding other types of vegetables?

A. I would not be able to break it down and tell you which goes and which don't go.

Q. Now, with respect to potatoes or any other vegetable, after you put it on the floor of the pier, it is there accessible to the truck of the consignee, and if he wants to take it away, you, of course, let him; isn't that right?

A. That is right. He signs for it and he does whatever he [fol. 1404] cares to do with it.

Q. And it leaves your jurisdiction and enters his jurisdiction when you put it on the floor of the pier; isn't that right?

A. When he signs for it, yes, sir, and that is when the car is completely unloaded, yes.

Q. When you say "completely unloaded" you mean taken off the carfloat and put on the floor of the pier?

A. That is right.

Q. And then it comes under his jurisdiction and leaves your jurisdiction?

A. It is his jurisdiction, if he takes it off the pier that day.

Q. No, I am asking you if he does not have the right at that point to take it off the pier, if he wants to, at that very moment?

A. He has more than a right; he has an obligation.

Q. He has an obligation and a right to take it off as soon as you put it on the floor of the pier?

A. Yes, sir, that is right.

Exam. Brown: Let us get this straight. Is there obligation for him to take that off before conclusion of free time?

The Witness: Not any more, no, sir.

Exam. Brown: Let us be careful how you testify.

The Witness: Not any more. There was at one time, but that is not observed right now. There used to be a time [fol. 1405] when these piers had to be cleared every night, but over the years that drifted away.

By Mr. LaRoe:

Q. But you consider, do you not, that when you have placed it on the floor of the pier, you have made delivery to him?

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A. That would be our normal conclusion.
Q. Yes.

Mr. Miller: Now.
Mr. LaRoe: Just a minute, don't let's interrupt.
Mr. Miller: I do not want this confused. I do not want the record to indicate that it is Mr. Webb's testimony that the instant the freight is on the pier it is then in the custody of the receiver.
Mr. LaRoe: Well, now, just a minute, I would rather you would not shade his answers.
Mr. Miller: He did not state that. He said that as soon as it is placed on the pier and delivered to the receiver, it then become subject to his custody.

By Mr. LaRoe:

Q. Well, isn't it customary for you to try to get it signed for as soon as you put it on the floor of the pier?
A. Before the market is opened?
Q. Yes, before the market is opened, it is signed for?
A. That is not always right either.
Q. Well, have you got any exception or occasional thing [fol. 1406] that you want to refer to?
A. Well, we have difficulty getting signatures all the time, but for your purpose, we will assume that is correct, Mr. LaRoe.
Q. All right. Thank you, sir. Well, now, if it be true that in the normal course of events you place the vegetables on the floor of the pier and as soon as you can get it signed for he may take it away from there and, if, as you say, that is the normal and usual situation, why isn't that simple delivery?

Mr. Miller: Objection. I do not want this witness to argue this case. Now, if Mr. LaRoe has any facts he wants to obtain from this witness, I want the witness to answer them.
Exam. Brown: Don't forget that your witness at the start of his testimony referred to the simple delivery and stated that it is not as simple as it sounds.
Mr. Miller: And that is right. The witness went on to

explain what he meant, in factual form, and the reasons why it was not just a simple process.

Exam. Brown: It will be understood that the responses of this witness are to be considered solely from a factual standpoint. So far as legal conclusions are concerned, we do not expect this witness to make any such conclusions. If he does, they will not be so considered. They will not be considered by the Commission.

Mr. Miller: A general ruling of that sort is not quite [fol. 1407] fair to the witness, I do not think, Mr. Examiner. Mr. LaRoe will place question after question to this witness, saying if this is so, therefore you mean this is so, or if this is so, why isn't this so? Now, such questions are argumentative, are unfair to the witness, and unfair to me, and I think they should not be permitted.

Mr. LaRoe: In other words, I am not to cross examine the witness.

Mr. Miller: I did not say that.

Exam. Brown: Well, go ahead. Let us get along. You can answer the last question.

Mr. LaRoe: Let me try the question again. I think it is perfectly within his direct examination.

By Mr. LaRoe:

Q. In your direct examination, you said there was not such a thing as simple delivery. I understood you to say, in answer to my questioning, that in the usual, normal case, with respect to vegetables, the vegetables are taken out of the car and placed on the floor of the pier and signed for even before the market opens, and in the normal course of events taken away soon. Now, why isn't that simple delivery?

A. I would agree that when a car moves off, as you describe, it is simple delivery as you describe.

Q. Wouldn't you go further and say that what I have described is the customary situation rather than the exceptional?

A. I will say it is the situation for anybody who trucks [fol. 1408] their freight the day it is unloaded.

Q. That does not answer the question.

A. I know it does not, but I cannot answer your question as you put it, sir. You are trying to have me say that

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is a general situation, and discount what you call the exceptions, which I call an important part of the delivery process.

Q. But you regard them as exceptional, don't you?

A. No, I do not regard them as exceptional; any one of those as exceptional.

Q. Do you mean to tell me that it is not exceptional for a consignee to turn a car back on you; that is the normal course of events?

A. It is not unusual at all.

Q. Is it the normal course of events to have a car turned back?

A. When a consignee does not want to take a car, he turns it back. It is 100 percent with that sort of a job.

Q. Is the average car turned back in that way?

A. There isn't any average, Mr. LaRoe.

Q. I mean the preponderance of the shipments?

A. Oh, I will agree that the preponderance of shipments are not——

Q. Turned back?

A. ——turned back, yes.

Q. All right. Now, let us deal with the normal preponderance of shipments that are not turned back. Why [fol. 1409] isn't placement of those on the pier simple delivery?

A. Because—— well, I will give you some of the reasons. I will give you some more that refer particularly to that shipment. We have got to police those piers. We have got to see the traffic gets in and out, all complications affecting deliveries, Mr. LaRoe.

Q. I do not see what that has to do with the question I am asking you, whether or not the pier is policed; when you put that on the floor of the pier, he can back up with his truck and pick it up and take it away?

A. Yes, he can.

Q. And that is what he usually does; that is what he wants the freight for. He wants the freight. He does not want you to have it.

A. That is what we would like him to do.

Q. And isn't that what usually happens?

A. By the term "usually," if there is a proper understanding between you and I of what is usual, yes.

Q. Why isn't that simple delivery then?

A. I said that is simple delivery from that point of view.

Q. Why did you say in your opening statement there isn't such a thing as simple delivery?

A. Because that is not the way the thing is worked out, Mr. LaRoe. We just cannot provide for what you call simple delivery.

[fol. 1410] Q. All right. Let us go on to something else now. With respect to Jersey City yards, will you give me the names of the team track yards that you mentioned over there?

A. Ball Ground.

Q. How do you spell that?

A. B-a-l-l Ground.

Q. Is that the same as Henderson Street?

A. That is Henderson Street.

Q. I think the staff used Henderson Street. What was the other one?

A. Waldo Avenue. That is another Jersey City delivery.

Q. You do not prefer that carload shipments of fruits and vegetables be delivered over there rather than at the pier stations, do you?

A. I certainly do.

Q. You do?

A. Yes, sir.

Q. Why?

A. Why? That takes away all the difficulties and the expense of lighterage, a very unusual expense for delivery of traffic in New York Harbor, one that you have only at a few places in the country. It means a stabilization of the market.

Q. You would like, then, would you not, to discourage the use of pier stations?

A. I would like to see the perishables delivered in Jersey [fol. 1411] City, Mr. LaRoe.

Q. You would like to see the handling of perishables at the pier stations in New York discontinued entirely if you had your choice, would you not?

A. That would be my view, yes, sir, for the benefit of the trade and for the benefit of the railroad and the public, as a whole.

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Q. We will take care of the public if you will take care of the railroad.

A. I shall try to do that, sir.

Q. As a matter of fact, after this charge went into effect soon after the first of November, you noticed, did you not, an increase in the use of those yards over there in New Jersey?

A. Yes, we did.

Q. And that is just what you wanted, wasn't it?

A. That is exactly what I should like to see.

Q. That made you happy, and it is, in part, for that reason, that you spent money for the rehabilitation of those team-track yards over there in New Jersey, isn't that right?

A. That is right.

Q. How many miles is that, generally speaking, from the produce market on Manhattan Island?

A. Well, I guess your guess is as good as mine. I would say a mile and a half.

Q. By truck?

[fol. 1412] A. Yes. That would be by truck.

Q. And toll charges are required to get the trucks through the tunnel?

A. That is right.

Q. Would you care to tell us how extensive was your reconditioning of those team-track yards; what did you do, and how much money did you spend?

A. Well, my recollection was a couple hundred thousand dollars, Mr. LaRoe, to fit those yards up.

Q. Did you say, also, that you set up a new yard? I did not get that very clearly.

A. The Waldo Avenue yard. It is, I should say, a mile and a half further inland than the Ball Ground. The delivery was used by the Railway Express for quite some time and we moved them out of there and built new team yards there for the accommodation of this traffic.

Q. Did you put in new tracks and eliminate some curbs?

A. Yes, we changed the tracks, eliminated the curb, made the driveways wider, and put in some solid surface driveways.

Q. That is at least three or four miles away from this

produce market in Manhattan?

A. I would say it is from three to four miles.

Q. Are you trying—and I do not mean this in a critical way—is it your policy to bring about a system of terminal delivery here that saves the railroad not only the lighterage, [fol. 1413] but imposes on the shippers three or four miles of trucking in order to save the railroad's expense?

Mr. Miller: Objection, Mr. Examiner. Mr. LaRoe has gone pretty far with this line of testimony, none of which is of any real relevance here.

Exam. Brown: Mr. LaRoe made an observation. I did not hear it. What did you say, Mr. LaRoe?

Mr. LaRoe: I said if it is objectionable, I shall not press it because I am going to argue it in my brief. All I am interested in here is to get the facts.

By Mr. LaRoe:

Q. And the fact is, Mr. Webb, that you not only have encouraged the use of the team-track yards in Jersey City, instead of the pier stations, but you have gone so far as to build a new yard a mile and a half further west for the purpose of attracting more traffic in that manner; isn't that right?

Mr. Miller: Objection.

Exam. Brown: Objection to the question, Mr. LaRoe.

Mr. Miller: It seems to me that the question goes far beyond any issue which can conceivably be material to this proceeding. The witness has described the facilities which are available for this traffic in Jersey City. Whether or not it be the policy of the Pennsylvania to attract the traffic to those facilities or not is immaterial. They have provided the facilities for any one who wishes to use it. [fol. 1414] There is no indication anywhere in the record that they have done anything to encourage the movement there other than to provide facilities, which, as Mr. Webb testified, were built in response to the demand which grew up there.

Now, for Mr. LaRoe to put additional words into the witness's mouth, explaining what may or may not be the policy of the Pennsylvania Railroad, is utterly immaterial, is unfair to the witness and should not be permitted.

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Exam. Brown: I cannot concede that that information is immaterial. It may not be helpful in the proper determination of the issues, but I think it is material. So far as being unfair to the witness is concerned, I do not think Mr. LaRoe intends anything of that kind.

Mr. LaRoe: If I am guilty of any unfairness, I want to be caught up on it quickly because I do not think it is right to be unfair. I do, however, want to make very clear our position on this point, which is that the imposition of this delivery charge is part of a design to, instead of serving the public, deny service, reasonable service to the public, in order to save the railroad some money, and even going so far as to make, try to make, New York consignees go all the way over into New Jersey several miles to get their freight.

That is our position and I think that is the relevancy of this thing.

Exam. Brown: The witness conceded that it would be a [fol. 1415] good thing so far as his company is concerned to have deliveries made in Jersey City, have you not?

Mr. LaRoe: He has made all the admissions I need.

The Witness: I went quite far with that, Mr. Examiner.

Exam. Brown: So I assume, Mr. LaRoe, that you may cover this in your brief, this particular phase.

Mr. LaRoe: That is right. Now, just one or two questions about Philadelphia.

By Mr. LaRoe:

Q. I got the impression from your testimony that after the freight is unloaded on the platform and from there placed on trucks, hand trucks for distribution to the locations on the platform, that there is some sorting of the freight according to the size or marks on the box; is that right?

A. Are you referring to vegetables or to auction freight, Mr. LaRoe?

Q. Auction freight.

A. Well, auction freight we do sort at Philadelphia.

Q. Without any extra charge?

A. That is right.

Q. Do you do anything like that at New York?

A. No, sir.

Q. Why do you do it free at Philadelphia and not do it free at New York?

A. I really cannot answer that question except to say that [fol. 1416] the practices in various communities differ. They seem to grow up from precedence established in the earlier years.

Mr. LaRoe: All right; that is all. Thank you very much.

By Exam. Brown:

Q. Do you make any sorting with respect to tomatoes at Philadelphia?

A. Well, tomatoes, no—yes, tomatoes, we sort tomatoes at Philadelphia.

Q. Do you?

A. Yes, auction.

Q. And you sell all auction materials then?

A. That is right, yes, sir.

Q. That includes citrus and tomatoes?

A. That is right.

Q. Do you ever sort free of charge or display merchandise subject to brands and so forth of any fruits or vegetables other than citrus and tomatoes?

A. Oh, yes, there are other commodities that come under the same category. All auction freight is sorted.

Q. Well, it is my understanding that only citrus and tomatoes are auctioned in Philadelphia. If I am wrong on that, I should like to be corrected by you.

A. One of us must be wrong now, and frankly, I will yield to you if you got that advice.

Q. Well, I have gotten that impression, not that advice.

Mr. Fitzgerald: I think I can clear that up through this witness, possibly, Mr. Examiner.

[fol. 1417] Exam. Brown: Well, I should like to get an answer to this question, and you be sure to develop it. Mr. LaRoe has concluded his cross examination. You proceed now.

Mr. Augello: I should like to ask a question, if I may.

Exam. Brown: Well, I should like to get the continuity right here. I do not want to break this question down and find the answer 15 pages later.

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By Mr. Fitzgerald:

Q. Mr. Webb, it is correct, is it not, that at the Pennsylvania Produce Terminal there are two platforms?

A. That is right.

Q. A platform and B platform?

A. That is right.

Q. For what purpose is A platform used?

A. Auction traffic.

Q. And what commodities are unloaded at A platform for auction?

A. Well, speaking just from general observation of the thing, citrus fruit.

Q. By citrus fruits you mean oranges, grapefruit and lemons?

A. Oranges, tangerines, grapefruit, everything like that.

Q. Grapes?

A. Yes, grapes are unloaded there.

Mr. Miller: I wonder if it would not be better here if we could just stipulated from our combined information as to what vegetables and fruits are auctioned in Philadelphia? [fol. 1418] Mr. Fitzgerald: Well, I think the direct testimony brings that out very clearly, and I think Mr. Webb on this next question will do so.

By Mr. Fitzgerald:

Q. Also sold at auction on A platform are certain deciduous fruits such as apples and pears, is that not correct?

A. That is so. I have seen those on there.

Q. Now, on B platform, what commodities are unloaded on B platform by the railroad pursuant to this tariff?

A. Vegetables and melons, general categories, potatoes.

Q. Certain fruits such as peaches may also be unloaded there?

A. Yes.

Q. Peaches not being sold at auction?

A. That is right.

Mr. Fitzgerald: Does that clear that up?

Exam. Brown: That clears up everything except the question I asked, whether or not you sort according to brand, sizes and so forth, any vegetables other than citrus and tomatoes.

Mr. Augello: On B platform, is that what you mean?

Exam. Brown: On no platform. I am asking whether they sort on any platform.

The Witness: You say any vegetables?

Exam. Brown: Any vegetables at Philadelphia or any fruits, other than citrus and tomatoes.

The Witness: Yes, not on B platform, but there are others [fol. 1419] sorted.

Exam. Brown: Sorted and displayed according to brands and sizes and so forth?

The Witness: That is right.

Exam. Brown: And what are they?

The Witness: Well, there is plums and grapes—and that is about all, as far as my general experience can tell you. Frankly——

Mr. Miller: Mr. Examiner, may we go off the record?

Exam. Brown: Let him finish his sentence, first.

The Witness: (Continuing) To tell you the list of commodities, I would just have to go through the list and tell you what I think was and what I think was not.

Mr. Miller: Mr. Examiner, I think at this time it would be proper to go off the record to formulate a stipulation according to your question. Mr. Webb obviously is not informed as to the specific details of all the miscellaneous commodities which may or may not be sold at auction at Philadelphia.

Exam. Brown: All right, we are off the record.

(Discussion off the record.)

Redirect examination.

By Mr. Miller:

Q. Mr. Webb, can you state what particular varieties of perishables are auctioned at Philadelphia?

A. No, sir.

[fol. 1420] Q. Do you know, Mr. Webb, when the Ball Ground yard was reconverted?

A. Do I know when?

Q. Yes.

A. The latter part of 1948.

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Mr. Fitzgerald: May I ask a question here, Mr. Examiner? Is this redirect? I haven't completed my cross examination.

Mr. Miller: I am sorry. May I ask that the questions be stricken?

Exam. Brown: All right.

Cross examination (continued).

By Mr. Fitzgerald:

Q. Now, Mr. Webb, I have asked you a few questions relative to platforms A and B at Philadelphia. It is true, is it not, that the railroad performs no sorting operations whatever as to platform B?

A. That is right.

Q. And it is also true that on platform A, to such extent as sorting may be rendered necessary for the commodity involved, sorting is performed at that platform?

A. By the railroad.

Q. And that pertains only to auction commodities?

A. That is right.

Q. Now Mr. Webb, you have mentioned in your direct that prior to November 1, 1948, Sol Tredwell had unloaded potatoes at platform B at his own expense. How fre- [fol. 1421] quently did you say he unloaded, and to what extent?

A. Very infrequently; just an occasional car.

Q. About how many cars per week, would you say?

A. Oh, it was not anything like that. I would say, from my information, it might have been one or two cars a month, when the potatoes were running, and that was done for the purposes of reconditioning and rebagging.

Q. Then it is your answer that Mr. Tredwell prior to November 1, 1948, did not unload more than two cars per month with his own labor at his own expense on B platform?

A. That is my estimate, yes sir.

Mr. Fitzgerald: It probably will be necessary that I recall Mr. Tredwell.

By Mr. Fitzgerald:

Q. Did I understand you to say that no one else unloaded at B platform at his own expense?

A. That is right.

Q. Do you say, Mr. Webb, that Mr. Dan Storie never unloaded at his own expense?

A. Not to my knowledge, sir.

Q. And that Mr. Sherman of Westcott & Company never unloaded at his own expense?

A. Not to my knowledge.

Q. And that Mr. Jones, another large receiver of potatoes, never unloaded at his own expense?

A. Not to my knowledge.

[fol. 1422] Exam. Brown: Off the record.

(Discussion off the record.)

Exam. Brown: We will recess until 2 p.m.

(At 12:30 p.m. a recess was taken until 2 p.m. of the same day.)

AFTERNOON SESSION—2 P.M.

Exam. Brown: Are you ready to continue your cross examination, Mr. Fitzgerald?

Mr. Fitzgerald: Yes, Mr. Examiner.

JOHN L. WEBB resumed the stand and testified further as follows:

Cross examination (continued).

By Mr. Fitzgerald:

Q. Now, as to Mr. Klein, another receiver in Philadelphia, is it your testimony that he also never unloaded potatoes at B platform with his own labor?

A. That is right; not to my knowledge, no, sir.

Q. Now, Mr. Webb, it is my understanding of your testimony that you conceded that the capacity of the team tracks adjoining Pennsylvania Produce Terminal had been reduced.

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A. That is right.

Q. I take it, then, that the figures given on direct examination of approximately 400 cars is approximately correct?

A. 500 is my recollection.

Q. Then is your testimony to the effect that the capacity of the team track is still 500 cars?

[fol. 1423] A. That is right.

Q. You are aware, of course, that the testimony at the previous hearing was that the maximum capacity was 510 cars, and I believe you testified on direct this morning that that had been reduced by the elimination of one track, at least?

A. Well, there was a rearrangement of the car unloading spots, the spots used for car unloading, to make a better operating condition in and out of the yard.

Q. Suppose you explain just what was done.

A. Why, we discontinued the use of certain of the tracks for the unloading.

Q. What tracks?

A. By name, I cannot tell you, sir.

Q. How many tracks?

A. Four tracks, if my memory is correct, sir.

Q. What would be the capacity of those four tracks?

A. I do not know.

Q. What is your best guess as to the capacity of those four tracks?

A. You mean the capacity, the total capacity of the tracks or the total discontinued capacity?

A. The total capacity of the tracks discontinued, the four tracks discontinued, as you testified.

A. I am sorry. I just do not have that information available, sir.

[fol. 1424] Q. In the previous hearing, Mr. Hampton testified that there were at that time 17 team tracks with a total capacity of 510 cars. That is as originally designed in 1927. Now, you have testified that four tracks were eliminated?

A. No, I said that a portion of the tracks were just discontinued for unloading purposes.

Q. For our purposes, were eliminated?

A. That is right.

Exam. Brown: Talk louder, please.

Q. Then the capacity of one track would be 30 cars, according to Mr. Hampton's testimony, is that correct?

A. Not necessarily so. I suppose you are taking an average on that now, but understand, that is a move made to facilitate the operations in and out of the yard, and by the same way we took it out, we put it back; the possibilities of the yard are still 500 cars.

Q. As I understand your testimony, Mr. Webb, at least four tracks were rendered unavailable for team-track delivery at this time.

A. I did not say that, sir. It may be right. I said it was four tracks affected, my recollection, by the shortening of the delivery space.

Q. And if each track accommodated approximately 17 cars, four tracks would equal 68 cars?

A. That would be right, yes. That calculation would be right.

[fol. 1425] Exam. Brown: Where does that leave the record? The witness testifies that the capacity is approximately 500 cars. You compute 68 cars as a total number of cars which would be affected by this change. Now, the prior record showed 510 cars, and if you subtract 68 from that, you will have much less than 500. Are you going to leave the record like this? It is very unsatisfactory to me.

Mr. Fitzgerald: Well, Mr. Examiner, I am not prepared to say that I can produce a correct answer from this witness. He has indicated throughout that it is extremely difficult to get a precise answer from him. I am content with that state of the record from this witness.

Exam. Brown: Well now, let it be understood at this time that this is a special proceeding and it is encumbent upon this Commission to develop the facts as well as to listen to facts from the parties. I think it should be in the record, and I think we should have it, and I do not see why we cannot have it.

Mr. Miller: Do you want to go off the record to see if we can decide on the capacity?

Exam. Brown: All right, we are off the record.

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(Discussion off the record.)

Mr. Miller: Mr. Examiner, in a discussion off the record, the respondents and protestants agreed to disagree. It is our position that there is a capacity of 450 cars in the [fol. 1426] team tracks at the produce terminal in Philadelphia. Protestants stand on the testimony of Mr. Ward yesterday that the capacity is 400 cars. I submit that the issues of this proceeding are not concerned with the difference.

Exam. Brown: In other words, should it be stipulated that the capacity is between 400 and 450 cars?

Mr. Miller: Yes, sir.

Exam. Brown: So far as you are concerned?

Mr. Miller: So far as we are concerned.

Exam. Brown: How about the protestants?

Mr. Fitzgerald: All right, I will agree to that.

Exam. Brown: All right. Go ahead then.

By Mr. Fitzgerald:

Q. Now, Mr. Webb, I show you a paper which I will ask the stenographer to mark for identification——

Exam. Brown: Are you going to put that in as an exhibit?

Mr. Fitzgerald: No, sir.

Exam. Brown: Then you need not mark it.

By Mr. Fitzgerald: (Continuing)

Q. ——and ask you if you are familiar with this sheet, if you know what this sheet is?

A. Well, I never saw it before, but I see from the heading what it is.

Q. Will you explain to the Examiner what it is?

A. Well, it is a piece of paper headed "Report by the Philadelphia Produce Terminal, Delaware and Oregon Avenue, Philadelphia, commodity."

[fol. 1427] Q. Now, to whom is that report made, Mr. Webb?

A. I do not know.

Q. You know, do you not, that the Pennsylvania Produce Terminal each day furnishes to the Department of Agri-

culture of the United States Government a report of the number of cars which arrive at the terminal, the number of cars unloaded and the number of cars withdrawn and the number of cars held?

A. I do know that, yes, sir.

Q. And this report that you have in your hand now is a copy of such a report, is it not?

A. I do not know that.

Q. You say that it is not?

A. I say that I never saw the report before.

Q. I am not concerned with whether you ever saw that particular report before.

A. Then why do you want me to tell you what it is used for?

Q. Do you deny that that is a report prepared by the Pennsylvania Produce Terminal?

A. No, I do not know anything about this report.

Mr. Fitzgerald: May I go off the record a moment?

Exam. Brown: Why do you wish to go off the record?

Mr. Fitzgerald: I feel that the witness is being difficult here about a matter which will only require me to bring another witness on to show what this figure is. It is an official figure and from it I wish to demonstrate the [fol. 1428] capacity of the yard with reference to the actual existence of cars as of that particular date.

Exam. Brown: Well, the witness says that he does not know what this is and is not prepared to testify with respect to it. I think it would be appropriate for you to put that in on rebuttal, if you wish.

Mr. Fitzgerald: Yes, I will not attempt any further questions on this line of this witness.

By Mr. Fitzgerald:

Q. Now, Mr. Webb, you have stated that your railroad refused to permit the petitioners in this case as respects the Pennsylvania Produce Terminal permission to unload their own cars at the terminal. That is correct, isn't it?

A. Well, I do not know what form this refusal was given in. I know that is our position.

Q. I did not quite understand on your direct examination

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what you gave as the reason for that refusal or that position, as you stated.

A. Well, I think I gave three reasons on that one. It was a public facility, and that we were not assured that the interests of the entire public could be protected. There was another factor of a possibility of having to run a dual operation, one to be handled by the trade and the other by the railroad, and the third——

Q. I did not hear that. Will you explain what you meant [fol. 1429] by that.

A. Well, if the trade portion did not take care of all the public, we might have to have a facility to take care of what the Association did not take care of. And the third one was the labor question.

Q. And the labor question specifically?

A. The labor question is very prominent.

Q. What was the labor question, specifically?

A. That this work has been done by our men for many years and with no change in operations, physical operations, to take that work away from them would, according to our expectation, be followed by immediate reaction.

Q. Now, when you say that the unloading by the trade might not supply the public, what did you mean?

A. I mean anybody who wants to take delivery at the produce terminal.

Q. Who wants to take delivery at the produce terminal who is not a member of the trade?

A. I would not know, sir. I would not know who your members are as related to the general receivers of freight in Philadelphia.

Q. When you say the trade, whom do you refer to?

A. I mean the Association.

Q. It is a fact, isn't it, that only the wholesale produce trade in Philadelphia uses the Pennsylvania Produce Ter- [fol. 1430] minal and the platforms we are referring to?

A. I do not know who the members of the Association are.

Q. That was not my question. Will you answer the question?

A. Well, I would like the question read, please.

Mr. Miller: Mr. Fitzgerald, if you are going to play on

words that way, I will object to the question. Mr. Examiner, counsel is using the word "trade" in one sense and the witness is using "trade" in another sense.

Mr. Fitzgerald: I quite agree with Mr. Miller that there is a great deal of play on words here, but it is not counsel who is doing it. I am attempting to have this record show what the witness means.

Exam. Brown: Read the question back.

(The reporter read the following question):

"It is a fact, isn't it, that only the wholesale produce trade in Philadelphia uses the Pennsylvania Produce Terminal and the platforms we are referring to?"

Exam. Brown: Now, if you will be a little more specific with your question, when you refer to the trade, who do you mean?

By Mr. Fitzgerald:

Q. Mr. Webb, when I refer to the Philadelphia wholesale trade, I mean those persons in Philadelphia who are customarily engaged in the wholesale fruit and vegetable business.

A. I understand that, yes, sir.

[fol. 1431] Q. Now, will you answer the question?

A. Well, I think that if I understand your question correctly, that my answer is that there may be members of the trade so-called that are not members of the Association. I think, as a matter of fact, that is true.

Q. And it is your position, then, that without making any investigation, without having testified that such was the fact, you have refused to consider any means of these people in the trade performing their unloading service because you are afraid that some members of the trade who were not members of an Association would be deprived of that right? Is that correct?

A. Well, all I have said is that the railroad has to—this is a public facility, and the railroad has to maintain that facility for the general use of the trade, now using your definition, of all those who receive fruits and vegetables in Philadelphia.

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Q. Now, it is a fact, isn't it, Mr. Webb, that at Baltimore the trade performs its own unloading?

A. That is right.

Q. And nevertheless it is a public facility?

A. But not the trade such as we are talking about. There is a facility, meaning now the general receivers of freight —there are certain specific receivers of freight there that have leased space on the platform, and they unload [fol. 1432] their traffic on the platform, although my recollection is that it is more likely to be part cars than what it is assorted cars, because their space is very limited, and the practice is for anybody else who does not have space on that platform in Baltimore has to conduct his activities in New York.

Of course, those people rent that space. It is assigned to them in mutual agreement between the railroad and the trade.

Q. Now, you have used another term that I want to be clear on. You said "freight in Baltimore." We are referring now to——

A. Perishable traffic.

Q. ——perishable fruit and produce at the Pennsylvania Produce Terminal in Baltimore.

A. That is what I am referring to, yes.

Q. And there, I take it, at least 90 percent of the fresh fruit and produce at that terminal is unloaded by the consignees themselves, is that correct?

A. No. I could not agree to that, to a figure of that kind. I do not know what the figures are, but the majority of the traffic moves right from the cars in the yard, and the platform is, to an extent, and again I cannot give you the percentage, used for display purposes, although a man may bring his freight in on there for sale if he has the room and there is facility to do it.

Q. And if he brings it into the platform, it is unloaded by his employees and not by the railroads?

[fol. 1433] A. That is right.

Q. But in Philadelphia you had refused to consider the same sort of proposal by the members of the Philadelphia wholesale trade?

A. I do not like that word "refusal." Perhaps it amounts

to the same thing, but there has been no arrangement worked out that the railroad feels is mutually protective of everybody's interests.

Q. Has any such arrangement been proposed to the railroad?

A. Nothing that they felt would cover the situation.

Q. Has any specific counter proposal been made by the railroad as to how the interests of members of the trade could be safeguarded?

A. No, sir, because we haven't been able to see how we could safeguard the interests of the trade as a whole with any kind of a proposition such as was suggested. Neither do I understand that this proposition of Philadelphia is definitely closed. There are avenues in Philadelphia—— you have got a contact committee between the trade and the railroad that is always open for discussion of a problem of this kind.

Q. I think the record already shows the extent of those discussions and the result. The fact is, then, that the railroad has and does insist that it perform the unloading service at Philadelphia and that no consignee be permitted to do so.

[fol. 1434] A. Well, that is again a play on words, but it perhaps covers the situation. The railroad is unloading.

Mr. Fitzgerald: I would like to say, Mr. Examiner, that if I am playing on words here, it is entirely unintentional, and I want the record to show that I am attempting to be as specific as I can be.

Exam. Brown: Proceed.

By Mr. Fitzgerald:

Q. I believe you also testified, Mr. Webb, that there had been proposals made to lease facilities at the Pennsylvania Produce Terminal and that the railroad had rejected those proposals; is that correct?

A. Well, isn't that the same question you asked me before, and I have been trying to answer for you?

Q. This question has to do with leasing facilities at the Produce Terminal.

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Mr. Miller: Mr. Examiner, I should like to interpose an objection to any further controversy along this line. The witness has stated all he knows on this subject as to the reasons why the request of the trade association in Philadelphia was denied. That is his complete story. That is all he can possibly say about it. He can only repeat what he said before.

Mr. Goldsmith: I understood that was as to the unloading only, Mr. Miller.

Mr. Fitzgerald: This is a new line entirely.

[fol. 1435] Mr. Miller: He specifically referred to the proposal to lease. He said that it would be impossible.

Mr. Fitzgerald: As to Mr. Miller's remarks that this witness's knowledge has been exhausted, I submit that as manager of the stations and motor service of the staff of the vice-president for this entire system, that Mr. Webb's knowledge, the surface of his knowledge of this subject, has not been scratched, and furthermore, whatever may have been elicited on direct examination, this is cross examination as to which, I believe, the Examiner will allow reasonable latitude.

Exam. Brown: I have allowed very reasonable latitude thus far.

Mr. Fitzgerald: I have no complaints, Mr. Examiner, whatever. I think Mr. Miller has failed to consider that I am now approaching a new line.

Exam. Brown: Go ahead with your line. I think this witness can answer it in one simple answer.

Mr. Fitzgerald: I haven't gotten a simple answer so far, Mr. Examiner.

Exam. Brown: I said I think he can answer with one simple answer.

The Witness: May I have the question?

Exam. Brown: You restate your question. I am not going to go back to read from the record. Restate your question.

[fol. 1436] By Mr. Fitzgerald:

Q. I believe you testified on direct examination, Mr. Webb, that the Pennsylvania Railroad had refused to consider and act favorably upon propositions submitted by the trade

in Philadelphia to lease any facilities at the Pennsylvania Produce Terminal?

A. No, sir, I never said that the Pennsylvania refused to consider. I think I did say that the railroad had not agreed to lease these facilities to the trade, so they could do their own unloading. That is my recollection.

Q. Your refusal, then, to lease the facilities to them was for the purpose of denying them the privilege of unloading; is that your answer?

A. That is not my answer.

Q. Well, then, I do not understand your explanation, Mr. Webb, and I wish you would explain it more fully.

A. Well, the Pennsylvania Railroad did not agree to lease the facilities to the Association in Philadelphia for the purpose of having them operate and unload the cars because this was a public facility and they are not satisfied that they can fulfill their obligations to the public in general, under the terms of the lease such as you propose.

Q. Now, Mr. Webb, on direct examination, my recollection of your testimony in that respect was that you had to consider other costs and other factors which made it impossible for you to agree to lease facilities to these people. [fol. 1437] A. Well, if I said anything like that, I certainly do not recall it. There are other factors for consideration, but I gave three reasons why we did not agree to a lease and the three were—I cited them first in my testimony, and I cited them to you a few moments ago—they started with this question of public facility and wound up with the labor question.

Exam. Brown: Can't we leave it this way, that the Pennsylvania Railroad thus far has failed or refused to lease platform space to the trade in Philadelphia?

Mr. Fitzgerald: Mr. Examiner, there were two specific questions, and they were not related until this witness, at this moment, attempted to relate them. One was a proposal that the receivers be permitted to perform their own unloading service. The other was a proposal that they be permitted to lease space. This witness now, for the first time, to my knowledge, in this testimony has attempted to

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join the two and said that his consideration of them was inseparable.

Exam. Brown: Now, I asked the question of counsel, I would like to have an answer to it, if I might.

Read it back, please.

(The reporter read the Examiner's question.)

Exam. Brown: That is a simple question.

Mr. Fitzgerald: Yes, Mr. Examiner, I think I can agree to that.

Exam. Brown: I am sure Mr. Miller will agree to that.

[fol. 1438] Mr. Miller: Certainly.

By Mr. Fitzgerald:

Q. And it is also true, is it not, that you have and continue to refuse to grant the trade permission to unload irrespective of any lease facilities?

A. That is correct; under our interpretation of the tariff we are required to unload.

Q. Now, Mr. Webb, you are familiar with the facilities at B platform in Philadelphia, I take it?

A. That is right.

Q. You are also familiar with the facilities at the Pennsylvania Produce Terminal in Baltimore, I take it?

A. That is right.

Q. Will you tell me from a physical standpoint whether there are any essential differences in those facilities?

A. I do not recognize any such except size.

Q. They are both platforms of great length with sidings, with rolling doors between columns, along the sidings?

A. We can agree that they are facilities of somewhat the same construction.

Q. Now, you have characterized Philadelphia facilities as public facilities which must remain such, is that correct?

A. That is our opinion, yes, sir.

Q. And you have characterized Baltimore facilities, as referred to, as private facilities?

A. Lease facilities.

[fol. 1439] Q. It is true, then, that the only distinction that you make there between them is that in one case you have

permitted consignees to lease facilities and in the other you have not?

A. That is right. In the case of the lease facilities, there are no open facilities for the unloading of perishable traffic at Baltimore. There has never been in recent years, at least, and there is in Philadelphia.

Mr. Fitzgerald: Now, I am sorry, I did not understand that answer.

Exam. Brown: Read it.

(The reporter read the last answer.)

By Mr. Fitzgerald:

Q. Now, it is true, isn't it, Mr. Webb, that a part of the platform at Baltimore is open?

A. Not to my knowledge.

Q. You say that it is not?

A. I think it is not, yes, sir. I certainly think it is not, because we are not unloading anything there.

Q. Are you familiar with the tariff applicable to unloading facilities at Baltimore?

A. Yes, sir.

Q. It is correct, isn't it, that that tariff——

Mr. Fitzgerald: Should I cite it?

Exam. Brown: Yes, cite it by the ICC number and the tariff number.

Mr. Fitzgerald: ICC 2927; tariff 1233F.

[fol. 1440] Exam. Brown: Agency tariff or Pennsylvania Railroad tariff?

Mr. Fitzgerald: It is Pennsylvania Railroad tariff, entitled "Local and Joint Freight Tariff of Rates and Regulations governing miscellaneous services applying to stations on Pennsylvania Railroad.

By Mr. Fitzgerald:

Q. It is correct, isn't it, that under Rule 41 for Baltimore, that tariff provides that when, upon request of shipper——, and I will not quote the entire words——the carrier is called upon to unload carload freight at Pennsylvania

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Produce Terminal, a charge of 6¼ cents for 100 pounds actual weight will be assessed in addition to the rate charged for shipment.

Is that correct?

A. That is the general reading of the tariff, yes, sir. There may have been a supplement on the rates; I do not know offhand.

Q. And that rate would amount to $1.25 per ton, would it not?

A. On straight calculation.

Exam. Brown: When is the effective date of that tariff?

Mr. Fitzgerald: March 15, 1949, is the effective date of it.

Exam. Brown: You say you do not know if there has been a supplement issued to that?

The Witness: No, I do not know. I have no reason to [fol. 1441] think there is, Mr. Examiner, but I simply do not know if that is the latest tariff.

Mr. Fitzgerald: I might state for the record that I know of no such supplement.

Exam. Brown: Well, that can be checked. Go ahead.

By Mr. Fitzgerald:

Q. Now, Mr. Webb, you then hold out that you would perform unloading service at Baltimore for $1.25 a ton applicable to fruits and vegetables?

A. The rate named in the tariff.

Q. And you tell me that you perform no unloading service at the Pennsylvania Produce Terminal?

A. That is right.

Q. The consignees in Baltimore, then, perform their own unloading service at their own expense?

A. That is right.

Q. It can be concluded, I suppose then, that their rate is advantageous as compared with this rate?

A. With what rate?

Q. The rate of the tariff.

Exam. Brown: Do you understand what the question is?

The Witness: I get him now, as to whether the cost of unloading by the consignees is advantageous as related to

the tariff rate. I do not think that follows at all, sir. It is a convenience to them, and it is a practice set up over the years, and the railroad has never unloaded anything [fol. 1442] in Baltimore, although we stand ready to do it.

By Mr. Fitzgerald:

Q. At any rate, the consignees at Baltimore do not take advantage of the railroad's offering to unload their freight at $1.25 a ton?

A. That is right.

Q. Mr. Webb, are you familiar with the tariff applicable in this connection at Pittsburgh, Pennsylvania?

A. Yes, I am fairly so.

Q. Referring specifically to ICC 2905, Tariff 1472G, local freight tariff to the Pennsylvania Railroad, rules and regulations governing the handling of fresh fruits, fresh or green vegetables, and other commodities at Pennsylvania Railroad Produce Terminal, Pittsburgh, Pennsylvania, it is correct, is it not, that that tariff in item 45, of Rule 4, provides, in substance, that the company will upon request of the consignee unload carloads when billed at 10,000 pounds or more from cars to the auction house or package delivery house, for which service a charge of 6¼ cents per 100 pounds will be made, based on actual weight but not less than 10,000 pounds; that is correct, is it not, that is the tariff?

A. You are reading from the tariff. I accept what you say as correct, sure.

Q. And it is correct, also, is it not, that that tariff goes on to say that the company will, upon request of the consignee, sort packages according to grades, kinds, marks or [fol. 1443] brands for which a charge of $4.47 per car will be assessed. That is also correct?

A. No, there is something wrong about that. That rate is $4.92.

Mr. Miller: Mr. Examiner, it seems to me that we can gain nothing further from further reading of the tariff and further references to the tariff. The tariff speaks for itself. What it provides, the Pennsylvania holds itself out to perform. The witness has stated that he does not perform the service. That is the sum total of the story, I submit.

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Exam. Brown: I think it is of interest in this proceeding to know what the tariff provides. We cannot assume that a tariff provides something. It has to be in the record or proper reference to it.

Mr. Fitzgerald: I might state for the record that I understand that ex parte 168 is applicable to those rates as referred to that in that tariff. I do state that.

The Witness: The present unloading rate is $1.40 and the sorting charge is $4.92 per car.

Exam. Brown: At what point?

The Witness: At Pittsburgh.

Mr. Augello: $1.40 per ton?

The Witness: Yes.

By Mr. Fitzgerald:

Q. And that applies to all fresh fruits and vegetables? [fol. 1444] A. Everything which we are able to unload, sir.

Q. Now, at Pittsburgh, according to this tariff, the consignee does have the option of unloading at his own expense, does he not?

A. That is right.

Q. Now, Mr. Webb, it is true, is it not, to your knowledge, that some commodities commonly thought of as auction commodities, are unloaded in Philadelphia at B platform by the consignees, and in such case do not go through auction, and in such case are unloaded according to the customary practices at B platform?

A. You say unloaded by the consignees?

Mr. Fitzgerald: I may have said that inadvertently, Mr. Examiner.

Q. (Continuing) The point being that such cars are not delivered at A platform, but instead are placed alongside B platform and unloaded at B platform for sale other than through the auction?

A. Are you referring to Mr. Tredwell's cars?

Q. I am referring to citrus and other auction commodities.

Mr. Loos: If I may interrupt at this point, I think we

have a stipulation that will cover this subject, if it is agreeable to Mr. Fitzgerald.

Exam. Brown: Do you wish to go off the record and discuss it?

[fol. 1445] Mr. Fitzgerald: I should like to have an answer to this first.

Exam. Brown: All right, get your answer to the question.

The Witness: Well, frankly, with the discussion, I lost out. What is the question? I do not know what you want to know.

Mr. Fitzgerald: Well, I ask the Examiner's indulgence and ask that that question be reread.

Exam. Brown: All right.

(The reporter read the pending question.)

Mr. Miller: I submit, Mr. Examiner, that the witness is entitled to a clearer question than has as yet been given.

Exam. Brown: Off the record.

(Discussion off the record.)

Exam. Brown: All right, Mr. Loos.

Mr. Loos: I think you might take this. I hope it will be satisfactory.

It is agreed that the commodities unloaded on the A platform at Philadelphia are sorted by the carrier by sizes and brands so that each size (or sometimes two or more sizes as a group) and brand are in separate piles. These piles conform to the lines shown in the auction catalog. The commodities unloaded at the A platform include most of the citrus fruits and western deciduous fruits delivered at the Produce Terminal platforms and small quantities of asparagus and potatoes.

[fol. 1446] In the case of certain fruits, particularly grapes (which constitute a large part of the volume of western deciduous fruits) most of the arrivals contain a single brand without any variations in size and such cars require no sorting except the counting of specified numbers of packages into the several piles.

Commodities unloaded at B platform are not sorted by the carrier. These commodities include occasional cars of citrus

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fruits and western deciduous fruits and most of the asparagus and potatoes and all of the other fruits and vegetables received at the Produce Terminal platforms.

Exam. Brown: That stipulation has been agreed to by the protestants?

Mr. Loos: I think so, Mr. Examiner.

Exam. Brown: I hear no negative answer, so I assume that the protestants are agreeable to that and so stipulate.

Now, how about the respondents?

Mr. Miller: The respondents agree.

Exam. Brown: All respondents?

(No response.)

Exam. Brown: That will be considered as a stipulation then.

Mr. Fitzgerald: May I say for the record, Mr. Examiner, that inasmuch as the last paragraph of that stipulation clarifies the point to which my last two questions were directed, I withdraw those questions.

[fol. 1447] Exam. Brown: All right. Any further cross examination, Mr. Fitzgerald?

Mr. Fitzgerald: That concludes my cross examination.

Exam. Brown: You have concluded your cross examination?

Mr. Fitzgerald: Yes, sir.

Exam. Brown:

Mr. Hoffman.

By Mr. Hoffman:

Q. Mr. Webb, does carload freight consisting of fresh fruits move over the Pennsylvania lines and over the Chicago Belt line to the Chicago fruit auction?

A. I really cannot tell you whether it does or not. I really do not know.

Mr. Hoffman: No further questions.

Mr. Augello: I have a few questions.

Exam. Brown: Mr. Augello.

By Mr. Augello:

Q. Mr. Webb, I believe you testified on direct that vegetables were sold on the piers, is that correct?

A. I would not be surprised. That is my understanding generally.

Q. Do you know, for a fact, whether they are or not?

A. I have seen them sold there. I understand they are sold off the piers, too. But vegetables have to be sold somewhere, and we let the buyers enter a certain time in the morning for that purpose. I never bought any, but I know the procedure we go through to make them available.

Q. Well, were you thinking of tomatoes that you saw [fol. 1448] sold on the pier?

A. No. I just cannot get into any more detail, whether it is this or that. I said, in answer to Mr. Miller's question, I did not know, and I am not prepared to take any particular spot and tell you where we sell tomatoes or where we sell apples or where we sell grapes or anything else other than the definition given here today. Wouldn't that be satisfactory?

Q. Well, with your amendment, yes, but the way it stood before, I understood your answer to be that vegetables were sold on the pier.

A. Well, the last answer that I made to Mr. Miller was —and he asked me, I think, at Philadelphia—what is unloaded, and he may have asked sold—what is unloaded at a certain pier, and I said I did not know.

Exam. Brown: You said what?

The Witness: I did not know. I made that answer just before we adjourned.

By Mr. Augello:

Q. Were you talking about New York at that time?

A. I am talking about New York also, yes, sir.

Q. And your answer is that you do not know what vegetables are sold on the pier?

A. Put it that way, if you wish. That is okay with me.

Q. Or the percentage of vegetables?

A. Or the percentage, that is right, yes, sir.

[fol. 1449] Q. Do you have a knowledge of the percentage of the total fruits and vegetables unloaded on the pier; that is, related to vegetables alone?

A. I have no figures on that.

Q. Approximately, can you give an estimate?

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A. No, I would not approximate. I would not want to estimate; no, sir.

Q. You heard the testimony of Mr. Spangler and Mr. Volk, who testified about the unloading of thousands of cars on the piers of vegetables from the west and Florida, did you not?

A. I am not certain, but I certainly would not take objection to it.

Q. You would not take any objection to the statements that they made?

A. No, not at all; no, sir.

Q. Would you go so far as to say you subscribe to what they said?

A. Well, without knowing what they said, I could hardly subscribe to it, but if they made certain statements about the commodities they had unloaded on the piers, I would not say they were wrong because I do not know.

Q. You heard the statements that they made, that the vegetables were unloaded from the car on to the pier floor and immediately trucked from the pier to their store in Washington Market and sold there? Do you recall that statement?

[fol. 1450] A. I recall a statement of that kind being made, yes, sir.

Q. Do you also recall the statement in answer to my question whether that was the usual procedure of other consignees of vegetables, that it was? Do you recall that?

A. Well, I do not know that I heard that, no, sir.

Q. Will you tell us, for the record, approximately how many visits you have made to your piers 27, 28, 29, North River, in the past two years?

A. Oh, I would say maybe six or eight times.

Q. And at what time of the day was that?

A. Well, the last time I was down there was in the evening.

Q. What time in the evening?

A. From about 8 o'clock to 1.

Q. 8 to 1. That was the last time?

A. Yes.

Q. How about the previous time?

A. I would not know. I am all over this railroad. I have

got 1,500 stations, and I get to them as I can, and I do not keep any records for even my own reference of what hours I am at which station. These particular periods you are talking about are pretty big periods in our operations. We have got merchandise operations there as well as perishable and I am in and out just as often as I get around.

Q. You understand, of course, that vegetables are normally taken around 10 p.m. at night?

[fol. 1451] A. I have the hours here, and I saw them taking some vegetables the night I was down there, as a matter of fact, too. This is the market hours for the various kinds of freight.

Q. What time is early delivery?

A. Early delivery of the melons on eastern deciduous fruits, the last load arrives at 1:30; unloading completed at 3:20; sale at 3 a.m.

Q. That is melons and deciduous fruit?

A. Yes.

Q. I asked about vegetables. What time is the first delivery taken on vegetables?

A. Well, I am going to say that I saw it being taken at 10 p.m.

Q. That is correct.

A. That is what I thought it was.

Q. And after those vegetables are taken delivery of at 10 p.m., isn't that space used again for the placing of fruit for the auction market which is about five or six hours later?

A. Well, I can see where in certain conditions it would, yes. I really do not know whether it is or not, but I can see where it would be, because to handle this traffic we sometimes have to move so-called merchandise freight out of the way to make room for it, and we would be foolish if we could use that space and not take it.

Q. And to your knowledge, you have used that space for the second time, and in some cases, for the third time by [fol. 1452] placing dead freight during the day, is that correct?

A. No, I could not agree with that. It merely means that certain spaces that we have got assigned for dead freight, as you call it, are needed, and we have to move the dead

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freight off and put it somewhere else on the pier in order to make room for these commodities.

Q. Did you hear Mr. Pettit's testimony in the original hearing as to that?

A. No, sir, I did not hear Mr. Pettit's testimony. I read his testimony.

Q. You do not recall——

A. I will agree to anything that Mr. Pettit said as being absolutely correct.

Q. And if he said that that same space was used twice, and in some cases occasionally three times, you would agree to that?

A. You can rest assured that is right, yes, sir.

Exam. Brown: The question is whether you know or not.

The Witness: The answer is I do not know.

Exam. Brown: Let us say that and let us get ahead.

Mr. Augello: That is all.

Mr. Van Arnum: Mr. Webb, I have just one or two questions to clear up.

By Mr. Van Arnum:

Q. In your Baltimore station, how many years has it [fol. 1453] been since you leased all of the doors at the terminal?

A. Well, I have been in this eastern territory for about 14 years and it was my recollection that it has always been that way.

Q. Well, let us say within recent years hasn't it been the practice of the Pennsylvania Terminal in Baltimore to leave a certain number of doors open for those receivers who receive rail carloads on a seasonal basis?

A. I really would not know whether that is the regular practice or not.

Q. You would not know?

A. No, sir.

Q. At the present time, then, any receiver who has not obtained a lease space on a platform and receives carloads, must receive them in the yard and unload them in the yard; is that the situation today?

A. That is my understanding.

Q. That is the situation as it is today?

A. Yes.

Q. Are those spaces or those doors leased on an annual basis, a permanent basis, or term, or how?

A. Well, the rental is paid monthly, but I do not have the information about the extent of the lease, if I understand your question right, whether it is for a year, two years, or what it might be.

[fol. 1454] Q. That is right.

A. I do not know the terms of the lease.

Q. You do not know whether it is, as it used to be, for one year?

A. I do not know, but it would sound very reasonable to me because sometimes there are fluctuations and I know other situations do vary from year to year.

Q. But you do not know in this case?

A. No, I do not know.

Mr. Van Arnum: That is all.

By Mr. Matson:

Q. Mr. Webb, as manager of stations and motor service, is it your responsibility to see that the stations are operated efficiently?

A. That is my principal job, yes, sir.

Q. I understood so. Now, I believe that you were the witness in the Ex Parte 168 proceeding, were you not?

A. Yes, I was.

Q. And my recollection is that you stated that you were continually experimenting with new types of motor equipment and other facilities for the improvement of your stations?

A. Yes, sir.

Q. Now, you are familiar with the unloadings at both New York and Philadelphia, I presume?

A. Yes, sir.

[fol. 1455] Q. And what is the principal difference between the two operations?

A. The length of haul of the produce after it is put on the four-wheel trucks.

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Q. Is it longer at Philadelphia?
A. No, much shorter at Philadelphia.
Q. Shorter at Philadelphia?
A. At Philadelphia, the trucks come out of the car and the distance across the platform or to where the trucks go, where the freight is, we haven't even found it advisable to put tractors in there. But at New York, where it comes off the end of the floats and goes down on the piers, the tractors pull the trailers off the floats.
Q. What is the difference in the distances?
A. Well, I would say the distance in Philadelphia would be perhaps a minimum of 50 feet, and a minimum distance at New York would be perhaps the length of the float, plus, oh, I would say, seven or eight hundred feet, at least, to haul the freight.

Exam. Brown: That is the maximum distance?
The Witness: No, that is the minimum, sir.
Exam. Brown: You mean it would be a minimum of 700 feet from the time it left the car and the time it reached its allotted place on the floor?
The Witness: Yes.
[fol. 1456] Exam. Brown: Well, then, what would be the maximum?
The Witness: Well, the maximum could be a couple thousand feet—oh, not a couple thousand feet—fifteen hundred feet, though.
Exam. Brown: Five hundred yards?
The Witness: Yes, down off the float and up around up the pier. The piers are over 1,000 feet long after you hit them, and you have got a big bulkhead in front of that.

By Mr. Matson:

Q. Are you also familiar with the Baltimore and Ohio operations in New York and Philadelphia?
A. No, I am not familiar with them.
Q. Would you state whether the pier operation in New York would entail any different distances for the Erie or Baltimore and Ohio and New York Central than your operation does?
A. Frankly, I could not tell you, sir.

Mr. Miller: Objection—go ahead.

A. (Continuing) I said frankly I could not tell you, sir.

By Mr. Matson:

Q. And at Philadelphia, would you answer the——

Exam. Brown: Will you state that again? We had an objection over here that we were disposing of.

Mr. Matson: The witness said he did not know.

Exam. Brown: Now, I did not hear your next question, nor did Mr. Miller.

By Mr. Matson:

Q. The next question is, does the witness know with [fol. 1457] respect to the Philadelphia operations at the two terminals?

A. Well, it has been a good many years since I have been at the Baltimore and Ohio terminal. I would prefer to just say that I do not know because I do not know too much about their operations down there.

Mr. Matson: What prompts me to ask these questions is that I am completely mystified as to the reason why the New York operation of the Pennsylvania should cost so much more than the Philadelphia operation of the Pennsylvania and for the New York operation which is motorized, and contrariwise, in Philadelphia, the motorized operation of the B&O appears to be more costly than the Pennsylvania.

The Witness: Well, where are you getting your information from about the relative costs?

Mr. Matson: From the cost exhibits placed in evidence at the original hearing and at this hearing by the railroad witnesses. I am not asking any questions as to the measure of the cost. I want that understood. I am not going into that at all.

Mr. Miller: I think the record should show that there is no question before the witness at this time.

Exam. Brown: It sounded like a question to me. Didn't you ask a question? Wasn't that intended as such?

Mr. Matson: I was just stating that I was mystified.

[fol. 1458] Exam. Brown: You are just making a statement.

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Mr. Matson: Now, I would like to ask the witness a question.

By Mr. Matson:

Q. Can you explain the apparent discrepancy or mystery why there is such a situation; why does it exist?

A. Between the Pennsylvania at Philadelphia and the Pennsylvania at New York?

Q. Yes.

A. Well, pier operations are the most costly operations that you can get in the handling of traffic of any type, meaning now where freight has to be moved on and off the floats.

On our New York operation, as was testified here by Mr. Pettit, these floats go in, head in against the pier, and the little trucks have to come down over the end of the float and be taken, maybe moved right back past the float to get where they want to go, where at Philadelphia it is an operation from a track to a platform, a normal station operation. The New York operations are abnormal from the viewpoint of efficient freight.

Q. You mean New York operations are unique. There is nothing else like it in the country?

A. Well, no, I do not know of anything else. I think all the float operations are practically discontinued, certainly here on the eastern seaboard.

Q. Now, with respect to increasing the efficiency of these [fol. 1459] operations, what have you done in the last two years in either Baltimore or Philadelphia?

Mr. Miller: Objection, Mr. Examiner. The witness said the procedure was exactly the same.

Exam. Brown: I do not understand your objection.

Mr. Miller: Well, we are now going over and over again the same ground which was gone over two or three times at the preceding hearing, and this witness has stated that the description of the operation in 1947 is the description of the operation today.

Now, there is just no good purpose to be served by going over again through the detailed description that we have already covered two or three times.

Exam. Brown: The question is now what has this witness done to improve the operation?

Mr. Matson: Yes, sir.

Exam. Brown: Now, the witness has previously testified that the operations are the same, so isn't your question answered by that?

Mr. Matson: I submit, Mr. Examiner, that we have a very responsible witness from the Pennsylvania Railroad, a very high officer, whose principal duty is to increase the efficiency of these operations, and I would like to know what he has done. I assume he has done something in the last two years.

[fol. 1460] Exam. Brown: How are you going to hook that in with the issues in this proceeding?

Mr. Matson: That would come under Section 15A.

Mr. LaRoe: Isn't it answered by his statement that the operations are the same now as they were before? That would seem to indicate no change of any kind.

Mr. Goldsmith: Nothing was done.

Exam. Brown: Well, has there been any change? You can answer that without any difficulty, can't you?

The Witness: Mr. Examiner, I can answer it, yes or no, but I would ask your consideration is not asking me to answer it that way because it requires an explanation.

Exam. Brown: I will be glad to have you give the explanation. I do not think it is going to hurt the record one way or another, except as counsel states, it might have some bearing in 15A.

The Witness: I have said, and I am right, that on the perishable unloading operations they are being conducted in the same way that they were done in 1947. But that is not true of general unloading operations. The point is that while we have found no way to further mechanize the operations at piers 27, 28, for example, at pier 29 or Desbrosses Street, which is a continuation of the same operation, we have, I believe, a mechanism in the handling of equipment that is percentage-wise on a par with that of any [fol. 1461] industry or any railroad that has attempted to mechanize. We have a facility there where we receive outbound carload traffic in packages.

I will take the small packages of rubber, where, when the rubber comes in on the pier on a truck, it is placed in a small two open-end—both ends open—box about four feet

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high, and a lift truck lifts that off of the truck, the motor truck, and takes that container of rubber into the car and stows it in the car, pushes it out of the small container we use and places it in the car, making it conditional whereby one man will load an entire car of rubber which is, from my knowledge of the situation, and I try to keep up to date on that, about as far as anybody has been able to go.

Exam. Brown: That is interesting, but let us confine our discussion to fruits and vegetables.

The Witness: All right. Now, at this pier, where we unload these fruits and vegetables, and we do that the same way as we did in 1947, we place our gang planks—one man with a lift truck will place a gang plank in position, that it took two gangs of five or six men 15 or 20 minutes to place in position, say three or four years ago.

Now, my point is that we have endeavored in every way we know how to mechanize every part of our operation, and as new equipment comes on the market, we buy it, we use it, but we have found nothing that will enable us to mechanize [fol. 1462] the perishable operation beyond that which we have done now. We cannot use pallets.

Mr. Miller: Mr. Examiner, in this connection I would like to call your attention to the figures of improved efficiency which Mr. Heywood put in this record this morning, showing that very substantial improvements have been made in both operations.

Exam. Brown: Mr. Heywood's testimony will be given proper consideration.

Mr. Matson: Mr. Heywood's figures show—and I am using these figures for their relative value only; I am not attacking the measure of the charge—Mr. Heywood's figures show that the cost of unloading top-iced vegetables is now $4.11 a ton, as compared with $4.24 two years ago, which is some improvement.

Mr. Miller: I was not talking about those figures. Those are not figures as to efficiency. Those are figures as to cost. Mr. Heywood did place in the record the figures pertaining to tons handled per man hour.

Mr. Matson: Well, I am talking about these.

By Mr. Matson:

Q. Now, for unloading the same type of vegetables, the Erie cost study now shows a cost of $2.51 as compared with $2.05 two years ago, and I understand from the testimony that that is a hand truck operation.

Now, I am asking you, have you, and if not, why not, [fol. 1463] considered going back to hand truck operation in lieu of this motorized operation in New York?

A. Well, I would certainly hestitate to even recommend something of that kind because when you unload a freight by hand truck from a carfloat, you go down over the side of the float on what we call gang planks.

Q. Yes?

A. When you have a tide unusually high, you have got to put ropes on the men to hold them back. You have got to either rope the man or rope the hand truck, and if you rope the man the hand truck goes down in front of him, and unloading of any freight in volume over the side of a carfloat is a tremendously unsafe job from our point of view, and I will say very frankly we are doing everything we can to improve the safety of our men.

Q. Well, do you mean to say that you are more humane in that respect than the other railroads who have these operations on the same river within a few yards of your operation?

A. No. I know nothing about what their situation is, but I do know this, that there aren't two pier operations where your problems are identical.

Q. I guess that is enough on that point. I should like to ask you one more small question: that is about this Pittsburgh operation, where the consignees are permitted to perform their own unloading. Are they limited to team-[fol. 1464] track delivery in that, or can they unload on platforms?

A. They can unload on the platform if they so desire, but I testified that they did not seek that privilege. They wished the railroad to unload the freight for them.

Mr. Matson: Thank you; that is all.

Exam. Brown: Any further cross examination of this witness?

(No response).

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Exam. Brown: Any redirect?
Mr. Miller: No, sir.
Exam. Brown: That is all, sir; you are excused.

(Witness excused.)

Exam. Brown: Any other testimony on behalf of the protestants? I assume you are through with your case?
Mr. Miller: Yes, sir.
Mr. LaRoe: Yes, sir, I should like to call Mr. Laux, please.

Edward K. Laux was recalled and testified further as follows:

Direct examination.

By Mr. LaRoe:

Q. Mr. Laux, did you hear the testimony of Mr. Webb?
A. I did.
Q. Regarding the encouraging of team tracks in New Jersey, in lieu of the pier station service?
[fol. 1465] A. I did.
Q. In your judgment, would that operate as a convenience or inconvenience to the public at wide?
A. I think it would operate to an inconvenience to the public.
Q. In what manner?
A. For the simple reason that the vast majority of vegetables and fruits that are consumed are consumed east of the Hudson River.
Q. Is there an economic reason why the produce markets are located on the west side of Manhattan, as they are?
A. I believe there is, yes, sir. It is mainly because of the location of the markets and the consuming public.
Q. In your judgment, would the location of the markets change if the railroads should succeed in getting more of the deliveries made on the New Jersey side?
A. Definitely so. I think it would have a tendency to dislocate and scatter the markets.
Q. Assuming that the markets stayed where they are,

would a truck haul be involved to get the material over here?

A. Yes, sir.

Q. Would you describe that truck haul?

A. Well, the trucks ordinarily that handle the market freight are centered in the lower west side and, of course, to unload on the Jersey side, such as at the Henderson Street yard or Ball Ground they call it, Waldo yard, and I [fol. 1466] believe the Erie has a yard over there, too, would mean that the truck would have to leave lower Manhattan, use the ferry boat or the Holland Tunnel, and perhaps cover a distance of about three miles. Now, that may take at best about 20, 25 minutes, perhaps another half hour, to locate the car and unload the car and load his truck, and perhaps another hour and a half would be entailed to get the truck back to the market.

In other words, it may consume at least three hours, and in addition, I am sure it would cause congestion and delays.

Q. How about the yard that is said to be located at a mile and a half west of the other yard? Would that involve still more transportation?

A. It would. It probably would increase the length of time by another 15 or 20 minutes, too.

Q. Have the rather elaborate plans which the Port Authority has made with respect to the improvement of this terminal situation here, for the handling of fruits and vegetables, and which, I believe the record shows to involve a potential expenditure of 27 million dollars, assumed the continuance of the pier station service?

A. It did, yes, sir, and I think that is in line with the thoughts of, not alone the Port of New York Authority with regard to our development plans, but also the thoughts of the City of New York.

Q. Well, if the railroad should succeed in inducing the [fol. 1467] traffic to go across to New Jersey, would that not disrupt the plans of both the Port Authority and the City?

A. It certainly would.

Mr. LaRoe: That is all.

Mr. Goldsmith: Just one question, Mr. Laux.

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By Mr. Goldsmith:

Q. On the question of the time that you gave, three hours, was that under favorable traffic conditions?
A. I would say most favorable traffic conditions.
Q. Most favorable?
A. Yes.
Mr. Goldsmith: That is all I have.

Exam. Brown: Any further direct examination?
Mr. Fitzgerald: Not of this witness.
Exam. Brown: Any cross examination?
Mr. Miller: No, sir.
Exam. Brown: All right, Mr. Laux.

(Witness excused.)

Mr. LaRoe: Is Mr. Papa here? Will you take the stand, Mr. Papa, briefly?

Joseph G. Papa was recalled and testified further as follows:

Direct examination.

By Mr. LaRoe:

Q. Did you hear the testimony of Mr. Webb regarding the discouraging of pier station service and the encouraging of team-track deliveries on the New Jersey side of the [fol. 1468] Harbor?
A. I certainly did.
Q. In your opinion, would that operate to the convenience or inconvenience of the public, and in what way?
A. That would operate to the inconvenience of the public.
Q. Explain.
A. The operation, as it is now, provides that the trucks take the merchandise from the New York side and deliver it on the New York side, where most of it is delivered. In addition to that, if they are compelled to take delivery over in New Jersey, there is the inherent loss of time as a result of delays at ferries and at tunnels, and overtime payments to the employees because of that loss of time.

In addition to that, the railroads in New Jersey perform no services at all for them. We must go in and get the stuff ourselves right out of the cars.

Q. If the markets stay where they are, that would involve bringing the freight back to these markets, would it not?

A. It most certainly would. In addition to that, it would maintain that employment which we saw jeopardized when this order first went into effect, and we permitted——

Q. Would there be any tendency for——

A. Let me finish that.

Mr. Smith: The witness wants to finish his answer.

Mr. LaRoe: I am sorry.

[fol. 1469] Exam. Brown: Read what you have of the witness's answer.

(The reporter read the witness's last answer.)

A. (Continuing) We permitted these receivers to make their pickups in New Jersey in order to keep them in business and avoid paying that additional charge, but when we discovered the objectives of the railroads in moving this whole business over into New Jersey, we could not for a moment tolerate that any longer because what has not been injected in this whole proceeding here is this human element. All along here we have been talking about commodities; we have not been talking about human beings at all.

Exam. Brown: When you say you could not tolerate it any longer, what did you mean by that?

The Witness: I mean that your contracts provide that we, from time to time, may make certain rules or regulations governing the physical movement of these commodities wherein the union might feel that the employment security of his member is in jeopardy.

Exam. Brown: You are speaking for your union now when you said you could not tolerate it any longer?

The Witness: Yes, because our members were unemployed.

Exam. Brown: And what did you do when you——

The Witness: We met with the receivers and told them that effective a certain date we would not pick up any merchandise in New Jersey.

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[fol. 1470] Exam. Brown: All right.

The Witness: That is what we did.

By Mr. LaRoe:

Q. Is there any tendency that you notice now for the people on the New York side who handle this stuff to threaten to go over to New Jersey or to actually go over there?

A. Those poor people, these receivers with these unloading charges, there is a constant stream of telephone calls and personal visits to my office to talk to me directly, constantly pleading to be permitted to go back and pick up the merchandise in New Jersey in order to avoid paying this additional charge, and if they continue to pay this additional charge they are out of business, and some have already gone out of business.

Q. Have you any illustration of that?

A. Yes. I want to show you here—just a few minutes ago or a half an hour ago I telephoned the office. I had some message given to me over the phone. In addition to that, I was told there is a telegram here addressed to me as president of Local 202 from Mark Yeckes of the firm of Yeckes Eichenbaum, and this is only one of the many such requests, and pleas, either by phone or by personal visits. I asked that that be sent over, and Mr. Michael Murray, our business agent, who supervises the purveyors, brought it to me. He is here now.

It says: "It is imperative to the life of our business to change our present method of operating. Unloading charges on Penn, B&O, and Erie piers in New York now cost us approximately two thousand dollars per week. We must [fol. 1471] start unloading and riding from Jersey side as quickly as possible in order survive. We must have and request your immediate cooperation."

And it is signed Mark Yeckes, of the firm of Yeckes Eichenbaum.

Mr. Examiner and gentlemen, that is one of our largest companies, employing about 150 of our people from office workers all the way down the line to all those I mentioned yesterday.

Mr. LaRoe: That is all I have.

Exam. Brown: Take the stand, Mr. Ward.
Mr. Fitzgerald: Mr. Ward, you may be seated; you have been sworn.

[fol. 1473] D. W. Ward was recalled and testified further as follows:

Direct examination.

By Mr. Fitzgerald:

Q. Mr. Ward, you were present during Mr. Webb's testimony on direct?

A. Yes, sir.

Q. And you heard him testify to the effect that no one in Philadelphia prior to November 1, 1948, had unloaded his own commodities with his own labor at B platform except that Mr. Tredwell might have unloaded from one to two cars per month. I believe that is a fair summary of his testimony. Did you hear him so testify?

A. That was my understanding of his testimony.

Q. Now, you have testified on direct, Mr. Ward, that you have an intimate and long-standing acquaintance with and knowledge of the operations at the Pennsylvania Produce Terminal; is that correct?

A. That is right.

Q. How often are you present at the Pennsylvania Produce Terminal?

A. I am at the Produce Terminal each day.

Q. And during the past two years, have you had occasion to be there each day on an average, each business day, on an average?

A. That is right.

[fol. 1474] Q. And during the past two years, have you had occasion to observe the operations on B platform with particular reference to Mr. Tredwell's operations in unloading his own potatoes?

A. During each of those days I have made observations on the platforms and I have, during that time, acquainted myself with Mr. Tredwell's operation.

Q. To your knowledge, how many cars each week does Mr. Tredwell or did Mr. Tredwell, prior to November 1,

By Mr. Augello:

Q. Mr. Papa, do you know what the total unloads of fruits and vegetables on Pennsylvania piers for the period November 1, 1947, to November 1, 1948, were? Have you got those figures with you?

A. Yes, I have.

Q. Have you got a breakdown between fruits and vegetables.

A. Yes.

Q. Will you give us the fruit first?

A. November, 1947?

Q. To November, 1948.

Mr. LaRoe: Just the total.

A. Fruit, 16,023.

Q. 16,023, and what is the total of the vegetables during the same period?

[fol. 1472] A. 15,356.

Q. 15,356. So that vegetables represent approximately about 50 percent of the total unloads at Pennsylvania piers 27, 28 and 29?

A. Yes.

Mr. Augello: That is all.

Mr. Miller: Your figures include 13 months, do they not, Mr. Papa?

The Witness: 13 months, November to November.

Exam. Brown: Any further direct examination of Mr. Papa?

(No response)

Exam. Brown: Any cross examination?

Mr. Miller: No, indeed.

Mr. Smith: No questions, sir.

Exam. Brown: That is all.

(Witness excused).

Exam. Brown: We will have a short recess.

(A short recess was taken.)

Mr. Fitzgerald: Mr. Examiner, I wish to recall Mr. Ward briefly.

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1948, unload at B platform with his own labor or at his own expense?

A. To the best of my knowledge Mr. Tredwell unloaded on an average of five to six cars per week during the potato season, which would be starting about August, when the western potatoes came in, carrying through to the conclusion of the Maine deal.

Q. To your knowledge, during that time, did any other receivers of potatoes in Philadelphia make use of the same facilities in a similar manner?

A. There were other receivers who made use of the same facilities, but not to the extent that Mr. Tredwell did.

Q. Will you name such receivers who, to your knowledge, did so use the facilities?

A. From my observation, I have seen receivers such as Dan Storie, I. Kallish, I. Klein. They are the ones that I can testify to now.

Q. Did you ever observe Westcott & Company?

A. Yes, that is another one that I forgot to mention.

[fol. 1475] Q. And I believe Mr. Sherman is the principal of that concern?

A. That is correct.

Q. I understand from your testimony that these men you have named use this facility to a much lesser extent than did Mr. Tredwell?

A. That is correct.

Q. Now, Mr. Ward, directing your attention to that part of Mr. Webb's testimony in which he referred to the facilities of team track adjacent to the Pennsylvania Produce Terminal, do you know whether daily reports are made, and, if so, by whom, covering the cars arriving at, unloaded at, and held at the Pennsylvania Produce Terminal?

A. I do.

Q. Will you explain?

A. Daily report of track arrivals and track holdings and unloads at the Pennsylvania Produce Terminal's facilities is made by the agent at the Pennsylvania Produce Terminal and turned over each morning to the United States Department of Agriculture for their use in dissemination of figures as to total receipts in Philadelphia.

Q. Does a copy of that daily report come into your possession and, if so, how?

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A. A copy of the daily report comes into my possession through the office of the United States Department of Agriculture. It is picked up from the Department of Agriculture's office and the information contained thereon is phoned [fols. 1476-1612] to receivers of our association after the market has opened.

[fol. 1613] Proceedings of June 4, 1951

Statement by Examiner Walsh

Exam. Walsh: By notice of November 16th, 1950, specifically assigning the proceeding for further hearing at this time and place, the Respondents were directed to prepare in writing the evidence specified in the notice of October 10, 1950, and to furnish copies thereof to counsel for Protestants and to the Commission, not later than April 16, 1950, and Protestants were directed to prepare in writing their rebuttal of Respondents' evidence and such further evidence as they may deem appropriate and to furnish copies thereof to the counsel for Respondents and to the Commission not later than May 16, 1951.

In this proceeding by schedules to have become effective June 1, 1947, respondents proposed to establish charges for unloading carload shipments of fruits and vegetables at New York, N. Y., and Philadelphia, Pennsylvania. Upon protests by numerous parties, including the Port of New York Authority, operation of the schedules was suspended. Hearings were held and the parties were heard in oral argument and reargument.

[fol. 1614] No proposed report was served. In its report of October 4, 1948—that was a final report—the Commission found the proposed charges just and reasonable and vacated the Order of Suspension and discontinued the proceeding.

The proposed unloading charges as subsequently increased became effective November 1, 1948.

Upon further consideration of the record in this proceeding and upon consideration of numerous petitions for reopening and reconsideration, the proceeding was reopened for rehearing.

Hearings were held and the proposed report on rehearing was on June 5, 1950, served on the parties.

Exceptions to the proposed report were filed and the parties were heard in oral argument.

By notice dated October 10, 1950, the Commission, upon further consideration of the record in this proceeding and upon it appearing that the record was deficient in respect of certain evidence which seemed to be important, assigned the proceeding for further hearing for the introduction of such evidence, to which we have earlier referred.

Is that an outline or a resume of the proceeding up to now?

Mr. LaRoe: That is a correct resume of the proceeding up to now. The only thing that I would add will be added later as to specifically what information the Commission did call for, because that will prove to be important as the case develops.

Exam. Walsh: Is that statement agreeable to respondents?

[fol. 1615] Mr. Smith: It sounded correct to me.

E. A. Hodkinson was recalled, having previously been sworn, and testified as follows:

Redirect examination.

By Mr. Smith:

Q. Please state your name and business address.

A. E. A. Hodkinson, 1 Park Avenue, New York 16, New York.

Q. Have you distributed to the Commission and all parties prepared testimony and certain exhibits referred to [fol. 1616] therein?

A. Yes, I have.

Q. Will you proceed to identify your exhibits so they may be given numbers for identification?

Exam. Walsh: The first exhibit will be No. 136.

The Witness: Exhibit 136 is supplemental to Exhibit *136*. It is headed "Fresh Fruits and Vegetables not Frozen, comparison of Revenue Car Freight Terminated, U. S. versus Eastern District."

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(Respondents' Exhibit No. 136, Witness Hodkinson, was marked for identification.)

The Witness: Exhibit 137 is a single page exhibit, a statement showing the number of carloads of fresh fruits and vegetables terminated in the United States, and the Eastern District, respectively, for the years 1947-48 and 1949.

Exam. Walsh: That will be 137 for identification.

(Respondents' Exhibit No. 137, Witness Hodkinson, was marked for identification.)

The Witness: 138 is a statement showing number of carloads of fresh fruits and vegetables terminated at New York and Philadelphia, respectively, for the years 1947, 1948, and 1949.

(Respondents' Exhibit No. 138, Witness Hodkinson, was marked for identification.)

The Witness: Exhibit 139 is a one-page exhibit, supplemental to Exhibit 114. That shows at the top right-hand corner of the exhibit, being a statement showing the railroad and consignee unloadings for the period November 1, [fol. 1617] 1947 to August 31, 1948.

(Respondents' Exhibit No. 139, Witness Hodkinson, was marked for identification.)

The Witness: Exhibit 140 is a one-page exhibit. That was corrected. The original exhibit was corrected because of an error in the number of carloads that I have shown as to some of the commodities. I assume you all have the corrected exhibit. They are in the sets that I have distributed this morning.

This exhibit shows the unloadings of fresh fruits and fresh or green vegetables at pier stations in New York City for the first eight months of the year 1948, 1949, and 1950.

(Respondents' Exhibit No. 140, Witness Hodkinson, was marked for identification.)

The Witness: Exhibit 141 is a 24-page exhibit, supplemental to Exhibit 115, and it shows the auction prices for wholesale lots only on fresh fruits and fresh vegetables at New York City for the seasons 1949, 1950 and 1951.

(Respondents' Exhibit 141, Witness Hodkinson, was marked for identification.)

The Witness: Exhibit 142 is a three-page exhibit. This is supplemental to Exhibit 117. This exhibit shows the auction or private sales prices for wholesale lots only on fresh fruits and vegetables at Philadelphia.

(Respondents' Exhibit 142, Witness Hodkinson, was marked for identification.)

[fol. 1618] The Witness: Exhibit 143 is a three-page exhibit. It is supplemental to Exhibit 118. It shows the auction or private sales prices for wholesale lots only on fresh fruits and vegetables at Philadelphia.

(Respondents' Exhibit No. 143, Witness Hodkinson, was marked for identification.)

The Witness: Exhibit 144 is a three-page exhibit. It is supplemental to Exhibit 119 and it shows the retail range of prices for fresh vegetables at New York City.

(Respondents' Exhibit No. 144, Witness Hodkinson, was marked for identification.)

The Witness: No. 145 is supplemental to Exhibit 120. It is a three-page exhibit. It shows the retail price range for fresh fruits at New York City.

(Respondent's Exhibit No. 145, Witness Hodkinson, was marked for identification.)

Mr. Smith: Mr. Examiner, I would like to suggest that Mr. Hodkinson's testimony be copied into the record as though read and if that is agreeable I would like him to leaf through his testimony and indicate what numbers should go in for the various blanks for the exhibits.

Exam. Walsh: Very well.

The Witness: My name is E. A. Hodkinson. I am employed by the Traffic Executive Association—Eastern Railroads as Manager, Trunk Line Commerce Bureau, and I am located at One Park Avenue, New York 16, New York. [fol. 1619] I was a witness at the two prior hearings in this proceeding. I have prepared the following exhibits:

Exhibit 136 is supplemental to Exhibit No. 113 which shows as to Fresh Fruits and Vegetables, not frozen, for

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the years 1946, 1947, and 1948 the total number of cars terminated in the United States and the Eastern District, respectively, and the percentage of the United States total terminated in the Eastern District.

For convenient reference I have reproduced those percentages for the years 1946, 1947, and 1948 in the instant Exhibit and have added the figures for the year 1949, which is the latest year available.

It will be noted that as to the commodities particularly involved in this proceeding the Eastern District is holding its own. Dealing with the total fruits and vegetables shown on this Exhibit, the Eastern District terminated 51.8 per cent of the total cars terminated in the United States for the year 1948, and 49 per cent of the total cars terminated in the United States for the year 1949.

However, as to some of the principal commodities involved in this proceeding, such as Citrus Fruits, Groups 59 and 61, there was an increase in the Eastern District in 1949 over 1948. Cantaloupes and Melons remained about the same as did also Fresh Grapes. Fresh Fruits, MOS, not frozen, were slightly up, and Vegetables, fresh, not frozen, were down 1.6 percentage points. Celery and Lettuce were both up.

[fol. 1620] Exhibit 137 is a statement showing the number of carloads of fresh fruits and vegetables terminated in the United States and the Eastern District, respectively, for the years 1947, 1948, and 1949.

In this exhibit I have treated the terminations in 1947, as constituting 100 per cent and have shown the percentage of increase or decrease in the number of cars terminated in the United States and the Eastern District, respectively, in 1948 and 1949 as compared with 1947.

Dealing with all fruits and vegetables covered by the exhibit, there was a decrease of 5 per cent in the number of carloads terminated in the United States in 1948 as contrasted with the 1947 figure.

For the Eastern District the decrease was 3.7 per cent. In 1949 there was a decrease of 17.5 per cent in the carloads terminated in the United States under 1947 terminations, and for the Eastern District the decrease was 20.8 per cent 1949 versus 1947. However, as to Citrus Fruits it will be noted that for the United States there was a decrease of

16.3 per cent 1948 versus 1947, whereas for the Eastern District the decrease was only 10.4 per cent. In 1949 for the United States the decrease for citrus fruits was 39.5 per cent, whereas for the Eastern District it was only 34.6 per cent.

Vegetables, fresh, not frozen, show a decrease for the United States 1948 versus 1947 of 10.5 per cent whereas the decrease for the Eastern District was only 7.9 per cent, and [fol. 1621] 1949 the decrease for the United States was 24.6 per cent whereas for the Eastern District it was only 24.4 per cent.

Celery 1948 for the United States showed an increase of 5.4 per cent over 1947 and for the Eastern District the increase was 8.1 per cent. In 1949, for the United States there was a decrease of .7 per cent whereas for the Eastern District there was an increase of 4.2 per cent.

Coming now to New York and Philadelphia, the points involved in this proceeding, I have shown on Exhibit 138 the number of carloads of the various fruits and vegetables for the years 1947, 1948, and 1949, and have considered the 1947 receipts as constituting 100 per cent. I have then shown the percentage of increase or decrease in 1948 and 1949 versus 1947. In 1948 the decrease at New York was 7.6 per cent on all fruits and vegetables and in 1949, 19 per cent. At Philadelphia there was a slight increase of .3 per cent 1948 versus 1947, and a decrease of 8.9 per cent 1949 versus 1947.

Dealing more specifically with the commodities involved in this proceeding, as to citrus fruit for 1948 at New —— there was an increase of 10.7 per cent over the 1947 receipts, this despite the fact that there was a decrease in the number of carloads of citrus fruits terminated in both the United States and the Eastern District in 1948 as compared with 1947. In 1949 there was a decrease of 14.1 per cent in the carloads of citrus fruits terminated in New York as con- [fol. 1622] trasted with a decrease of 39.5 per cent for the United States as a whole and 34.6 per cent for the Eastern District.

At Philadelphia the carloads of Citrus Fruit terminated in the year 1948 were 10.8 per cent in excess of the cars terminated in 1947 as contrasted with a decrease of 16.3 per

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cent for the United States and 10.4 per cent for the Eastern District.

In 1949 the carloads of Citrus Fruit terminated in Philadelphia were 12 per cent below the carloads terminated in 1947. However, for the same year 1949 versus 1947 the decrease for the United States was 39.5 per cent and for the Eastern District 34.6 per cent.

Exhibit 139 is supplemental to Exhibit No. 114. For convenient record I have reproduced the figures in that exhibit showing receipts at New York and Philadelphia, November 1, 1947 to August 31, 1948, and November 1, 1948 to August 31, 1949.

In the present exhibit I have added the figures for the period November 1, 1949 to August 31, 1950.

At New York for the period November 1, 1948 to August 31, 1949, 42,216 cars, constituting 63 per cent of the total rail receipts were unloaded by rail carriers. For the period November 1, 1949 to August 31, 1950, the ratio is practically the same, 34,114 cars, constituting 62.8 per cent of the total rail receipts, were unloaded by rail carriers.

At Philadelphia, 30.3 per cent of the total receipts were [fol. 1623] unloaded by rail carriers during the period November 1, 1948 to August 31, 1949, while for the period November 1, 1949 to August 31, 1950, 7,763 cars, constituting 26.7 per cent of the total rail receipts, were unloaded at Philadelphia by the rail carriers.

Exhibit 140 shows carloads of fresh fruits and vegetables unloaded at pier stations in New York City for the first eight (8) months of the years 1948, 1949, and 1950.

This Exhibit also shows the number of carlot equivalents of citrus fruits received by boat in New York City November 1, 1949 to August 31, 1950. There were no boat receipts subsequent to June 1950.

Exhibit 141 supplements Exhibit No. 115 and shows auction prices (for wholesale lots only) for fresh fruits and fresh vegetables at New York City for the part of the seasons of 1949, 1950 and 1951.

In common with the similar Exhibit filed at the prior hearing, No. 115, this present Exhibit shows the wide range of auction prices from day to day, week to week, and month to month.

As examples, Page 7 (which covers Grapefruit) shows

prices on California Grapefruit ranging from a low of $2.40 per box on July 5, 1950, to a high of $9.00 per box on July 26, 1950, a difference of $6.60 per box of approximately 90 pounds, which is equivalent to 7.3 cents per pound. The unloading charge is less than a mill per pound.

[fol. 1624] Page 16 covers oranges and shows a range of $3.00 to $8.00 per box.

Page 9 covers lemons and shows a range from $2.00 to $9.50 per box.

Page 4 covers carrots and shows as to Texas receipts a range from $2.50 to $5.75, January 1950, and from $4.00 to $6.00 January 1951.

Prices for California Carrots are shown for July 1950, and the range was from $1.50 to $7.00 per box. Similar ranges obtained as to other fruits and vegetables, and as I stated previously, there was a wide range of prices on the same day. Take Texas Carrots again, Page 4, January 23, 1950; low $2.50, high $5.75 per box.

Ranges over $1.00 per box or per unit generally prevailed as to the commodities covered by this Exhibit.

Exhibit 142 supplements Exhibit No. 117 and shows auction or private sales prices (for wholesale lots only) on fresh fruits and fresh vegetables at Philadelphia in June 9th to 15th, 1950. This exhibit also shows range in prices for the commodities listed therein.

Exhibit 143 supplements exhibit No. 118. It is similar to that exhibit and the exhibit I have just dealt*h* with, since it also shows price ranges at Philadelphia. It covers the period August 9th to 15th, 1950.

Exhibit 144 supplements Exhibit No. 119. It shows the retail price range on fresh vegetables at New York City for [fol. 1625] the year 1950, and for January, February, and March 1951.

In compiling this statement, we used the second weekly release for each month. This exhibit shows a range in prices far in excess of the unloading charge. As examples:

Lima Beans—

Low 9 cents; high 35 cents per pound in 1950.

Low 19 cents per pound; high 35¢ per pound 1951.

The unloading charge for top iced vegetables is 1.3 mills per pound.

Carrots—

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Low 7½ cents; high 17 cents per bunch ¾ to 1¼ pounds in 1950.

Low 9½ cents; high 19 cents per bunch in 1951.

The unloading charge is 1.3 mills per pound.

Lettuce—

1950—Low 7 cents; high 29 cents per head.

1951—Low 10 cents; high 29 cents per head.

The unloading charge would be about 2.6 mills per head.

Similar ranges prevailed as to other vegetables, such as cucumbers, peas, peppers, tomatoes.

Exhibit 145 supplements Exhibit No. 120. It is similar to the exhibit I have just introduced, except that it deals with fresh fruits.

Here again there was a wide range in retail prices. [fol. 1626] Grapefruit ranged from 7 cents to 19 cents per pound in 1950, and from 7 cents to 15 cents in 1951. The unloading charge is less than a mill per pound.

Cantaloupes ranged from 10 to 29 cents per pound in 1950. The unloading charge is 1.3 mills per pound.

Lemons ranged from 13 cents to 39 cents per pound in 1950 and from 15 to 28 cents in 1951. The unloading charge is 1.3 mills per pound.

Oranges, California, ranged from 49 cents to $1.00 for five (5) pounds in 1950, and from 50 cents to 95 cents in 1951. The unloading charge would be less than half a cent.

Oranges, Florida, ranged from 33 cents to 65 cents for five (5) pounds in 1950, and from 35 cents to 65 cents in 1951.

The unloading charge would be less than half a cent for five (5) pounds.

Mr. Smith: That completes Mr. Hodkinson's testimony, Mr. Examiner.

Exam. Walsh: Cross examination.

Mr. LaRoe: No questions.

Exam. Walsh: Any questions of this witness in cross examination?

Mr. Wells: I have a few, Mr. Examiner.

Exam. Walsh: Mr. Wells.

Recross-examination.

By Mr. Wells:

Q. Mr. Hodkinson, will you turn, please, to page 7 of [fol. 1627] your exhibit No. 141? What is the significance of the fact that you show the high and the low prices for particular dates and do not show averages?

A. I haven't shown any average price anywhere, Mr. Wells, and for a matter of quick viewing I underlined the low price in both columns and the lowest low price, and the lowest high price in each column.

Q. You do not anywhere in the exhibit show what were the averages on particular dates or particular weeks, do you?

A. No, sir.

Q. Do you know that the particular price that you do show in many instances is incorrect?

A. No, I don't know that because these are the prices that we took from the source for those prices which I have shown you and had the average prices been available either for the day or the week, I would have shown them.

Q. You don't know that the average prices are available?

A. They weren't in the publications that I looked at, but the whole purpose of this exhibit is to show the wide range between the low price and the high price. That purpose would not have been served by showing average prices.

Q. Well, specifically, Mr. Hodkinson, as an illustration, on April 5, 1950, you show a high price of $9.25 for Florida Grapefruit?

A. Yes, sir.

[fol. 1628] Q. I inquire if the high price on that date was not actually $9.45?

A. $9.25 is the price that we got from the source of the information that I have given you. If it was $9.45 in fact the variation was very much wider. It was 20 cents wider than from $2.10, to $9.25.

Q. Well, specifically the $9.45 that I suggested to you was the high price on April 4, whereas the high price on April 5, for a single box, was $8.95. Will you check that, please, and also check the other items on page 7 and the items on page 16? I refer specifically, for example, to the fact that on

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April 7, as an illustration, the low price on Bruce Boxes, Florida Oranges—there were two lower prices than the 390 you gave, one 330 and another 350. As another illustration——

A. You are going a little too fast for me, Mr. Wells, if you want me to take some notes for checking up.

So far, on page 16 you are referring to the 390 price, on April 7.

Q. That is correct.

A. As the low?

Q. That is correct.

A. Now, do you suggest that that should be what?

Q. I suggest that there are at least two items of sales on that date of individual boxes, or lines, that were less than the 390.

Mr. Miller: Mr. Wells, is it your position that this exhibit [fol. 1629] is an incorrect statement of the information shown?

Mr. Wells: Yes.

Mr. Miller: And the source, or do you mean that the source is incorrect?

Mr. Wells: I have taken the auction prices for the particular dates and they do not jive with the figures that Mr. Hodkinson has.

Mr. Miller: You don't mean that this exhibit fails to reflect accurately what is published in the New York Daily Fruit Reports?

Mr. Wells: I have not had an opportunity of checking the New York Daily Fruit Report. I do have with me, which I will be glad to make available to Mr. Hodkinson if he likes, the Florida Fruit Digest, which is the official citrus record from Florida, issued daily, showing each individual item of auction sales.

Exam. Walsh: You may do that, Mr. Wells, but the witness stated that the facts shown in this exhibit No. 141 was taken——

The Witness: —from the New York Daily Fruit Reporter; Mr. Wells is going to another source altogether in questioning those prices.

Mr. Wells: I am suggesting to him that he should verify

the figures in his exhibit, because from data which I have checked and which should show exactly the same information, it does not check.

[fol. 1630] By Mr. Wells:

Q. Are you not familiar, Mr. Hodkinson, with the fact that in an official publication of the U. S. Department of Agriculture, namely, "Market News Service on Fruits and Vegetables," and "Marketing Summary Citrus," 1949-50 Season, which is an official publication, that the weighted average auction prices by days at each of the auction markets is shown?

A. I am not familiar with that, Mr. Wells, but I am perfectly willing to accept your statement that that is the situation, that the average price is shown. I want to repeat to you, Mr. Wells, however, that the purpose of this exhibit is to show the range between the low price and the high price realized, as shown in the New York Daily Fruit Reporter.

Q. Did you observe, Mr. Hodkinson, that it so happens that, for example, on sheet 7 of your exhibit the fruit for which you show the high price in each instance was Indian River fruit from Florida?

A. That may be so.

Q. And that in each instance the fruit was either Orchid or Acme brand of D'Albora, or Nevins, or Flora Gold, and that there is no other item in those particular listings, no other brand?

A. That may be so, Mr. Wells.

Q. Would you expect the different brands and different sizes on a particular date to sell for exactly the same amount?

A. No, sir.

Mr. Wells: That is all.

[fol. 1631] Exam. Walsh: Any further cross examination of the witness?

By Mr. Kaplan:

Q. Mr. Hodkinson, on page 4 of your report——

A. Which exhibit?

Q. Of your statement. You have in the fourth para-

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graph, at New York, for the period November 1, 1949, to August 31, 1949, 42,216 cars.

Don't you wish to change that to November 1, 1948?

Mr. Smith: It looks as though you have got something there.

The Witness: Yes. That should be at New York for the period November 1st, 1948, to August 1949. You are correct, thank you.

Exam. Walsh: To August 31, 1949, instead of 1950?

The Witness: No, there is no other change. I added November for the period November 1st, to August, 1949. It should obviously be November, 1948.

Exam. Walsh: Are there any further questions?

Mr. Hoffman: Yes, sir.

By Mr. Hoffman:

Q. Looking at page 8, Mr. Hodkinson, of your exhibit 141 entitled, "Table," and under "Grapes" October 2, I see the item $3.50, Emperor. Have you found that?

A. Yes.

Q. Is that the highest price at which Emperors sold on that date?

A. I have got these as average prices, Mr. Hoffman.

Q. Then, you took all Emperors that sold on October 2, 1950, and averaged the price?

[fol. 1632] A. Yes. This sheet deals with average prices.

Q. How is it that you selected the month of October with respect to these various varieties of Grapes?

A. Well, we understood that that was a thoroughly representative month.

Q. Would you say that is a fairly representative month with respect to the movement of Thompson Seedless?

A. I am not sufficiently expert in distinguishing these grapes to tell you which is a representative month for any one of them.

Q. So when you compiled these figures you did it in the absence of any knowledge as to whether the month of October is representative with respect to the various varieties shown?

A. We had previously shown October, 1949, and we brought this exhibit up to date by adding October, 1950.

Q. So you did it just because you did it before?

A. Yes, and in selecting before we thought that we had a fairly representative month.

Q. Did you take any recognition of the fact that some of these cars may have moved by Railway Express Agency rather than by freight?

A. No.

Q. So that you are unable to say at this time whether any of these cars represented on page 8 moved by Express Agency, where the rate might be twice as much as compared with freight?

[fol. 1633] A. Well, if you look at the heading of the exhibit you will see it excludes receipts by Express or Plane.

Q. So you are changing your testimony now——

A. I never testified to the effect that this included all shipments. You suggested that in your line of cross examination.

Q. How did you ascertain whether these excluded Express?

A. The Publication from which the prices were taken specifically showed these were prices for those other than those by Express or plane.

Q. Did you make any study of what the private sale market prices might be during the month of October?

A. No.

Q. 1950?

A. No, I didn't.

Mr. Hoffman: No further questions.

Exam. Walsh: Any further questions on cross examination of the witness?

(No response.)

Exam. Walsh: The Witness is excused.

(Witness excused.)

Exam. Walsh: I should like if respondents would supply for the record at this time, what the present unloading charges are; that is, reflecting the various increases.

Mr. Smith: At this time?

[fol. 1634] Exam. Walsh: At some time.

Mr. Smith: Yes. We will do that.

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Mr. Miller: They are the same as at the last hearing.

Exam. Walsh: Haven't you had 168 since then?

Mr. Smith: They have not applied on these prices, Mr. Examiner.

Mr. Smith: I will give the charges now, Mr. Examiner, if you wish.

Exam. Walsh: All right.

Mr. Smith: The present unloading charges are as follows:

Citrus fruits, $1.95 per ton.

Fresh fruits, other than citrus, $2.28 per ton.

Melons, including Canteloupes, $2.60 per ton.

Vegetables, fresh or green, not cold pack or frozen, $1.95 per ton.

Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used, $2.60 per ton.

The charges today are the same as they were on November 1, 1948, when they became effective.

Exam. Walsh: Thank you.

Mr. Wells: For clarification, may I inquire if those are not the exact amount of the charges as published in the tariff which initially was suspended, but were plused by the increases of Ex Parte 162?

Mr. Smith: 166 I believe.

[fol. 1635] Mr. Wells: 166 was it?

Mr. Smith: That is correct.

Exam. Walsh: Respondents may call their next witness.

Mr. Smith: Mr. Root.

Mr. Examiner, according to your opening statement, I assume Mr. Hodkinson's exhibits have been received?

Exam. Walsh: You offer them now?

Mr. Smith: I will offer them now anyway.

Exam. Walsh: Exhibits 136 through 145, inclusive, Witness Hodkinson, are received in evidence.

(Respondents' Exhibits Nos. 136-145, incl., Witness Hodkinson, were received in evidence.)

E. S. Root was sworn and testified as follows:

Redirect examination.

By Mr. Smith:

Q. Mr. Root, have you distributed to the Commission and all parties prepared testimony and two exhibits?

A. I have.

Q. Will you identify your exhibits so they may be given a number for identification?

Exam. Walsh: The next one will be 146.

The Witness: Exhibit consisting of 18 sheets will be Exhibit 146 and the exhibit consisting of three pages will be Exhibit 147.

Exam. Walsh: They will be marked Exhibit 146 and 147. [fol. 1636] (Respondents' Exhibits Nos. 146 and No. 147, Witness Root, were marked for identification.)

Mr. Smith: Mr. Examiner, I suggest Mr. Root's testimony be copied in as though read.

Exam. Walsh: Is that agreeable to protestants?

Mr. LaRoe: Yes, that understanding will apply to all such offers in this proceeding, unless otherwise indicated.

Exam. Walsh: All right.

By Mr. Smith:

Q. Kindly state your full name and business address.

A. Eugene S. Root, Midland Building, Cleveland, Ohio.

Q. You have testified previously in this proceeding?

A. I have.

Q. What is your occupation?

A. Chief of Research, Erie Railroad Company.

Q. Is that the same as when you gave your previous testimony?

A. Yes, sir.

Q. You are familiar with the notice of the Interstate Commerce Commission, dated October 10, 1950, requiring certain additional data to be furnished by respondent railroads in this proceeding?

A. I am.

Q. As a result of that notice have you prepared, or had prepared under your jurisdiction, a study of the terminal

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costs of handling fresh fruits and vegetables from Croxton, N. J., to Duane Street Piers at New York City as compared [fol. 1637] with team track delivery at Jersey City, N. J., and on Manhattan Island?

A. Yes, I have. This study has been summarized on eighteen pages.

(Study marked as Exhibit No. 146 for identification.)

Q. Will you describe Exhibit No. 146.

A. Before describing Exhibit No. 146 in detail, I would like to make some general comments regarding the study. The only team tracks the Erie Railroad has on Manhattan Island are at 28th Street. Less than 400 cars of fruits and vegetables were delivered on these tracks during the year 1950, and these were almost entirely carloads of vegetables.

At Jersey City, fruits and vegetables are delivered at the Pavonia Ave. team tracks, and, during the juice grape season, deliveries of juice grapes are made at Monmouth Street yard. Excepting grades, there were less than 100 cars of fruits and vegetables handled on team tracks at Jersey City during the year 1950. As the juice grape season had closed prior to the time any study could be made in response to the Commission's notice, our study at Jersey City was limited to the team tracks at Pavonia Ave.

Both the team tracks at 28th Street, New York City, and Pavonia Ave., Jersey City, are used primarily for the delivery of dry freight. As it was impracticable to segregate costs for team track delivery of fruits and vegetables from [fol. 1638] other team track deliveries, the costs per car included in my Exhibit No. 146 are the average of all team track deliveries at the locations named.

The terminal operations covered by Exhibit No. 146 are haul by Croxton Yard Crew from Croxton Yard, the break-up yard for eastbound trains, to Jersey City, a distance of approximately two miles; any classification switching that is performed by Jersey City Yard crew; placement on team track or carfloat by Jersey City Yard crew, floating to Duane Street Piers and 28th Street Floatbridge, New York City; pier costs at Duane Street; floatbridge switching and delivery on team track at 28th Street by 28th Street yard crews, and return of empty car to Croxton, N. J.

Q. Will you explain briefly each page of your Exhibit No. 146.

A. Page 1 of Exhibit No. 146 summarizes each of the costs of the above described operation by destination. The costs summarized on this page are supported by further detail as shown by page reference. The total costs, including return on depreciated investment, shown on line 18, are $46.00 for delivery to Duane Street piers, $10.73 for delivery on team track at Jersey City, and $45.44 for delivery on team track at 28th Street. Costs for unloading at Duane Street piers are not included in this summary.

Page 2 of Exhibit No. 146 summarizes the yard switching costs. The costs per yard engine minute for Croxton, [fol. 1639] Jersey City, and 28th Street yards have been applied to the average switching minutes per loaded car, including handling of the return empty, in each class of switching performed by the respective yard crews. The minutes in each class of switching are based on special time studies made under my direction at these yards for the one week period December 14 to 20, 1950. The costs per minute are taken from page 3 of this exhibit.

I wish to direct particular attention to the classification time at Jersey City for cars destined to 28th Street and Duane Street. Line 5 shows 9.31 minutes for cars destined to 28th Street Team track, and line 10 shows 1.15 minutes for cars destined to Duane Street. The great disparity between these figures is due partly to differences in operation, and partly to the mechanics of making this study.

Cars of perishable traffic destined to Duane Street are classified at Croxton Yard for direct placing on the floats at Jersey City. Only occasional classification work is required at Jersey City. Because of this, it was practical to segregate the classification on such cars at Jersey City. This was likewise true on cars destined to Long Island and Bush Dock. On the other hand, cars destined to other New York Harbor points are rarely classified at Croxton for direct placing on flats at Jersey City. This requires considerable classification at Jersey City.

It was impracticable in the study to segregate the classi- [fol. 1640] fication of cars destined to 28th Street from other cars in this latter group. Therefore, the classifica-

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tion at Jersey City Yard of 9.31 minutes shown on line 5 as applicable to cars destined to 28th Street team track is the average classification for all cars floated from Jersey City, excepting Duane Street piers, Long Island Railroad and Bush Dock destinations.

Page 3 of Exhibit No. 146 shows the computation of the cost per yard engine hour and per yard engine minute for Croxton, N. J., Jersey City, N. J., and 28th Street, New York City yards.

Locomotive depreciation, wages and fuel costs at these yards for the month of December, 1950, are divided by the respective yard engine hours for that month to determine the equipment depreciation, wage and fuel cost per yard engine hour shown on line 15. The annual depreciation on roadway property and taxes on such property for each yard are divided by the respective yard engine hours for the year 1950 to determine such costs per yard engine hour shown on line 5.

To determine the remaining yard engine hour costs, there is deducted from the total system yard expenses for the year 1950, locomotive depreciation, taxes, wages and fuel cost for that year, and the remainder divided by the system yard engine hours for the year 1950. The resulting engine hour cost is shown on line 21. The totals of these various engine hour costs are shown on line 22. These are divided by 60 to produce the costs per yard engine minute for these yards, shown on line 23.

[fol. 1641] Pages 4, 5 and 6 of Exhibit No. 146 show in detail the allocation of the system freight operating expenses, taxes and rents to yard service, other services, and overhead expenses for the year 1950. The method of allocation is shown on the right hand side of these pages. There is computed on page 6 of this exhibit the ratio of overhead expenses to directly assigned expenses which is applied to the directly assigned costs on page 1 of this exhibit to cover overhead costs.

Page 7 of Exhibit No. 146 shows the computation of the cost per loaded car of floating from Jersey City, N. J., to Duane Street piers, and to 28th Street, New York City.

The costs per hour for tug service and carfloat expenses have been applied to the average tug boat hours and carfloat hours per round trip of carfloat (including a proportion

of non-productive time) to 28th Street and Duane Street, New York City, respectively (lines 8 and 9).

The hours are based on an analysis made under my direction of all marine operation in New York Harbor for the one week period, December 14 to 20, 1950. To the costs of tug service and carfloat expense per round trip of carfloat has been added floatbridge expense at Jersey City and 28th Street, and certain marine department expenses incurred at Duane Street.

The total cost per round trip of carfloat for each destination has been divided by the average number of loaded cars per round trip of carfloat to determine the cost per loaded [fol. 1642] car on line 14.

Page 8 of Exhibit No. 146 shows the computation of the unit costs of floating used on page 7. Briefly, the principal items of expense were determined for the test week in the following manner. Maintenance of shore facilities are one week's proportion of an engineering estimate of annual expense. Repairs of tugboats and carfloats were based on the average cost per tugboat hour and carfloat hour, respectively, for the years 1946 to 1950, inclusive, applied to the actual hours during the test week. Wages of tug crew and floatmen were based on the average cost per tugboat hour and carfloat hour, respectively, for the month of December, 1950, applied to the actual hours during the test week.

The total expenses for the test week applicable to the different units of service are shown on line 15. The cost per unit shown on line 18 was determined by dividing line 15 by the units shown on line 16.

Page 9 of Exhibit No. 146 details the computation of costs per car for miscellaneous station employees and police protection at 28th Street, New York City.

Pages 10 and 11 of Exhibit No. 146 show the detail of the computations of costs per car for certain miscellaneous expenses at Duane Street, New York City, including miscellaneous station employees, rental, maintenance, insurance on piers and contents, and heating and lighting of the piers.

[fol. 1643] In my testimony with respect to Exhibit No. 23 in this proceeding, which was our study of the cost of unloading, I stated there were two classes of employees

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carried on the contractor's payroll that had been omitted from our unloading costs: "namely, the A-line men and the Sealer-Ice Clerk."

(Pages 208 and 209, Transcript.)

We also excluded from our unloading costs the expense of unloading gangs assisting the A-line men.

(Page 210, Transcript.)

In my present Exhibit No. 146 I have also excluded the cost of A-line men and expenses of unloading gangs assisting these men (these men function with respect to recoopering and I have omitted all re-coopering costs), but I have included in line 7 on page 10 the wages of the Sealer-Ice Clerk plus the overheads paid the contractor for this class of employee. It will be noted that the expenses at 28th Street include this type of expense on line 2 of page 9.

I also testified at that time (pages 217-218 of the Transcript) regarding other items of expense assumed by the Erie at Duane Street piers which were excluded from our unloading cost study. With two exceptions, these items of expense I enumerated are now included on page 10 and 11 of Exhibit No. 146. The two exceptions are:

(1) Maintenance of equipment used by the contractor (but owned by the Erie) such as hand trucks, gang planks, [fol. 1644] race pieces, etc.

(2) Re-coopering of packages.

Page 12 of Exhibit No. 146 shows the ratio of freight proportion of non-revenue net ton miles to revenue net ton miles for the year 1950. This ratio is applied to the directly assigned costs on page 1 of this exhibit to cover the costs of handling non-revenue traffic.

Page 13 of Exhibit No. 146 shows the computation of and summarizes the return on depreciated investment per loaded car in yard property used in making deliveries to Jersey City team track, 28th Street, New York City team track, and Duane Street piers. The return per yard engine minute has been applied to the average switching minutes shown on page 2 of this Exhibit, previously referred to, to determine the return required per car. The returns per

yard engine minute are taken from pages 14, 15 and 16 of this Exhibit.

Page 14 of Exhibit No. 146 details the computation of the amounts required per yard engine minute to provide return on depreciated investment in property used in the haul from Croxton, N. J., to Jersey City. Return of 6% has been computed on the depreciated investment in road property, and this divided by the yard engine hours in haul service for the year to determine the cost per yard engine hour for road property. Depreciated investment on yard locomotives at Croxton was computed on the basis of use of locomotives during the month of December, 1950. Re-
[fol. 1645] turn at 6% was computed on this depreciated investment and divided by the yard engine hours for the month of December to determine the cost per yard engine hour for equipment. The cost per yard engine hour shown on line 23 was then divided by 60 to determine the cost per yard engine minute.

Page 15 of Exhibit No. 146 details the amounts required per yard engine minute to provide return on depreciated investment in property used in yard service at the Jersey City yard. The same method of computation was used as for page 14.

Page 16 of Exhibit No. 146 details the computation of the amounts required per yard engine minute to provide return on depreciated investment in property used in yard service at 28th Street, New York City. Here again the method used is the same as on page 14.

Page 17 of Exhibit No. 146 shows the computation of and summarizes the return on depreciated investment per loaded car for marine property used in making deliveries to 28th Street and Duane Street, New York City. The return per tugboat hour and carfloat hour has been applied to the average tugboat hours and carfloat hours shown on page 7 of this exhibit, previously referred to, to determine the return per round trip of carfloat for tug service and carfloats. To this has been added the return per carfloat for floatbridge at Jersey City. Total return per round trip shown on line 7 is divided by loaded cars per round trip of carfloat to determine the return per loaded car shown on [fol. 1646] line 8. Returns per unit used on this page are taken from page 18 of this exhibit.

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Page 18 of Exhibit No. 146 details the computation of the amounts required per service unit to provide return for depreciated investment in property used in marine service. Return at 6%, shown on line 9, has been computed on the total depreciated investment in property separately for tug service, carfloats, and floatbridge at Jersey City, and then divided by the units for the year 1950, to determine the average return per unit.

Q. Does this complete the detailed explanation of your Exhibit No. 146?

A. Yes, sir.

Q. Have you any further general comments with respect to your Exhibit No. 146?

A. In order that there may be no misinterpretation of the costs shown on page 1, I wish to recapitulate certain statements I have made in this testimony and state one or two additional facts.

First, Exhibit No. 146 does not include any cost of recoopering, or inspection by the Railway Perishable Inspection Agency.

Second, Exhibit No. 146 does not include any of the cost of unloading fruits and vegetables at Duane Street used in my Exhibits No. 23 and 127 in this proceeding.

Third, the costs shown for team track delivery at 28th Street and Jersey City are the average of all traffic handled on those team tracks.

[fol. 1647] Fourth, the costs shown for 28th Street team track cars include classification at Jersey City, which on Duane Street perishable traffic is performed almost entirely at Croxton Yard. The cost of the latter is not included in this Exhibit No. 146. If it were not for this fact, the excess cost of pier delivery at Duane Street over 28th Street team track delivery would be far greater than the 56¢ shown by this Exhibit. This can be understood when we compare the cost of classification at Jersey City on Duane Street cars of 54¢ shown on line 2 of page 1 of Exhibit No. 146, plus return on investment per car for classification of 6¢ on line 12 of page 13, a total of 60¢, with the classification at Jersey City for 28th Street cars of $4.35 on line 2 of page 1, plus return on investment per car for classification of 50¢ on line 6 of page 10, a total of $4.85.

Q. At the hearing in New York in July, 1947, you intro-

duced Exhibit No. 23, consisting of three sheets, summarizing a study made by you of the cost of unloading fruits and vegetables at the Erie's Duane Street Piers. At the subsequent hearing in Brooklyn in September, 1949, you introduced Exhibit No. 127 which represented an adjustment of your original unloading cost -tudy to give effect to certain changes in compensation paid employees of the Seaboard Terminal and Refrigeration Company. Have there been any further changes in the compensation paid Seaboard employees which would affect the results shown in Exhibit No. 127?

[fol. 1648] A. Yes. The 20¢ per hour wage increase to which I referred in the record of the September, 1949, hearing (transcript pages 1354-1355) was granted in November, 1949, retroactively to September 1, 1949. Further, certain increases in compensation were granted to the foremen and office personnel effective January 1, 1951.

Q. Have you prepared an exhibit to show the effect of these changes in compensation paid on the costs per ton for unloading fruits and vegetables?

A. I have prepared an Exhibit consisting of three pages to show current costs of unloading, headed: "Erie Railroad Company—Cost of Unloading Fruits and Vegetables, Duane Street Piers, New York City."

(Study offered as Exhibit No. 147 for identification.)

Q. Will you please describe Exhibit No. 147.

A. Sheet 1 of Exhibit No. 147 is the same as Sheet 1 of my original Exhibit No. 23 in these proceedings, and shows separately for Citrus Fruits, Fresh Fruits (other than citrus), Fresh or Green Vegetables—top iced, Fresh or Green Vegetables—not top iced, and Cantaloupes and Melons, the number of cars unloaded, and unloading gang minutes required for the test period covered by my original study. On Sheet 2 of Exhibit No. 147 I have shown in column 2 the contractor's cost for the test period as shown on Sheet 2 of my original Exhibit No. 23. Column 3 shows the per cent increase of current wage rates over the rates in effect during the test weeks, and in Column 4, the test [fol. 1649] weeks' costs have been restated to current levels. The revised percentage used for computing insurance and taxes on line 11 is based on the year 1950.

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Revised cost per unloading gang minute of 31.21¢ compared with 21.55¢ during the test weeks is shown in line 15. In restating these costs, I have not given effect to the increased vacation allowance currently being granted. The restated cost per unloading gang minute is, therefore, understated to this extent.

On Sheet 3 of my Exhibit No. 147 there is shown in Column 2 the gang minutes per ton for the various commodity groups as shown on Sheet 1 of this Exhibit. I have applied to the gang minutes per ton the cost of 31.21¢ per minute as computed on Sheet 2 of this Exhibit to determine the total unloading cost per ton in Column 3.

As stated in my testimony at the first hearing, the unloading gang minutes per ton include the time of assorting fruits and vegetables. Under present tariff provisions, including the interim increase in Ex Parte 175, the consignee is charged $4.66 per car on Cantaloupes and Melons, and $4.82 per car for all other Fruits and Vegetables for assorting. This tariff carload rate has been divided by the average number of tons per car in the test weeks for each commodity group and the averages per ton shown in Column 4. These amounts have been deducted from the total unloading cost per ton shown in Column 3 to deter- [fol. 1650] mine a net cost per ton for each commodity group in Column 5.

Q. Mr. Root, at the first hearing you testified that not all fruits and vegetables were assorted; however, that the method of computation that you used in your Exhibit No. 23 assumed that each car was assorted, and as a result the net costs per ton were understated. Are these statements true with respect to your present Exhibit No. 147?

A. They are true. I would like to emphasize that most cars of vegetables are not assorted, and for this reason the total cost per ton shown in Column 3 for Fresh or Green Vegetables—top iced, and for Fresh or Green Vegetables—not top iced, more nearly represents the actual cost of unloading than the net cost shown in Column 5.

Q. What are the net costs per ton for unloading in each of the selected commodity groups as shown in Exhibit No. 147?

A. The average net cost per ton for Citrus Fruits is $1.7621; for Other Fresh Fruits, $2.4897; for Fresh or

Green Vegetables—Top Iced, $2.9652; for Fresh or Green Vegetables—not Top Iced, $1.7434; for Cantaloupes and Melons, $2.6259.

Q. In connection with Exhibit No. 127, you stated (pages 1351-1352 of Transcript) that subsequent to the time your original study had been made, there had been a change in method of display of citrus fruit, and further, that the average load per car for oranges had declined from 561 boxes, or 47,685 pounds per car, to 462 boxes, or 39,270 [fol. 1651] pounds per car. What is the situation with respect to these two items at this time?

A. There has been a change in the method of display of citrus fruit since the introduction of my Exhibit No. 127, and the method currently being used is the same as at the time of my original study of unloading costs. The average load per car for oranges remains at 39,270 pounds, and is less than the 47,685 pounds per car existing at the time of my original study. No consideration has been given in Exhibit No. 147 to this reduced loading per car.

Mr. Smith: I have a few additional questions of Mr. Root, Mr. Examiner.

Exam. Walsh: All right.

Mr. LaRoe: Just a moment please. Mr. Examiner, I am sorry, but I must object to the receipt of these exhibits because they do not comply with the notice which the Commission issued on October 10.

One of the main purposes, as the Examiner has already stated in his opening statement, was to obtain certain information which the Commission thought was pertinent and important in this proceeding, and among other things, "and any difference in nets resulting from the fact that pier delivery does not require an investment in team track facilities."

I am reading from the Commission's notice of October 10.

As I read Mr. Root's study, and he will confirm this I [fol. 1652] believe,—You have not, have you, Mr. Root, made any study of exact team track facilities which would be required to handle all of the Erie cars at Manhattan, or the investment therein?

The Witness: I have not.

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Mr. LaRoe: Well, it is quite apparent therefore, Mr. Examiner, that the exhibit does not show the difference in cost to which the Commission refers in its notice, and I am obliged to object to the exhibits on that ground.

Mr. Smith: If the Examiner please, we think that Mr. Root's exhibits do comply with the Commission's notice.

We did everything that we thought the Commission wanted us to do in making such compliance.

We are not offering these exhibits because we think they are material or relevant to the case. We were directed by the Commission to prepare these exhibits and we have done so to the best of our ability. That is why we are here to present them.

Mr. LaRoe: My point, Mr. Examiner, is this: That the expression, the fact that pier delivery does not require an investment in team track facilities, clearly means that if the piers were not there, an investment in team track facilities would be required, but the study does not comply with that.

It does not show what investment would be required.

Mr. Miller: The notice certainly does not clearly show any such fact at all. Mr. LaRoe is giving us a preview of [fol. 1653] his argument only.

The exhibit very definitely does show the investment cost of team tracks.

Mr. LaRoe: Present team tracks.

Mr. Miller: That is right. That is what the notice was intended to ask and Mr. Root has fully complied with the terms of the notice.

Mr. Wells: Mr. Examiner, I would like to join in the objection as made by Mr. LaRoe, because clearly the information that was indicated by the notice of the Commission is something entirely different from what is attempted to be submitted by the respondents in the testimony and in the exhibits, and I refer that not only to the exhibit and testimony immediately under discussion but also the similar ones from witnesses of the other respondents.

Mr. Thornton: On behalf of the City of New York we concur in Mr. LaRoe's interpretation of the notice and as we read it we feel what the Commission was interested in was comparison of cost between things that you can prop-

erly make a comparison; that the railroads should be able to handle the volume at the team tracks that they handle at the piers and that is the only fair comparison you can make; and I would like to ask does Mr. Root feel the team tracks can handle the volume the Erie handles at the station.

Mr. Smith: The Erie's team tracks on Manhattan Blvd. [fol. 1654] are not physically large enough to handle all of the traffic which we now handle at the piers.

Mr. LaRoe: This does go to the very heart of the case. You will recall, Mr. Examiner, that the argument was made that the railroads should make team track delivery at least as a normal proposition, and that in the absence of team tracks they were giving pier station delivery as their normal station delivery.

Now, the Commission very clearly wanted to know what team tracks would be required if the piers were not there, because the language is "difference in cost resulting from the fact that pier delivery does not require an investment in team track facilities."

Well, if it does not require an investment in team track facilities what would that investment be? That question remains unanswered although that apparently is the very thing the Commission was aiming at.

Mr. Miller: Mr. Examiner, I suggest this whole discussion is rather pointless. The Commission well knows what it desired when it requested this information.

This is the information that has been prepared. It is rather absurd to argue it should not be admitted on the ground that it doesn't conform with Mr. LaRoe's idea of what the Commission intended.

Mr. LaRoe: My argument is not that it fails to conform to Mr. LaRoe's ideas. My argument is it does violence [fol. 1655] to the plain English of this requirement of October 10.

Otherwise the expression, "difference in cost resulting from the fact that pier delivery does not require an investment in team track facilities" is meaningless.

Mr. Hoffman: Walter Hoffman concurs in Mr. LaRoe's statement and I might add further that the background and the environment of this entire case shows there could only be one interpretation of the Commission's order.

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It being admitted that the Erie team tracks are inadequate to handle our traffic, the question at issue then according to the Commission's direction is what would it cost if in lieu of present pier deliveries, the Erie expanded its team track facilities so as to be able to accommodate our traffic, and I say the background of this case it seems to me unequivocably supports that conclusion.

Exam. Walsh: Well, I should like to know how you can show a difference even in the rudiments of arithmetic if you don't have a minuend and a subtrahend,—if you don't have something to compare.

Mr. LaRoe: Precisely.

Mr. Smith: We made a comparison. The Erie has team tracks on Manhattan Island and we handle traffic on team track and we studied the pier car cost of handling traffic on the team tracks in Manhattan Island. We have compared the two.

Exam. Walsh: I will accept your exhibit and the discus-
[fol. 1656] sion has been very helpful. It will show on the record the view of protestants and it will also show your view.

Mr. LaRoe: But we would like the respondents if they will, to show us where the minuend and subtrahend are because we have not been able to make the subtraction.

That is all for now.

Mr. Loos: Mr. Examiner, less my silence be misunderstood, I desire to join in the objection, and I will not prolong the argument because the Examiner has already ruled, but I might suggest that while my arithmetic isn't clear enough in my recollection to be sure which is the subtrahend and which is the minuend, but the point is that Mr. Root's exhibit shows one but not the other.

Mr. LaRoe: That is correct, which is the minuend and which is the subtrahend depends on which is the larger, in this instance.

Exam. Walsh: Proceed, Mr. Root.

Mr. Smith: Are exhibits 146 and 147 received, Mr. Examiner?

Exam. Walsh: 146 and 147 will be received.

(Respondents' Exhibits 146 & 147, Witness Root, were received in evidence.)

Mr. Smith: I have a few additional questions of Mr. Root if you please.

By Mr. Smith:

Q. Since preparing Exhibit 146, Mr. Root, have you determined some overstatement of costs and some understate-
[fol. 1657] ments of costs with respect to Duane Street Pier cars to which you want to invite attention at this time?

A. I have.

Q. Proceed.

A. On page 8 of Exhibit 146——

Mr. Loos: Will you pause just a minute until we can find that page?

The Witness: Line 10, in the column headed "Duane Street" the amount of $131.31, there was erroneously included an amount in this figure which, while applicable to handling of fruits and vegetables, was not applicable to the Duane Street operation. The correct figure there should have been $59.24.

Shall I correct the exhibit all the way through? It only makes a difference in the total amount on page 1 of $46 shown for Duane Street, reduces that figure to $45.79.

Mr. LaRoe: Is that the last figure?

The Witness: The last figure on line 48.

Mr. LaRoe: Reduces $46 to what?

The Witness: $45.79.

Mr. LaRoe: We won't quarrel about that.

The Witness: On page 11——

Mr. Wells: Pardon me, while you are still on page 8, does that change that you made also change line 5?

The Witness: Oh yes. As a matter of fact, I will give you the corrections all the way through if you wish them. It
[fol. 1658] changes line 11 to 7¢ instead of 14; it changes line 13 to 2¢; line 15 to $59.33; line 18 to $.81.

By Mr. Smith:

Q. What are the changes on page 1, Mr. Root?

A. In line 7, under Duane Street Piers, the item of $11.46 would become $11.28, line 13, the item of $37.26 would become $37.08; line 14, the amount should read $4.27; line 15 should read $1.31.

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And I have already given the correction for line 18.

On page 11 of 146, there is shown the expense of heating and lighting piers 19, 20 and 21. The heating plant serving these piers is located at our Chambers Street Ferry facility, which is between Pier 19 and Piers 20 and 21.

We did not include in our exhibit any proportion of the rental of Chambers Street Ferry applicable to this heating plant.

28.37 per cent of the rental of Chambers Street Ferry is applicable to the use of these facilities for the heating plant.

The annual rental of Chambers Street Ferry facilities is $59,961. The proportion applicable to the heating plant is $17,010.94. Of this amount, 97.18 per cent is applicable on a radiation basis to heating Duane Street Piers.

There should have been included, therefore, an additional amount of $16,531.23 for rental of this heating facility. This amount, divided by the cars handled on these piers gives an additional cost of 76 cents per car including the overhead and non revenue expenses.

[fol. 1659] Q. Mr. Root, are the physical operations at the Duane Street Piers substantially the same today as they were when they were described by Witness Hart at the first hearing in this case?

A. They are.

Q. When is the peak period for deliveries by the Erie of freight to the Duane Street Piers?

A. In the past two years, our peak month has been in August.

Q. Throughout your testimony and exhibits you have used the expression, "Duane Street Piers." What piers are embraced in that expression?

A. Piers 19, 20 and 21.

Q. Were any fresh fruits and vegetables unloaded on Pier 19 during 1950?

A. No, there were not.

Q. Was that unusual?

A. Yes. Prior to 1950, fresh fruits and vegetables were unloaded regularly each year on each of Piers 19, 20 and 21. Pier 19 is still available for handling fresh fruits and vegetables and whether it will be used during 1951 and subsequent years will depend on the volume at peak periods,

operating conditions, desires of the trade, and other factors.

Q. If Pier 19 were discontinued as a pier—perishable piers, what would be the approximate effect upon the figure of $46 per car at the bottom of page 1 of Exhibit No. 146? [fol. 1660] A. The effect would be to reduce such figure by about one dollar and a half per car.

Q. Can you tell us briefly how this reduction of about one dollar and a half per car would be brought about?

A. I can.

Q. Will you do so?

Mr. Loos: Excuse me. I am not following Mr. Root. What page of your exhibit are you referring to?

The Witness: Well I am going to refer to it now.

Page 10, Mr. Loos. The rental of $7.81 per car shown on line 18 of page 10 would be reduced to $6.60 by excluding the rental of Pier 19 and the number of cars handled on Pier 19 in making the computation.

On page 11, maintenance of piers now reading $1.63 on line 21, would be reduced to $1.40.

Insurance, appearing on line 24, would be reduced from $1.75 to $1.57.

Heating and lighting, shown at $2.04, would read $2.35.

That would be an increase of $.31 due to the fact that Pier 19 is not heated, so there would be very little reduction in the expense, but there would be a reduction in the number of cars.

That makes a net difference of $1.31, those items; the overhead per cent and the non revenue would increase it by 18 cents, making a total difference of $1.49.

[fol. 1661] By Mr. Smith:

Q. Does the Erie Railroad have team tracks at Jersey City with sufficient capacity to handle the cars of freight now terminated at the Duane Street Piers?

Mr. LaRoe: I object to the question on the ground, Mr. Examiner, that we are dealing here with the delivery of this traffic at these piers on Manhattan Island. Neither at common law nor under the statute would delivery over in New Jersey constitute Manhattan delivery and therefore whatever the cost may be in New Jersey is immaterial and

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irrelevant, has nothing to do with the making of reasonable delivery.

My objection also runs, if it is possible to make objection to what the Interstate Commerce Commission has done, to the wording of their notice, which requires a study of the New Jersey terminal costs.

I just see no escape, Mr. Examiner, from the conclusion that both under the statute and common law, delivery means reasonable delivery and reasonable delivery means at a reasonable convenient and accessible point. You can't have reasonable delivery for Manhattan somewhere over in New Jersey, and I therefore object to any testimony here with respect to New Jersey deliveries, even though it is included in the ICC notice.

Mr. Smith: Mr. Examiner, I don't propose to argue the case. I don't believe you want us to at this time. However, the Commission's notice does refer to Jersey City team tracks and I think the question is pertinent, and should be [fol. 1662] answered in the light of what the Commission said in its notice.

Exam. Walsh: All right. The witness will answer.

Mr. LaRoe: Mr. Examiner, I assume it is not necessary to take exception to your rulings each time. It will be understood the exception is made?

Exam. Walsh: Exception is made.

The Witness: We do have.

Mr. Smith: That is all of this witness on direct.

He did not finish his answer.

The Witness: You didn't let me complete my testimony before.

Mr. LaRoe: I am sorry if I interrupted.

The Witness: After I arrived at this correction of $1.49, by excluding Pier 19, then with respect to my testimony of the rental of the heating facility on Chambers Street Ferry, I testified that would be 76¢, by excluding Pier 19, that amount would increase to 91¢, instead of 76¢.

Mr. Smith: Does that complete your testimony?

The Witness: Yes.

Mr. Smith: That is all on direct.

Exam. Walsh: Cross examination.

Mr. LaRoe: I am not sure I have any cross examination but for clarification: your testimony regarding the elimina-

tion of Pier 19, or possible elimination of Pier 19, does that suggestion grow out of a decline in the volume of this traffic in 1950?

[fol. 1663] The Witness: My understanding is, Mr. LaRoe, that in 1950, in order to better serve the melon trade, we moved the handling of melons from Pier 19 to Piers 20 and 21.

Recross-examination.

By Mr. LaRoe:

Q. And you found that piers 20 and 21 were adequate to handle the whole volume of fruits and vegetables?

A. We handled them that way in 1950.

Q. What I mean is: can you continue to handle them on those two piers?

A. Well, we can continue to handle them on those two piers as long as conditions are the same as they were in 1950.

Q. Was there a subnormal volume in 1950, if you know?

A. I don't think 1950, my recollection is, was greatly different than 1949.

Q. That was my recollection too, so what really has happened here is that you have made an operating change which allows you to get rid of the cost of one pier out of three?

A. No. We have transferred some of our operations from Piers 20 and 21 to 19.

Q. Yes, but I mean——

A. I mean we operate the piers, have operated the three piers more or less as units since we have had 19, and when it was necessary to use 19 on any particular night, or or any particular week, or any particular month, for fruits and vegetables, we have done so.

[fol. 1664] Q. But what I am trying to bring out is that by reason of this change in operating practice, it is your intent to discontinue the use of pier 19 unless there is some up-swing in volume which would make it necessary to resume the operation of that pier?

A. I am sorry. I couldn't say as to the intent, no.

Mr. Smith: I am sure this witness doesn't know that and I don't know it. That is a matter that hasn't been decided.

Mr. Donadio: I didn't understand he had testified he

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had discontinued the use of Pier 19. That would seem to be implicit in your question.

By Mr. LaRoe:

Q. Has there been any use of Pier 19 for this traffic since that operating change was made?

A. What do you mean by "this traffic"?

We handle, of course, carloads on pier 19. We are still handling carload traffic on Pier 19.

Exam. Walsh: Of fruits and vegetables?

The Witness: We are not handling fruits and vegetables on Pier 19.

By Mr. LaRoe:

Q. When did you discontinue handling fruits and vegetables on Pier 19?

A. I don't know whether it was in January, 1950, or whether it started in December 1949, but we didn't handle any during the year 1950.

Q. Or since?

A. Or since.

[fol. 1665] Mr. LaRoe: Thank you.

Cross-examination.

By Mr. Thornton:

Q. When you prepared your studies, Mr. Root, did you at any time consider or make any studies as to the cost of a comparison of expanded team tracks sufficient to handle all the fruits and vegetables delivered by the Erie on the Piers?

A. I did not.

Q. When you made this study did anyone direct you as to what types of comparison you should make?

A. I discussed, of course, with our management as to what the Commission's order required, and in my humble judgment we fully complied with the order.

Mr. Thornton: That is all.

Exam. Walsh: Any further cross examination?

Mr. Loos: Yes. I have some questions.
Exam. Walsh: Mr. Loos:

Cross-examination.

By Mr. Loos:

Q. In referring, Mr. Root, to the discontinuance of handling fruits and vegetables on Pier 19, prior to that time did you also handle on Piers 20 and 21 any traffic in addition to fruits and vegetables?

A. Yes, we handled merchandise traffic.

Q. Do you still handle some merchandise traffic on Piers 20 and 21?

[fol. 1666] A. We do.

Q. Has there been any substantial change in the amount of that traffic or the nature of that traffic since your prior testimony and the prior testimony of other Erie officials in this proceeding?

A. No. I don't believe there has.

Q. You testified with reference to the separation of the cost of rentals as between Piers 19 and 20 and 21, and you gave certain figures as to the cost per car after excluding Pier 19. Did that take into consideration an allocation between Pier 19 on the one hand, and Piers 20 and 21 on the other of your credits?

Perhaps if that isn't clear, we had better look at page 10 of your exhibit.

As I understand your testimony, it was that the figure of $7.81 is at the bottom of that page, average cost per car, line 18, became 660.

A. That is correct.

Q. In arriving at that you are taking into consideration not only the allocation of rentals, as between the two sets of piers, but also the allocation of your credits, shown in lines 14 and 15?

A. That is correct.

Mr. Loos: Mr. Examiner, I took advantage of the opportunity to examine the Erie's—or Mr. Root's working papers and underlying data in connection with this exhibit, and at [fol. 1667] my request Mr. Root has furnished me with certain figures which are not in the record, but which I

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think should be in the record, taken from these working papers—not so much with the idea of attacking the accuracy of the exhibit as with the idea of clarification, and to show additional information which I think will be helpful to the Commission, and he has just furnished me this morning a few additional figures.

I have assembled all of these in the form of a statement which I would like to offer as an exhibit after Mr. Root has checked it, and I would suggest that a great deal of time might be saved if I could hand this to Mr. Root now and after he has checked it, recall him for further cross-examination.

Mr. LaRoe: Do you have any copies of it?

Mr. Loos: I can make up some copies.

Exam. Walsh: That will be satisfactory.

Mr. LaRoe: It is something I have not seen.

Mr. Loos: Before I offer it I will have copies to distribute.

Mr. Wells: I wonder if I might ask a question for clarification, please.

Exam. Walsh: Yes, Mr. Wells.

Cross-examination.

By Mr. Wells:

Q. Mr. Root, as I understand you gave some amounts with respect to pages 7, 9, 10 and 11, of what the item would be if Pier 19 were eliminated; is that correct?

A. That is right. I think it was only to pages 10 and 11.

[fol. 1668] Q. That is pages 10 and 11?

A. That is right.

Q. Have you brought that forward to determine what the amount in the last item on line 18 would be if those revised amounts were used?

A. If we were—I think it is on the record, Mr. Wells—but if we were to eliminate Pier 19 from the computation of rental, insurance, heating, and lighting, we would reduce our cost by $1.49.

Q. Do I understand then that the $45.79 correction that you gave would become $44.30 if Pier 19 were eliminated?

A. That is correct. And then by including the proportion

of rental for the heating facility that would add 91 cents to that figure. It would add 91 cents.

Q. Well, you mean your 91 cents for heating with Pier 19 eliminated is comparable to the 76 cents?

A. That is correct.

Q. Including all three piers for heating alone?

A. That is correct.

Q. So that the $45.79, plus 76, including Pier 19, would be comparable to $4.30, plus 91 cents, without Pier 19?

A. That is correct.

Cross-examination.

By Mr. Seals:

Q. Line 17, page 10 of 18, should that $24,690 figure be changed in view of the elimination of Pier 19?

Exam. Walsh: On page 10, line 17.

[fol. 1669] The Witness: My exhibit should not be changed. I am merely giving what the figures would be if we eliminated Pier 19.

By Mr. Seals:

Q. You say number of cars handled at Piers 19, 20, and 21. Will that figure be the same?

A. Not if we exclude Pier 19.

Mr. Seals: Thank you.

The Witness: That figure would be 20,870 cars.

Mr. Smith: That is if Pier 19 cars were eliminated?

The Witness: That is correct.

By Mr. Seals:

Q. Would that also be true of line 9?

A. No. Line 9 is strictly fruits and vegetables.

Q. It would change line 20 though at page 11, would it not?

A. That is correct; and line 23 also; and line 28; but now you are only speaking about the correction to the number of cars.

Understand the money will change also.

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Cross-examination.

By Mr. Pettijohn:

Q. Can you give us the revised cost under Duane Street on page 1 of your Exhibit 146, to give a figure of $44.30?

A. I wonder if you would mind repeating that?

$44.30 of course is the $55.79 less this item of $1.49, if we eliminated Pier 19 from all calculations in this exhibit.

Q. You authorized on page 7 a decrease of 18 cents from $11.46 to $11.28?

[fol. 1670] A. That is correct.

Q. Due to the change on Item No. 12.

A. That is correct.

Q. You next authorized for Item 9 a decrease from $7.81 to $6.60.

A. I don't authorize that decrease. I say that is what it would be if we eliminated Pier 19 from our calculations.

Q. You also take that correction, do you not, in arriving at your $44.30?

A. Yes. That is the way the $44.30 is arrived at.

Q. Now, your next item is No. 10. You show a decrease from $1.63 to $1.40, or a 23-cent decrease, do you not?

A. That is correct.

Q. On the next item you show a decrease from $1.75 to $1.57, or a 18-cent decrease?

A. That is correct.

Q. On the next item, No. 12, you show an increase from $2.04 to $2.35, an increase of 31 cents?

A. That is correct.

Q. On Item 14 you show a decrease from $4.29 to $4.27?

A. No.

Q. It is ten pier cent of your overhead?

A. No, because we revised these other figures.

Q. That is right. What was your revision on that?

A. That would become $4.13.

Q. That would be a 16-cent decrease, would it not?

[fol. 1671] A. Yes.

Q. And your 3 piers on that would be——

A. That would become $1.27.

Q. That would be a four. That would give you $1.69 decrease, would it not?

A. It should give $1.49 decrease.

Q. I mean it, your total decrease of $46.00, you have one dollar 49 on 13, you have 16, on 14, and 4 cents, on 15, which would give you $1.69 decrease, would it not? —in the aggregate?

A. In the aggregate the new total on line 18 would be $44.30.

Mr. Pettijohn: Thank you.

Cross-examination.

By Mr. Hoffman:

Q. What commodities are presently moving—being handled at Pier 19, Mr. Root?

A. Merchandise traffic. I don't know exactly what type.

Q. Are they unloaded at Pier 19?

A. I believe they are, certainly.

Q. Is there any charge made for the unloading of that merchandise at Pier 19?

A. No, sir.

Q. There is no charge?

A. No, sir.

Q. No tariff?

A. No, sir.

[fol. 1672] Q. Did I understand your testimony to be that if the volume of traffic handled by you on the other piers, other than 19, perishable, fruits and vegetables, does not increase in the future over 1949, and 1950 volume, you will have no further use for Pier 19 with respect to fresh fruits and vegetables?

A. I would like to make—I don't know what the intent will be or what the policy will be—I would like to make one comment though and that is the—it isn't going to depend upon the annual volume so much. You could have periods in the year that, due to weather conditions and such that your volume would be very low, but still you would want to provide for your peak periods.

Q. But in the meantime the pier would be used for other purposes?

A. Oh yes. Certainly. We try to operate efficiently.

Q. Mr. Root, I take it that one of the purposes of your

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study here is to contrast the over-all costs of operations at Duane Street Piers, as compared with the 28th Street Team track operation?

A. My purpose here was to comply with the Commission's order, Mr. Hoffman.

Q. And is it correct that you did make a study endeavoring to contrast the cost between those two points?

A. That is correct.

Q. And in making that study you sought to reflect all differences in costs between the operations at Duane Street [fol. 1673] and 28th Street Team track?

A. It is quite comprehensive. I will go along with it though and say "yes."

Q. Do you reflect in your cost studies any savings in cost by reason of the fact that cars are detained at 28th Street Team Track for a longer period of time than the detention of cars at Duane Street Piers?

A. As far as our costs are concerned, it would not make one penny of difference.

Q. And you have not endeavored to reflect that whatsoever?

A. No. There is nothing to reflect. Our cost is the same.

Q. Wouldn't the cost be different if the cars were detained at team tracks for a period as long as four days, as compared with the possible detention at Duane Street Piers of perhaps 12 hours?

A. No, sir.

Q. You charged demurrage don't you to the shipper for the detention of cars, do you not?

A. I am talking about what would be reflected in our costs, what we pay for the rental of cars is on a mileage basis and it *am*kes no difference whether it is held there for four days or three hours.

Q. So you believe in making charges for demurrage as against a shipper's detention of cars it doesn't reflect itself in the cost of the railroad operation?

[fol. 1674] A. I don't say that. I am talking about the expense of the cars. No, sir.

Q. Turning to page 8 of exhibit 146——

A. May I make one further remark, Mr. Hoffman? I may say this: insofar as the*re* being delayed there, we will say,

A. It should give $1.49 decrease.

Q. I mean it, your total decrease of $46.00, you have one dollar 49 on 13, you have 16, on 14, and 4 cents, on 15, which would give you $1.69 decrease, would it not? —in the aggregate?

A. In the aggregate the new total on line 18 would be $44.30.

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Q. So you believe in making charges for demurrage as against a shipper's detention of cars it doesn't reflect itself in the cost of the railroad operation?

[fol. 1674] A. I don't say that. I am talking about the expense of the cars. No, sir.

Q. Turning to page 8 of exhibit 146——

A. May I make one further remark, Mr. Hoffman? I may say this: insofar as the*re* being delayed there, we will say,

for 48 hours, and resulting in any additional switching, or complicating the switching in any way, that is all reflected in our 28th Street Costs.

Q. But not the difference in the detention period of the car?

A. But not any difference as reflected in car rent. Let me put it that way.

Q. I wasn't talking about car rent. I am talking about costs, or benefits, or advantages.

A. Our cost study reflects all the costs at 28th Street, including whatever results from abnormal detention.

Q. And when you say "all costs" you only mean costs that appear physically on your books of record and no other costs or advantages that might exist.

A. That is right.

Q. So that your study confines itself soley to an analysis of bookkeeping entries?

A. That is correct.

Q. And you have not given any consideration of other advantages that might exist which do not reflect themselves upon the books of record?

[fol. 1675] A. I have given no consideration to anything other than what appears in our record of costs.

Q. And you have disregarded entirely the physical aspects of the two operations?

A. Not in so far as they are reflected in our costs. The difference in operation is certainly reflected in our costs.

Q. Turning to page 8 of exhibit 146 and line 10, you indicated that with respect to the Duane Street column, $131.31 is incorrect, and that the correct figure should be $59.24?

A. That is correct.

Q. And how did that error arise, Mr. Root, or what is the nature of that error?

A. It was an amount that was reported to us as handling fruits, we had a similar item in a prior study that we made at Duane Street and it was merely a lack of sufficient information that we allocated it to Duane Street. Now, we were hitting against time limit when we had *on* file this on April 16, you understand, and while we were trying to be extremely careful and were careful in preparing this exhibit, we did explore and further test our figures, further check

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our figures, after we filed the exhibit and at that time we determined that this particular item of expense, the only item that we found of that nature, should have not been allocated to Duane Street.

It is part of our marine costs, but it was not applicable to Duane Street.

[fol. 1676] Q. But you still haven't told me just what it was. I notice it is under the item "Operating Floating Equipment."

A. That is right.

Q. Wherein was the error made?

A. In reporting the amount to us by our accounting department, they reported that amount as handling fruit. We allocated it to Duane Street erroneously. That is all. It is an error, nothing else, just an error.

Q. Not a mathematical error but an error in judgment with respect to allocation?

A. That is right.

Exam. Walsh: We will recess for a few moments.

(Short recess)

Exam. Walsh: On the record.

Mr. LaRoe: I have one or two questions for clarification.

Cross examination.

By Mr. LaRoe:

Q. Will you look at page 3 of your exhibit 147? As I understand it those figures show the cost per ton by commodity groups to the Seaboard Terminal and Refrigeration Company, but they do not show what the Erie pays to that agency; is my understanding correct that the Erie pays to that agency $2.26 a ton on all fruits and vegetables handled?

A. That is correct.

Q. In your answers to your counsel, or someone else, you said that you made this study this way only because the ICC called for it this way.

[fol. 1677] Do you care to comment on whether the study made in this way has any significance?

Mr. Smith: Well, Mr. Examiner——

Exam. Walsh: The witness may answer.

Mr. Smith: I want to object to the question. I don't think it is up to this witness to discuss the materiality or the legal significance of this study. He has made it clear that 146 was made in compliance with the Commission's notice and I think that is sufficient.

Mr. LaRoe: I am not asking for a legal significance. This man is an expert cost man and I simply want to know whether as an expert cost man he would have made this study this way if left to himself and what significance it has.

The Witness: If my management had asked me to compare the costs of handling fruits and vegetables at Duane Street with what it would cost us to handle them at Jersey City, or at 28 Street to the extent that we have capacity at 28th Street to handle them, I would have prepared the cost study in exactly the same way.

By Mr. LaRoe:

Q. Now, if you had been making it with a view to determining what it would cost you to handle at your team tracks if you didn't have the piers, would you have made it this way?

A. Well, then necessarily we would have had to go to the Engineering Department, or someone, and it would probably *would* have been turned over to them to have made [fol. 1678-1679] some sort of a study of that nature.

Q. Including the investment in the real estate?

A. Oh yes, certainly.

Q. And you have done it this way only because of the wording of the ICC notice?

A. That is correct.

Q. Your interpretation of that wording?

A. That is correct.

Q. And to get the record perfectly clear, you interpreted the ICC wording as calling for a study not of what the saving in cost would be, if you didn't have the piers, or what the difference in cost would be if you didn't have the piers, but you interpreted the Commission as saying, "We want to know what it costs you to handle on your piers today and we want to know what the cost is of handling whatever number of cars you now handle on your limited team tracks." That is the way you interpreted it? Isn't it?

A. That is correct.

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Mr. LaRoe: That is all. Thank you.
Exam. Walsh: Any further questions on cross examination?
Mr. Kaplan: May I ask a question.
Exam. Walsh: Mr. Kaplan.

Cross examination.

By Mr. Kaplan:

Q. On page 1 of Exhibit 146, the last column, bottom line, [fol. 1680] which you originally had at 46 cents, is now what figure?
A. Well, Mr. Kaplan, what I have done——

Exam. Walsh: He made that $45.79.
The Witness: Yes.

By Mr. Kaplan:

Q. Now, may I ask you whether or not you have made any study of what the Erie Railroad receives from any sources to compensate them for the $45.79?
A. Well, these particular items of expense—no, I haven't compared this with any revenue, if that is what you mean, that we have received with respect to these particular items.
Q. So that for all we know the revenue that is received by the Erie Railroad in return for this supposed expenditure of $4.79, may be $80, $90, or even a hundred dollars?
A. Well, I wouldn't quite go to those figures,—no, sir. Based on my judgment and the figures I have seen——
Q. Regardless of your judgment I am talking about any statistical figures that may have been prepared by you or by anyone else in your department, you have no way of telling what is received?
A. No. I have made no allocation of any revenues against these particular items of expense which are included in this particular exhibit. You understand, of course, this does not include the unloading costs.

Q. I understand that.

[fol. 1681] Exam. Walsh: Any further questions of the witness?

(No response)

Exam. Walsh: Do you offer 146 and 147?

Mr. Smith: Yes.

Exam. Walsh: Exhibits 146 and 147, Witness Root, have been received in evidence, but the receipt will show that they have been objected to by Mr. LaRoe.

Mr. Loos: And the others.

Exam. Walsh: And others.

Mr. Wells: May I ask one question at this time?

Exam. Walsh: All right.

Cross examination.

By Mr. Wells:

Q. Mr. Root, in the computation of the unit cost per loaded car, might it not be that a different volume of number of cars in a particular period of study would change completely the original cost that would be shown?

A. To the extent that our study is based on time studies, which is a large part of our study, no, I don't believe that volume would have any material effect at all on our study; any increase or decrease in volume. Does that answer your question?

Q. Well, doesn't the number of cars that you took into consideration determine the amount of unit cost developed by your exhibit?

A. Not on our floating marine study or on our yard studies. It does not, because that is based on time studies, and I do not think—I am quite positive in my own mind—that [fol. 1682] volume would have any material effect on that time study, or on those time studies.

Where there are costs based on annual cost, and divided by annual number of cars, volume could have some effect.

Q. Well, your study then as to yard costs and floatage costs, and so forth, was determined on the basis of engine hours in a yard.

A. And particular types of service.

Q. And tug hours, and so forth, in the floating service?

A. That is correct.

Q. And then you applied that to the number of those units that was determined for the particular study?

A. That is correct.

Q. So that if there was a different number of cars in-

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volved in a particular time, wouldn't you have a different result?

A. We would have a different total result. We wouldn't have a different average result.

Q. Well, if you had a float, for example, that took a certain period of time and there were ten cars on it, or another instance there was a float that had 8 cars or another 12 cars, wouldn't you have a different resulting unit cost per car?

A. On our car float expense we would have, yes.

Q. That is a big item here in your computation, isn't it?

A. Our floating costs amount to $11.28 out of the $45.79 at Duane Street, yes.

[fol. 1683] Mr. Wells: Thank you. That is all.

Exam. Walsh: Any further questions of this witness?

Mr. Loos: I understand when he is recalled, I may ask some more questions?

Exam. Walsh: All right.

Are you familiar with the physical set-up of the Duane Street piers? Piers 19, 20, and 21?

The Witness: Yes, sir.

Exam. Walsh: Does the Erie operate those piers as its terminal facilities in New York?

The Witness: That is a part of our terminal facilities in New York, yes.

Exam. Walsh: I understand that this record shows that those piers are owned by the City of New York?

The Witness: That is correct.

Exam. Walsh: And the Erie and the other carriers lease those piers from the City of New York; is that correct?

The Witness: The other carriers lease other piers; we lease these particular piers.

Exam. Walsh: That is right.

Do you occupy the pier, the part you have leased from the City of New York, as your terminal facility exclusively?

What I mean is, has anybody else any right in there other than a shipper, or receiver of freight?

[fol. 1684] The Witness: Well, no; of course, on Pier 19 I believe we do have a sub-lease of some property there from someone else.

Exam. Walsh: But it is your property?

The Witness: That is right.

Exam. Walsh: So that no other parties have a right to use the terminal facilities of these piers without the consent of the Erie Railroad and the other carriers at their respective piers?

The Witness: As far as the Erie is concerned, that is correct, yes.

Exam. Walsh: That is all.

Cross examination.

By Mr. LaRoe:

Q. There wouldn't be any doubt that those piers constitute your principal public delivery stations for freight in Manhattan Island?

A. I think in volume of cars that is correct, yes.

Mr. LaRoe: That is all.

Exam. Walsh: Any redirect?

Mr. Smith: No, sir.

Exam. Walsh: Witness is excused.

Mr. Loos: Subject to recall.

(Witness temporarily excused)

Exam. Walsh: You have testified previously in this case?

Mr. Heywood: Yes, sir.

[fol. 1685] Mr. Miller: Mr. Heywood's exhibit and testimony have been distributed, Mr. Examiner.

The testimony includes a statement of his qualifications.

Exam. Walsh: The next exhibit will be 148; and the next exhibit will be 149.

Mr. Miller: I believe, Mr. Examiner, we have identified the New York study as Exhibit 148?

Exam. Walsh: That is correct.

Mr. Miller: And the Philadelphia exhibit as Exhibit 149?

Exam. Walsh: 149.

Proceed.

(Respondents' Exhibits Nos. 148 and 148, Witness Heywood, were marked for identification.)

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J. L. Heywood was recalled, having been previously sworn, testified as follows:

Redirect examination.

By Mr. Miller:

Q. Will you state your name and business connection?
A. J. L. Heywood, Assistant Comptroller of the Pennsylvania Railroad, Philadelphia, Pennsylvania.

Mr. Miller: Mr. Heywood, Mr. Examiner has prepared a statement which was distributed with his two exhibits, which I think is complete in itself.
[fol. 1686] Exam. Walsh: All right.
Mr. Miller: In order to make the record perfectly clear, Mr. Heywood's exhibits include a 36-page study of team track and station costs on perishables delivered at New York, and a 21-page study of similar costs at Philadelphia. Those two exhibits have been identified respectively as exhibits 148 and 149.
That is all on direct, Mr. Examiner.
The Witness: My name is J. L. Heywood and my present position, which I have occupied for eight years, is Assistant Comptroller of The Pennsylvania Railroad Company. My duties include direct supervision over the compilation of statistics and cost studies. I was Assistant to the Comptroller for the previous three and one-half years and prior to that for nine years was directly engaged in the analysis and preparation of cost studies principally in connection with rate cases. I have been employed in the Accounting Department of The Pennsylvania Railroad Comany for 35 years.
I wish to present exhibits showing terminal costs at New York and Philadelphia which are entitled I. & S. Docket 5500, Unloading Charges, Fruits and Vegetables at Piers 27 and 28, New York, N. Y.; 37th Street, New York, N. Y.; and Henderson Street, Jersey City, N. J. (Ballground) and New Greenwich Classification, Pay Yards and Produce Terminal, Philadelphia, Pennsylvania.
The purpose of these exhibits is to show the cost of terminal services performed in handling a loaded car of per-
[fol. 1687] ishable freight for delivery, both at New York and Philadelphia, also the methods used in developing the

costs, using the month of December 1950 as the study month.

Results are further separated in order to show differences in costs at the piers and team tracks on Manhattan Island and the team tracks at Henderson Street in Jersey City, known as the Ballground and also in Philadelphia, between Pennsylvania Produce Terminal and the team tracks, which are adjacent thereto.

With respect to the New York Study, Page 1 shows the summary of costs per loaded car at the piers, 37th Street, N. Y., and Henderson Street, Jersey City, which amounts to $122.73, $73.57 and $58.50 respectively.

Pages 2 and 3 show the yard costs by primary expense accounts with overhead, taxes and 6% return on depreciated investment on basis of number of cars handled in and out of the yard.

Page 4 shows a summary of these costs on a loaded car basis. Pages 5 to 15, inclusive, show the supporting detail of the primary expense and investment accounts, taxes and the number of cars handled.

The Harsimus Cove Yard costs developed represent the average per loaded car within the confines of that yard. The study covers only those Harsimus Cove Yard movements and costs and directly associated with yard classification, float bridge and lighterage pier switching, also station and [fol. 1688] industry switching to those points immediately adjacent to the yard.

For example, Hudson Street Branch movements serving Colgate's and other industries and the movements between the Jersey City Terminal and Waldo Avenue Yard were not included in the yard engine hours or costs. Operations, maintenance, and investment costs at Lighterage piers and Henderson Street Freight Station, which are located in the yard area, were also eliminated.

Page 16 is a summary of Float Bridge costs in total at Harsimus Cove Yard, Jersey City and 37th Street, N. Y. and per loaded car supported with further detail on the pages enumerated thereon.

Pages 19 and 20 are a summary of the floatage costs in total and per loaded car with supporting detail on pages 21 to 30, inclusive.

On pages 31 and 32 there appears the station costs at Piers 27 and 28, Henderson Street (Ballground) and 37th Street

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in total and per loaded car with supporting detail on pages 33 to 36, inclusive.

All of the larger expenses were directly assignable to the studied operations. For example, wages of yard crews, yardmasters, bridgemen, etc., and handling and other station expenses the most of which are paid to contractors, also pier rental paid to the City of New York, are actual expenses incurred in December 1950.

In connection with the allocation of expenses on unit ratio [fol. 1689] bases, the accounts and service units on which the rates and ratios were based were New York Division statistics. All of the operations included in this study are a part of New York Division.

Subsequent to the preparation of the study, certain yard employees were awarded an increase of 12½¢ per hour with negotiations continuing which may result in further increases. While this study does not include this increase, the cost was retroactive to October 1, 1950 and was paid in February 1951.

Also, subsequent to the preparation of the study, non-operating employees received an increase of 12½¢ per hour effective February 1, 1951, with provision for additional increases subject to increases in the cost of living index.

Effective April 1, 1951 the contract under which the perishable traffic is handled at the pier was changed to reflect an increase of 12½¢ per hour in the wages of the stevedores. None of these increases was included in the cost study.

The next exhibit is described "Unloading Charges on Fruits and Vegetables—New Greenwich Classification and Pay Yards and Produce Terminal, Philadelphia, Pa., December 1950."

Page 1 shows total cost per loaded car unloaded in the terminal of $109.36 of which yard costs amounted to $14.68 and station costs amounted to $94.68 while the cost per car on team track amounted to $39.64 of which $14.68 was yard costs and team track costs of $24.96.

[fol. 1690] Pages 2 to 4, inclusive, detail by primary accounts the operating expenses, taxes, 6% return on depreciated investment and the cost per car handled separately for the New Greenwich Yard Classification and the switching at Pay Yard. Page 5 shows the number of Perishable Terminal Cars handled at each of the yards mentioned, the

total yard costs attributable to those cars and the yard costs per loaded Perishable Terminal car.

Pages 6 to 14, inclusive, furnish supporting data for the earlier pages.

Most cars to and from the Produce Terminal are classified in New Greenwich Yard over Greenwich Hump. New Greenwich Classification Crew and other yard expenses were determined and these expenses were divided by the number of cars classified.

The resultant cost per car was applied to each loaded and empty Perishable Terminal car handled over the Hump. After classification, cars for the Produce Terminal are switching to Pay Yard together with cars for the adjacent South Philadelphia Freight Agency and for two small private sidings.

A few Perishable Terminal Cars are taken directly into Pay Yard over tracks located north of the New Greenwich Yard and no classification expense has been included for such cars.

The crew and other yard expenses at Pay Yard covering the switching for the Produce Terminal, the South Philadelphia Freight Agency, and the two private sidings were computed and divided by the total number of cars into and out of those points. The resultant cost per car was applied [fol. 1691] to each loaded and empty car handled at the Produce Terminal, except reconsigned cars.

The New Greenwich Classification costs and the Pay Yard costs thus determined for Perishable Terminal cars were then totaled and divided by the number of loaded perishable cars handled at the Terminal to produce the yard cost per loaded car of $14.68.

Station costs are shown starting at Page 15, the costs per loaded perishable car unloaded in the terminal of $94.68 and at the team track of $24.96 appearing on Page 16. The supporting information is shown on Pages 17 to 21, inclusive. All of the larger station expenses are directly assignable to the studied operations.

In computing expenses based on unit rates or ratio bases Philadelphia Terminal Division expenses were used where applicable and expenses for Eastern Region, which includes Philadelphia Terminal Division, where applicable.

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No expense on account of the wage increases, mentioned previously, has been included in this study.

Exam. Walsh: That conclude your testimony on direct?

The Witness: Yes.

Exam Walsh: Cross examination.

Cross examination.

By Mr. LaRoe:

Q. I don't expect to go into each detail regarding your study, but I want to straigthen out some big points if I can. [fol. 1692] You would agree with the previous witness, I take it, that you interpreted the Commission's instructions as calling merely for a study of present cost of handling cars at team tracks and at piers, and you made no attempt to study or determine what the cost would be if you should acquire the land necessary to handle your fruit and vegetable traffic if the piers were not there?

A. That is right. We did not.

Q. Now, I must be entirely frank with you and say that we are shocked by your figures.

Can you explain, for example, or do you have enough knowledge of the other railroad operations or figures to explain why the team track costs on Manhattan to the New York Central is $22.30 and your cost in Jersey City is $58.50?

A. You mean what is the difference?

Q. No. The difference is $36.

A. I know that but you want me to explain the difference?

Q. Yes.

A. You will have to have the New York Central man if you want that. I can't explain it.

Q. In other words, you would not be able, for example, to explain why the Erie team track cost is $10.74 on Manhattan and yours is $58 just across the river?

A. No, sir.

[fol. 1693] Q. Those figures shock us. Would you be able to explain why the Erie shows a cost of $46 for pier operation, plus the unloading, whereas you show $122, including the unloading? Those figures are almost equally shocking.

A. The only explanation I have to that is I prepared a number of exhibits in previous cases on this same formula

and they are within confines of the original figures we prepared as far back as 1932.

Q. Well, if the figures that I have given them are correct, isn't there something rotten in Denmark somewhere? How could it be possible for an Erie team track cost on Manhattan to be ten dollars and yours across the river to be fifty-eight?

A. I don't know. That is what our cost is.

Mr. LaRoe: That is all.

Thank you.

Exam. Walsh: Any further questions?

Mr. Matson: Just a few questions for clarification, Mr. Heywood, of your Exhibit 148.

Cross examination.

By. Mr. Matson:

Q. On page 4 of your exhibit, under the column headed "Pier 27-28," you show the total number of cars perishable, 3,894, and then down in the middle of the page you show under the same column 2,076 cars of loaded perishables.

Now, following along those same two lines, the total number of cars of perishables in the other columns is double the number in the lower line.

[fol. 1694] Can you explain why that is not true of Pier 27 and 28?

A. Well, some of those cars in the first place at Piers 27 and 28 are shuttled back and forth to hold in the hold track at Harsimus Cove.

Q. They are counted twice?

A. Up in the upper one.

Q. I don't follow you on that. Under all the other columns the figure opposite the heading "Total cars perishable" is exactly double the figure for loaded cars, perishable.

A. That is true of Harsimus Cove because you have got the one line as loaded cars and the other is the total cars in and out and it isn't always true that all the loaded cars that went into Pier 28 come out empty. Some of them are loaded when they come out of there.

Q. Do you mean to say that cars delivered at 37th Street invariably are returned empty?

A. That is correct.

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Q. And so with respect to Henderson Street?
A. Yes.
Q. And Ballground yard, Henderson Street?
A. That is correct.

Mr. LaRoe: I neglected to object to this exhibit. Can we have an understanding that my objection goes to all railroad exhibits which proceed on the same assumption that Mr. Root did?

[fol. 1695] Exam. Walsh: The record will so show.

Mr. Loos: We all join.

Mr. Fitzgerald: The record will show that the Philadelphia interests, which not only have concurred in Mr. LaRoe's original objection, expressly and specifically join in the objection as to Mr. Heywood's Exhibit No. 149.

Exam. Walsh: That will come up later. All right.

By Mr. Matson:

Q. Now, in your explanation of the difference of those two figures on page 4, that would also apply to the same figures on page 16, I presume?
A. Yes. They are the identical same figures. That is in so far as cars are concerned we are speaking of now.

Q. Does that mean that you had 129 loads returning from the Manhattan piers? What happened to those cars? Were they diverted after they were taken over there for delivery?
A. Some of them may have been diverted. Some may have been loaded there. There are times when we will load perishables on there. Such as bananas have been loaded there.

Q. Now, if you will jump over to page 32, you show there a total number of cars inbound 1841, and outbound 3. I can't reconcile those two figures with the explanation which was just given on pages 4, 16, and I presume also page 20.
A. Well, we are down now on page 32 to the station cost, and the 1841 inbound and 3 outbound is exactly what the station accounted for, from a station cost standpoint.
[fol. 1696] The others were from the float standpoint and the yard standpoint over the float bridge.

Q. Do you mean some of those cars, those two thousand

76 loaded cars of perishables had no station cost after they get over to Pier 27 and 28?

A. They may be returned too late for unloading at that market, returned to Harsimus Cove, and again may never hit within that period and then also there is another element there of an overlap, where we may count the cars out of the yard at ten minutes to twelve, of a night——

Exam. Walsh: You mean at Harsimus?

The Witness: At Harsimus, the next day the agency will get it into his account so there is no lap in the beginning at the end of the month.

By Mr. Matson:

Q. This is only for clarification.

A. I understand.

Q. On page 33 you have an item near the bottom of the page of $6,740 for one year's premium on insurance, and that is for floating, ice, and collusion, and so forth, insurance—and I would like to ask you as to that why that is all charged to the Piers 27 and 28 and none of it allocated to 37th Street, for example.

A. For the simple reason that none of it was chargeable out to that service; none to Henderson Street you wouldn't have. That is natural but as to 37th Street there was noth-[fol. 1697] ing set aside on that. The insurance department claims that the collision they have, and ice, and so forth, is strictly on Piers 27 and 28.

Q. You mean you have an insurance policy which covers the movement to Piers 27 and 28 but does not have a similar policy covering the movement to 37th Street?

A. You may call it a policy if you wish. Of course, we insure through our own fund.

Q. It is a matter of self insurance by the Pennsylvania Railroad?

A. That is right.

Q. And you have set up no similar account for 37th Street?

A. That is correct, when we checked into the insurance department to give us the insurance on, any insurance they had on the collison, ice, and so forth, we were informed that it only was applicable to 27 and 28 pier and nothing to 37th Street.

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If we had we would have had it in there.

Q. I am not questioning the accuracy. I am just asking for clarification of this anomalous situation here.

If that is all the explanation that is all I have. Thank you.

Cross-examination.

By Mr. Augello:

Q. Would you elaborate a little more about your statement that some of the cars might have come over too late for the market and that is the reason they weren't unloaded.

A. I gave two reasons there: Too late for the market; or the market wasn't right and they told us to take them [fol. 1698] back and hold, due to the end of the month and the beginning of the month over lap as to the date that it would leave the Harsimus Cove and arrive at the Pier.

Q. Let's restrict ourselves to your first reason about the cars coming over too late for the market. Would that be due to the fact that the train arrived too late at Harsimus Cove to enable it to get over to the Pier on Manhattan side in time for the market?

A. Not necessarily. They might have changed their mind when they got over there, that it wasn't the right market today for that product.

Q. You know, don't you, that in some cases the railroad brings these cars in late?

A. We don't have a hundred per cent on time schedule, no; certainly not.

Q. And while the cars were ordered for the piers for a specific market, the fact that the train arrived late missed that day's market and that is the reason the cars were brought back to Jersey City after being taken over to the piers in the first place?

A. Did you say I know that?

Q. Did you know that?

A. I think that is the statement I made. I think it was clear enough to say it was cars to the market not being right for them. I didn't say necessarily that we held it up. I am not going to blame it all on us. You are trying to [fol. 1699] make me say it is due to our train being late, that is why the market wasn't right.

Q. There are cases where the train is late that brings these cars over to the pier, too late for the market; is that so?

A. I don't care to subscribe to that wholeheartedly,—no.

Q. You haven't any records here to show those conditions?

A. No; I have nothing here to show those conditions.

Mr. Augello: That is all.

Cross-examination.

By Mr. Wells:

Q. Did I understand you to say in your prepared statement you had been in the accounting department of the Pennsylvania for 35 years?

A. That is what it says, yes. It is 36 now.

Q. I understand you to say also that the first time you prepared any cost study in connection with these piers and perishables was about 1932; is that right?

A. Yes, sir, that is right.

Q. Did you know a Mr. J. J. Neal of the Pennsylvania Railroad Accounting Department?

A. Yes.

Q. Did you work under him?

A. No, sir.

Q. Do you know that he testified on the 24th day of April, 1926, in the line-haul citrus freight case, Docket 16939, with respect to station and unloading cost at the piers in New [fol. 1700] York City on Florida Citrus Fruit?

A. Do you want to know whether I knew he testified?

Q. Yes.

A. No, sir.

Q. You did not investigate, then, to determine that in the particular situation that you had under study here, in 1926 a study was made by him in which he testified at page 1527 of the record, "The cost as shown on page 1 of the exhibit is 3392 per car, or $2.60 per ton."

A. No, sir.

Mr. LaRoe: How much per ton?

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Mr. Wells: $2.60.
The Witness: I don't know anything about his testimony.

By Mr. Wells:

Q. And that the average loading is 13.05 tons for fruits and vegetables covering shipments from Atlantic Coast Line Railroad, Seaboard Airline Railway, and Florida East Coast Railway for the period September 1, 1924 to August 31, 1925 as per exhibit No. 36, sheet 1, Witness W. D. McKay, in Docket 16939; do you know anything about that?

A. No, sir.

Q. And you made no investigation whatever to determine either the methods used by your Mr. Neal, who was the witness of the Pennsylvania Railroad in that line haul rate case, nor as to the amounts for the respective items about which you are testifying here in this proceeding, is that right?

[fol. 1701] A. That is right.

Q. Did you make any time study or any other particular study of operations in the month of December 1950?

A. Only in reference to the tug and float time.

Q. What study was made with respect to that?

A. We went to the tug logs and took off all the information to show the movements to Pier 27, 28 and 29, and to 37th Street and then accumulated the total tug hours in that period.

Q. Well, in other words, you didn't make any study at all during that period.

After the period had elapsed and terminated, you then went back to the records to try to develop some information about it, is that correct?

A. You mean did we put men on the tugs? Is that what you are referring to, Mr. Wells?

Mr. Wells: I will ask the reporter to read the question.

(Question read.)

The Witness: Not entirely,—no. We worked on the tug logs as time went along in the month of December.

By Mr. Wells:

Q. Well, will you describe in detail and accurately just what study, if any, you made during the month and in the month of December, 1950?

A. We made a study of the tug logs to determine the time of the tugs, taking the floats to pier 27 and 28 and to 37th Street, and then also accumulated the total tug hours for the period under study.

[fol. 1702] Q. From the examination of the log?

A. Yes.

Q. And that is the entire study that was made in connection with data underlying your exhibit; is that true?

A. In so far as time study was concerned, yes.

Q. Now, I want to understand if I may about page 32 of your exhibit No. 148, which I don't understand.

You show there a total of 1841 inbound perishable cars; is that right.

A. That is right.

Q. To piers 27 and 28, New York City; and at another point you have shown 2,076 loaded cars and if I understood your answers to Mr. Matson a few minutes ago you said there were two reasons that might have caused that difference, one being that some of the cars came over to the pier on the float and were not unloaded and then went back to the yard at Harsimus Cove and the other being that there might have been an overlap at the beginning or end of a month; am I correct in my understanding?

A. That is what I said,—yes.

Q. Will you tell us how many, if any, of the cars in the 2,076 number in the month of December were brought to Piers 27 and 28 and not unloaded but carried back to Harsimus Cove Yards?

A. No.

I don't have that here.

[fol. 1703] Q. Do you know or did you ascertain that there were any included in 2,076 figure that were actually carried back loaded to Harsimus Cove Yard?

A. Yes. There were some cars carried back.

Q. Will you give us that figure, please?

A. We will try to get that figure, yes.

Q. You don't have that with you, sir?

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A. No, sir. I do not.

Exam. Walsh: Will you furnish that?

The Witness: I said I would,—yes.

Exam. Walsh: How long do you want for that?

The Witness: Give me a few minutes after I get off here and I will give you some idea.

Exam. Walsh: Will you do it here today?

The Witness: Yes.

Mr. Wells: I don't want your guess about it or judgment figure on it. I want your exact information, please, sir.

Mr. Miller: He will give you the exact information, Mr. Wells.

By Mr. Wells:

Q. I wonder if you would look at sheet 21, please.

You have referred to, in several places during your exhibits, the percentage of .287; and will you tell us how that percentage amount was computed?

A. That is the percentage of dispatchments of perishable cars to, as I recall—I might have to go back into the detail on that.

[fol. 1704] But it is my recollection of the perishable cars to 37th Street as compared with the total dispatchments.

Q. Did you divide ten by 1,034.81?

A. I would say here, yes, until I looked at the rough papers.

Q. Now, in getting your figure 12.927, what did you divide?

A. I specifically invite your attention to the fact that 451 divided by 481 does not give the amount you gave. I will ask the privilege of looking at the rough papers if I can do that.

Q. I would be happy for you to do that. Where did you get the 8.93 per cent which you have shown on that sheet as the perishable proportion?

A. That would be on the basis of the station operation, I would say. At the same time as I look up that 287 I will give you the detail on the 893, the base figures that made that percentage.

Q. Thank you, sir.

Now your total operating expense at the top of that

sheet that you used in connection with the cost of repairs to the boat master's office for three years totalled $3330; is that right?

A. That is right.

Q. And then you made an arbitrary assignment to Harper's terminal in a differing percentage for each of those three years, did you, sir?

A. Yes, sir.

Q. As a matter of fact, the $3110.78 then, as the result of [fol. 1705] that application, seems to be 93.698 per cent of the above.

Would that result from the *wait*ing of the expenses in each of those three years?

A. Yes.

Each year, the percents were applied to each individual year.

Q. And how did you get the material and labor costs separately then?

Did you do that?

A. That is based on our master carpenter, and master mechanic giving us the information, in part actually from material slips and bills from outside concerns who might have done the work rather than our own people and when it came to our own people there are times when he has to use some estimate because of him working more than one place within a given time and no separation is made of that in detail on our railroad.

Q. Well, in other words you- account 227 then does not have it separated as to material and labor; is that right?

A. No. It was made after we took off the material slips or time slips, and which we had available as I say for the bills from the outside concerns.

There are occasions when we have outside concerns do some of this work.

Q. Well, did you take that for the year 1950 or for each of the three years?

A. Yes each of the three years.

[fol. 1706] Q. And whatever the item was, if it was from an outside concern or something charged out from your own accounts——

A. It would be in the year in which it was charged out.

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Q. Well was there the same relation between labor and materials making up the totals for each of those years?

A. I wouldn't say so. That would be rather accidental possibly if it was that way.

Q. Then if you applied your percentages in each of the years to each of those amounts you would give different results from what you did, wouldn't you?

A. You are speaking of the 92.4 and the 92.6?

Q. Yes.

A. That is simply to get the figure of the total to the Harbor Terminal part. The boat master's office also has some other figures there that he considers as not applicable to the harbor terminal service.

Q. Is the dividing of the 3110.78, which is the only figure I understood you to say was obtained by the application of those percentages, and then is the division of that between the 999.88 for material and the amount there for labor, simply a guess?

A. No.

I didn't say that. I said that where material and time slips were available they were used. If we had a bill from an outside concern that would show labor and material it [fol. 1707] was taken off but I also said there was occasion when the master carpenter, and so forth, had men working, he would have to make some arbitrary split because of them working on different sections of the piers over there, maybe at the time he could be working on the "bos-master" which as I recall is on Pier "H". He could have hit "K" and "L" all within a given time of a day we will say, or something, and he would have to take some basis of saying so much time was spent at Pier "H" and so forth.

Q. How did you divide the 311078 as between material and labor?

A. I guess I can't explain it to you. I think I have tried to as far as I can and if it is necessary I will try to put it down in ABC order on a piece of paper.

Q. Thank you, if you will.

Mr. Miller: What do you mean?

Mr. Wells: Well I would like to have an answer from the witness on the record that is understandable——

Mr. Miller: It is undertandable to me.

Mr. Wells: It is not to me. I am sorry.

Mr. Miller: What is it you don't understand?

Mr. Wells: I want to know how he divides the 3,110.78 as to material and labor.

Mr. Miller: The material is shown on the sheet, divided between 999.88 and 2,110.09. What more do you want?

Mr. Wells: I want to know how he arrived at those amounts.

[fol. 1708] Mr. Miller: He has explained that he looked over all the bills that were available; that where the work was directly assignable to these items, he took the amounts off the bills, and off the pay slips. He said that some of the work was performed not only assignable to this item, but some of the work was performed on other projects, and as to that portion of the work where the pay slips and the material slips were not directly assignable to this item, he asked the master carpenter and the other bosses how it should be assigned. They told him how to assign it and that resulted in these figures.

Mr. Wells: Did you make that sort of an estimate on each of the years and then add up to arrive, for example, at the amount of $999.88 for the material cost average for the three years?

The Witness: Yes. That is my understanding as the master carpenter took it year by year, to give the best figure he could possibly ascertain, from in part, as I said, judgment.

By Mr. Wells:

Q. And then when you added up the materials, items assigned and apportioned by the method you speak about, you deducted from the 3110.78 and called the balance labor; is that right?

A. No. I didn't say that.

I haven't said that.

Q. Well, how did you obtain the labor item?

A. The record shows.

Q. Well, will you provide the working papers on that so [fol. 1709] that I can see the detail, please, sir?

A. I don't know. We will let counsel settle whether I will provide them or not.

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Mr. Wells: Well if I correctly understood, at the present hearing conference some time ago we were advised that the working papers would be available.

The Witness: In Philadelphia.

Mr. Wells: At the hearing.

The Witness: If that is so I haven't been apprized of that fact.

Mr. Wells: In other words, you do not have your working papers here at this hearing. Is that your statement, Mr. Heywood?

The Witness: That is my statement.

Mr. Loos: Mr. Examiner, if I may interrupt——

Exam. Walsh: Does that conclude your testimony?

Mr. Wells: No, sir.

Mr. Loos: If I may interrupt at this point I would like the record to show that I wrote to Mr. Miller some days ago saying that I assumed the working papers would be here at this hearing.

Did you receive that letter, Mr. Miller.

Mr. Miller: I did.

Mr. Loos: Did you determine not to bring the working papers to this hearing?

Mr. Miller: Yes.

[fol. 1710] Mr. Loos: Mr. Examiner, I move this hearing recess until we have the working papers here.

Exam. Walsh: Overruled.

Proceed.

Mr. Miller: We are perfectly willing to make those working papers available. Mr. Heywood, they are of course pretty bulky and it was not my thought that protestants would actually want to review them.

Now, if the protestants desire, we will have the working papers here as soon as we can get them brought over from Philadelphia, and they certainly should be here tomorrow.

Mr. Loos: Mr. Examiner——

Mr. Miller: I will arrange to have those papers made available and if you have further questions of Mr. Heywood, after you have reviewed them, Mr. Heywood will be supplied.

Mr. Loos: Mr. Examiner, I would like to make the record clear that I made it perfectly clear in my letter to Mr. Miller that I was anxious to have the working papers here.

There certainly couldn't have been any misunderstanding of my letter.

Exam. Walsh: Mr. Miller admitted that. He received your letter. He understood it that way. He could not bring the working papers here. He now offers to have them here tomorrow morning.

Mr. Wells: Then, may we defer additional cross examina-
[fol. 1711] tion of Mr. Heywood until we have examined them?

Exam. Walsh: Until tomorrow morning.

Mr. Donadio: I wonder if I might propose a point? My understanding of this pre-hearing conference with respect to the making available the working papers is that they should have been made available to anybody who wanted to see them prior to the hearing and I had no idea that it was expected that all these bulky working papers should be brought to the hearing. That is my understanding of the agreement, the understanding at the prehearing conference. If that is incorrect I would like to know it.

Exam. Walsh: Then, am I correct that it is your understanding that the working papers are available prior to the hearing to any person who desired to inspect them?

Mr. Donadio: That is correct.

Exam. Walsh: And that would mean that somebody from Florida would go to the Baltimore and Ohio Railroad headquarters at Baltimore, and then go to the Pennsylvania Railroad headquarters at Philadelphia and come up to the Erie—is it at Cleveland?

Mr. Smith: That is correct.

Exam. Walsh: And the New York Central here at New York, either one, if they were interested, or the Lehigh Valley.

Mr. Miller: That was our arrangement at the pre-hearing conference.

Exam. Walsh: I want the record to be straight on it.

[fol. 1712] Mr. Donadio: That is correct.

Mr. Wells: That is not my understanding of it, because I have very clearly in my memory a discussion, whether on or off the record at that time, I don't know at the moment, but with respect to the place of the hearing and whether there would be adequate facilities at the place of the hear-

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ing for lodging the working papers where they would be available for our examination.

Mr. Loos: Mr. Examiner, I would like to say also for the record that while it was my understanding that the working papers would be available at the offices of the respective railroads for inspection prior to the hearing, they were also to be available at the hearing.

Now, I took advantage of the opportunity to go to Cleveland and inspect the working papers of Mr. Root.

I intended to take advantage of the opportunity of going to Philadelphia and inspect the working papers underlying the exhibit of Mr. Heywood and I expected to do that last week but illness in my family prevented my absence from Washington and I so wrote to Mr. Miller to remind him of what I understood was the understanding that the working papers were also to be available at the hearing.

Exam. Walsh: Well, Mr. Miller you are agreeable to have those papers here tomorrow?

Mr. Miller: When can you have them over here?

[fol. 1713] The Witness: I—no one can have all working papers here. You are going to have papers that you worked-up figures to put in the exhibit but there are certain basic records that are still back on the ground. You don't cart those back anywheres to work. You work on them and get done with them.

Mr. Miller: What time can you have the transportable records here?

The Witness: Any time you want them tomorrow morning.

Mr. Miller: We will have them here at the opening of the hearing tomorrow.

Exam. Walsh: You can have them here at the opening of the hearing tomorrow morning. Proceed, Mr. Wells, with the cross examination.

Mr. Wells: I understood, Mr. Examiner, it was agreeable to defer it until after examining the papers.

Exam. Walsh: Does anybody else desire to examine?

Mr. Miller: I think we ought to complete as much of it as we can. Let's push it forward as far as possible.

Exam. Walsh: Cross examination not connected with the papers?

Mr. Loos: I have some questions if it is my turn.

Exam. Walsh: Proceed. And I might suggest at this time that it will be helpful if the cross examination is conducted by the parties in one particular sequence. Now, Mr. LaRoe starts first, and then somebody else follows.

Mr. Loos: We will go around the table. Give me the last [fol. 1714] word.

Exam. Walsh: And make an effort to conduct your cross examination at one time if possible. That doesn't mean that the Examiner will shut anybody out to just one time, but don't try to come back if you can avoid it.

Cross-examination.

By Mr. Loos:

Q. Will you please refer to page 4 of your exhibit, Mr. Heywood?

I note at the bottom of that page you have added together in a column headed by the word "Total" the items shown in the three preceding columns, one of which is headed "Cost per loaded car at Pier 27 and 28" and the other "Cost per loaded car at Henderson Street" and the other "The cost per loaded car at 37th Street."

And taking the first line, for example, you have added $6.55, and $6.98 and $6.98, and come to a total of $20.51.

What is the significance of that total?

A. That is the total of the cost of handling the cars for the three different destination points, 27 and 28, Henderson St., and 37th Street in so far as Harsimus Cove was concerned.

Q. The cost of handling three different cars?

A. No. Handling cars at the different places I say, for delivery at Henderson Street, 37th Street and Pier 27, 28 and 29. The Harsimus Cove end of it that is. When you come over to the last two columns, if I may get over there at [fol. 1715] the moment, it might clarify it.

That is the cost under Henderson Street at the Ballground and this is the cost at 27th Street when you get into the team track.

Exam. Walsh: By this, you mean 526?

The Witness: Yes. In New York.

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By Mr. Loos:

Q. Is the $5.51 the cost per car?

A. The $5.51 is the cost of handling—the significance there don't mean a whole lot, I will agree because we are only trying to get at Pier 27, 28 and 29, Henderson Street and 27th Street differently but it did show the cost in Harsimus Cove to handle the cars to the three points is $20.51, a car, average.

Q. $20.51 for one car?

A. That is right.

Q. Which place would that one car be going to?

A. Either one of the three places.

Q. I thought you said to go to Pier 27 and 28 it costs $6.55 per car?

A. That is right, and $6.98 at Henderson Street, and $6.98——

Q. How does it cost $20.51 for any car to go any place?

A. That is total cost at Harsimus Cove for handling a car.

Q. Do you mean you handle the car first for 27 and 28, then handle the same car for the Henderson Street, Jersey City and then you handle the same car for 37th Street, New York, so that you compute, come out with a total cost of $20.50 for that one car?

[fol. 1716] A. I would say if it would clear it up, may we strike that column total out of there?

Mr. Loos: I would be agreeable to that because to me it has no significance whatever.

The Witness: O. K. it is out.

By Mr. Loos:

Q. Now, Mr. Heywood, you indicated in your statement I believe that you had filed a number of exhibits in other cases with reference to costs?

A. Yes.

Q. And are those exhibits confined to terminal costs, such as you have developed here or do they cover costs of all kinds?

A. Costs of all kinds but there are some in particular that refer to cost, developing costs to the piers, 27 and 28.

Q. Is it fair to say that most of the cost exhibits prepared

by the Pennsylvania Railroad and introduced in hearings in cases before the I. C. C., are prepared under your supervision?

A. It is.

Q. How long has that been true?

A. Since about—I think I stated in the neighborhood of 1930 to '32, within that territory of two years it started.

Q. Now, Mr. Heywood, Mr. LaRoe indicated in his questions that the costs shown in your exhibits were quite shocking to the protestants in this case.

Have you, in your experience, found that your costs exhibits have been quite shocking to other parties in other proceedings?

[fol. 1717] A. I might add that they were quite shocking to the Southern Carriers until they came up and checked and I heard no criticism after that.

Q. You didn't see any criticism in the record after that?

A. No. The record doesn't show any.

Q. Have you read the briefs in the Divisions case?

A. Yes. I have read all but a few of them.

Q. Have you noticed any criti-sm in the briefs with respect to your costs?

A. They criticized them but they didn't stand. There was nothing substantial. They sent men up here on three different occasions and left and I saw nothing effecting the final figure from it.

Q. But you will agree that they were quite shocked by your figures?

A. I didn't say they were quite shocked. I said perhaps they were shocked. I don't know.

Q. Perhaps they were shocked?

A. Yes.

Q. You say that you have been making these cost studies in the same way, back to 1932. By that did you mean that you were making these terminal cost studies at Piers 27 and 28 and these team tracks at New York in the same way?

A. No. I didn't say that. I said to Pier 27 and 28.

Q. And how about the team tracks?

[fol. 1718] A. I have had no occasion to have made a team track study before to my recollection.

Q. So this is the first team track study you have ever

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made or the first team track study with respect to Manhattan Island?

A. This is the first one with reference to the specific 37th Street.

Q. Is it the first one with reference to the Jersey City side?

A. No. We have gone into that before several times.

Q. Have you had occasion to make cost studies with respect to any other team tracks in or around the greater New York area?

A. No. I can't say that I have.

Q. Well now, going back to your pier studies, you say those have been made in the same way back to 1932?

A. That is correct.

Q. Have there been any changes in operations over the period since 1932 that would have caused any change in the method of making the studies?

A. Well, generally speaking I would say the operations are fairly similar. Possibly wtihout the change in motive power there might have been some slight effect on them.

Q. So that you had no improvement then in your terminal operations at the piers since 1932?

A. I didn't say we had no improvement.

Q. You have had no change whatsoever?

A. I said the operation was relatively the same.

[fol. 1719] Q. So you have observed no change in operations then that would cause you to change in any way your method of making the study, is that right?

A. We took into account anything that was involved, any change in operation, in the study, as we progressed each time we studied it.

What changes in operation did you take into account in your studies since 1932?

A. I couldn't sit here and specifically say what they were. We are still coming into Harsimus Cove. We are still crossing the river, and we are still delivering the perishables at Pier 27 and 28.

Q. Are you sure that there are some changes in operations?

A. There are possibly some, yes.

Q. But you are not sure?

A. I didn't say I wasn't sure.

Q. You said possibly. How do you distinguish between possible——

A. There are some.

Q. But you can't name any?

A. No.

Q. Is there anything in your location of your piers that differs so materially from the location of the Erie Piers, the New York Central Piers, that would call for greatly increased costs in your case compared with those two railroads?

A. I am not in a position to answer that. I didn't study [fol. 1720] the situation at the Erie Piers or the New York Central Piers.

Q. Have you looked at the exhibits that were presented in this case by the Erie and the New York Central?

A. That is correct. I saw them.

Q. Have you any explanation for the difference in the cost between your railroad and the other two railroads?

A. I said previously I had none.

Q. Do you think that one explanation might be the location of the piers?

A. I wouldn't know.

Q. Do you think that you would be any better off if you had Piers 20 and 21, than if you had Piers 27 and 28?

A. I wouldn't know the answer to that one either.

Q. Do you think there is any difference in your handling of the perishable freight? Do you give it such a more luxurious handling than the Erie and the New York Central as to account for the great difference in costs?

A. I am not in position to answer that one.

Q. Can you find anything in the location of your yards that might account for the difference in costs?

A. No, sir. I don't know.

Q. Can you think of anything other than the general inefficiency of the Pennsylvania Railroad that might account for the difference in the costs?

A. No, sir. I don't know.

[fol. 1721] Mr. Miller: Objection. The witness has said——

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Exam. Walsh: You must take out that objectionable word.
Mr. Loos: I withdraw the question.

By Mr. Loos:

Q. You are familiar, are you not, Mr. Heywood, with the so-called indices of operating efficiency?

A. I have seen them quoted in different bul-etins from Washington, yes.

Q. And you are aware, are you not, that the Pennsylvania Railroad has not shown in the past 10 years, or so, anywhere near the improvement in those indices of operating efficiency as have other railroads in the country generally?

A. I don't know as I have made a comparison between railroads. The indices—when I said I had seen them, I referred to them generally from Dr. Parmelee's statement that he puts out, usually on an annual basis, as to the operation during the year.

Q. And you haven't compared your railroad's showings with other railroad showings?

A. Not in respect of specific indices, no. We have compared other things as to tons loaded, carried, and so forth. We have looked at that.

Q. Is that because you haven't been interested in measuring the efficiency of the Pennsylvania Railroad with other railroads?

A. No. I wouldn't say so.

Q. In this exhibit which you have submitted, Exhibit 148, isn't it a fact that so far as Yard costs are concerned, [fol. 1722] you have shown—you have based your figures on averages computed on the basis of total yard costs, and not on the basis of time studies?

A. That is correct.

Q. And in that respect your method differed from the Erie method did it not?

A. I believe it did. Yes.

Q. Do you think that that difference in method might account for some part of the difference in your costs compared with the Erie costs?

A. Now that you have asked me I would say that had it been a time study, the costs to handle perishables in the yard would have been greater than it is on the average.

Q. You think then that the Pennsylvania takes more time to handle perishable cars in yard switching than to handle other cars, whereas the Erie shows that it takes less time?

A. I don't say whether it takes time like that, but I will say that a perishable car certainly gets more handling than an ordinary car in that yard.

Q. But if the Erie exhibit shows, and I presume you haven't studied it sufficiently to say, but if the Erie exhibit does show that the switching time on perishables is less than the switching time on other cars and you say that the Pennsylvania takes more time to switch perishables than other cars wouldn't that indicate inefficiency on the part of the Pennsylvania in the handling of perishables?

[fol. 1723] A. I don't know what would give anybody that idea. Let's bring the Erie down to Harsimus Cove and see what they do.

Q. Do you think it is the difference in the set-up of your Harsimus Cove Yard compared with their Croxton Yard that is responsible for this great difference in cost?

A. I said I didn't know, and I hope that is understood; if it isn't I can make it plainer.

Q. Have you any interest in finding out why your costs are so much greater than the Erie costs?

A. I might if I had time.

Q. But you haven't time for an incidental detail like that?

A. No, sir.

Mr. Loos: That is all.

Exam. Walsh: Any further questions?

Mr. Hoffman: I have a question or two.

Exam. Walsh: Mr. Hoffman.

Cross-examination.

By Mr. Hoffman:

Q. Mr. Heywood, the Pennsylvania Railroad rents Piers 27 and 28 from the City of New York?

A. That is correct.

Q. And have you terminal offices located at 27 and 28?

A. What do you mean by "terminal offices"—agency?

Q. What offices have you there?

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A. The agency, our perishable agent, just the same as any other agent but he is located on the pier.

[fol. 1724] Q. Do you have any other offices besides what you call perishable agency?

A. Not that I recall, only connected with perishables is all that I recall.

Q. But that perishable agency handles all matters in connection with the termination of the movement of perishables to Manhattan; isn't that true?

A. Yes.

Q. So that it might be said that the duties of that office could be divided into that which might pertain to unloading and that which might pertain to the entire terminal operation of that movement?

A. Well, I guess it might be said that could be true, yes.

Q. And wherever you have a termination of the line haul movement you have to have offices, don't you?

A. Well, I wouldn't say yes to that. There is many outlying stations where we have an agency that covers half a dozen or more agencies. Where we have no agency we call it an agency yet make a delivery of carload at that point.

Q. The office work is handled some place else?

A. That is right. At what we call the consolidated station.

Q. But all the office work is fixed in connection with this perishable movement, is fixed at piers 27 and 28?

A. From an agency standpoint, yes.

Q. Now, turning over to page 35, I notice at the bottom [fol. 1725] of the page you have Account 374, weighing inspection and demurrage bureaus, and under the columns, Piers 27 and 28, you have the amount, $8,024.82. Do you see that figure?

A. Yes.

Q. Is that expense in turn reflected on page 1 of your exhibit 148, Station costs less miscellaneous revenue?

A. Yes.

Q. Piers 27 and 28?

A. That is right.

Q. So that this charge, however, pertains to weight as one of the items?

A. Well, that is the ICC Account.

Q. What do you mean by "weight".

A. In the Account 374, it is known as weighing inspection and demurrage bureaus. At the piers this is purely inspection.

Q. Isn't that weighing for the purpose of determining whether the commodity has moved under estimated weights under the line haul?

A. Oh. If we get into weighing, Yes.

Q. It has nothing to do with unloading, has it?

A. I didn't say any of the 8,282 had anything to do with it either.

Q. It has nothing to do with the terminal charge has it?

A. It has to do with inspecting perishable traffic.

Q. For the purpose of ascertaining whether the perish-[fol. 1726] able traffic has conformed with the estimated weights under the line haul?

A. I have said nothing to that effect. If you will notice, it says railroad perishable inspection agency.

Q. But you are saying are you not that it pertains to the estimated weights under the line haul?

A. I am not saying anything.

Q. What does it mean then, weighing?

A. What does what mean? I explained that that was under the ICC Account 374, known in the classification of accounts as weighing inspection and demurrage bureaus.

Q. Tell us further what it means, what you think it means.

A. What I think what means?

Q. Weighing.

Mr. LaRoe: Mr. Examiner, could we go off the record? It is quite clear counsel and the witness are confused.

Exam. Walsh: Off the record.

(Discussion off the record)

Exam. Walsh: On the record.

Mr. LaRoe: Will the witness please define what is in his inspection figure, that eight thousand?

The Witness: That is inspection in the handling of perishables at Piers 27, 28 and 29, specifically.

Mr. LaRoe: What precisely is included in the inspection?

The Witness: Inspection of the freight by the agency.

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[fol. 1727] Mr. LaRoe: Not any weighing?
The Witness: No.

By Mr. Hoffman:

Q. But the inspection pertains to nature and quality of the commodity upon arrival for the purpose of ascertaining, is it not true, whether there are claims or for the purpose of improving the carriage of the commodities?
A. Somebody else will have to answer that.
Q. Then you don't know what this eight thousand dollars is for?
A. I told you what the eight thousand was for and I will stick to it on the record any time.
Q. Isn't this, Mr. Jensen's department, where he makes inspections for the purpose of improving the loss by reason of claims?

Mr. Miller: Objection. The witness is having difficulty with the question——
Exam. Walsh: If he doesn't know he can say so.
Mr. Miller: If you please, Mr. Examiner——
Exam. Walsh: All right.
Mr. Miller: I am objecting to the form of the question because as I understand the witness he refuses to answer not the factual material in the question, but the conclusions which the question carries with it.
Now, if the question can be made purely factual, I am sure the witness will have no difficulty, but I think it is not [fol. 1728] entirely fair in the light of the previous answers to frame the question as this one is framed.
Mr. Hoffman: Withdraw the question.

By Mr. Hoffman:

Q. What is the inspection for?
A. Inspection of the perishable traffic for claim purposes.
Q. For claim purposes?
A. Yes.
Q. They make inspections of that nature at other terminal points?
A. Of perishables?
Q. Yes.
A. Yes.

Q. So that this particular expense is an expense that is incurred at any terminal point in connection with the arrival of these perishables at destination?

A. At any point we would put it in, yes.

Q. Now, turning to page 35 I notice you have an item, Aetna Cooperage and Stevedoring Company, recooperage $8,050.40, under the column Piers 27 and 28. On page 35 of exhibit 148.

Is that item, Mr. Heywood, of $8,050.47 reflected in the item on page 1 of that exhibit entitled, Station costs less miscellaneous revenue," Piers 27, 28 $92.69?

A. That is correct. It is in there.

Q. Will you tell us what you mean by recooperage, as the same appears on page 35?

[fol. 1729] A. That is the reclaiming of damaged packages by the Aetna Company and recooperage means to be in receivable condition.

Q. Is it then turned over to the consignee after it is recoopered?

A. Yes.

Q. And the requirement for recooperage might be due to losses incurred in transit or damage to the commodity in transit?

A. It may have been damaged in transit, yes. I couldn't say it wouldn't.

Q. Isn't that the usual case?

A. Yes. It is usually done in transit. It wouldn't be damaged if the car was standing still.

Q. What in your opinion is the relationship between this $8,050.40 and the so-called terminal operation costs at Manhattan at these piers?

A. Well that is where the operation is performed and it costs money to do it there at the terminal and it is certainly a terminal charge.

Q. Don't you have recooperage charge at other terminal points where the commodity is not unloaded at piers?

A. Sure. I admitted that. I said that, yes.

I also said it would be included in the cost at that point too.

Q. But it has nothing to do, has it, with a terminal charge for terminal costs as such, operations costs?

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Mr. Miller: Objection.

[fol. 1730] The value of this exhibit is not to be determined by Mr. Heywood.

Exam. Walsh: The witness may answer.

The Witness: I certainly thought so, or it would not have been put in the exhibit.

By Mr. Hoffman:

Q. Even though this claim may have taken place because of some damage in Chicago on the way from California to Manhattan?

A. It may have; who is supposed to pay? You have got to get in the costs some way, don't we?

Q. Sure, it is in the line haul.

If you were making an exhibit in justification of the line haul rate would you or would you not include this item of recooperage as one of the items in justification of the cost of the line haul rate?

A. I would put it where we have. If we were putting line haul in here it would have gone in terminal just the same.

Q. And not in line haul?

A. That is right.

Q. Are there any other items of that nature that you have included in these so-called terminal costs?

A. I can't think of any at the moment, like recooperage.

Q. Well now, let's look at the items starting, "Western Fruit" on page 35, under the column "Piers 27, 28 $578.75.

Isn't there a separate charge made for sorting at Man-

[fol. 1731] hattan, aside from the unloading charges that are set forth in the tariff here in question?

A. If there is it is beyond my recollection.

Q. So that you have no knowledge as to whether there is a separate sorting charge made in Manhattan at these piers over and above the line haul?

A. That is correct. I do not.

Q. And that item of $578.75 is likewise reflected, is it not, on page 1 of Exhibit 148 under the notation "Station cost less miscellaneous revenue, Piers 27 and 28"?

A. Yes, and if there is any correction, it would be in the miscellaneous revenue.

Q. Well, it is less miscellaneous revenue?

A. That is what I said. That is right. That is giving you the credit of the revenue.

Q. Do you know whether it has been added into the cost or subtracted from the cost in the item on page 1 entitled "Station Cost Less Miscellaneous Revenue?" Can you answer that?

A. No.

Q. So you don't know. Isn't it likely that you have added this item into the cost rather than deducting it, referring to the item of $578.75?

A. I don't know what you mean by adding it in rather than deducting it.

Q. I mean by charging it as a cost which would be reflected [fol. 1732] on page 1 in the item "Station cost, Piers 27 and 28."

A. I have put it in here as cost at Pier 27 and 28.

Q. Now, referring again to page 35 and the item "Penn Stevedoring Company—unloading, cleaning, $82,023.48." appearing under the columns, Pier 27 and 28.

That is the amount which the Pennsylvania Railroad actually has paid out to the Penn Stevedoring Company?

A. That is correct.

Q. Have you made any study for the purpose of ascertaining what the costs of the same service would be or are as performed by the Penn Stevedoring Company?

A. You mean whether or not this figure has some overhead for the Penn Stevedoring?

Q. Whether you have made any study of the costs incurred by the Penn Stevedoring Company in discharging the service that you refer to here?

A. I am not interested in the Penn Stevedoring Company's costs. I am interested in what they charge us.

Q. Is your position the position of the Pennsylvania Railroad Company, that you are not interested in what it costs the Penn Stevedoring Company to perform this service?

A. I didn't say that.

Q. Do you know what Item or what element of profit the Penn Stevedoring Company is making in connection with the charges made here?

[fol. 1733] A. No.

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I do not, but we audit their accounts periodically, possibly every six months, and every time they go for an increase it is only done after we have made a pretty thorough audit of their accounts.

Q. But you have made no study in connection with this case here based upon that audit or their costs, even though their figures are available to you?

A. Their figures are available, yes.

Q. But you have not gone behind what they are charging the Pennsylvania Railroad Company?

A. What am I supposed to do, give you that as a credit?

Q. You are not supposed to do anything for me. I am just asking questions.

A. This is what it costs the Pennsylvania Railroad, $82,-023.48 for the handling of perishable at the pier, and that is why it is in there.

Q. Which includes an element of profit to the Penn Stevedoring Company?

A. It possibly does. I don't think they care to run on just getting pay for their men and walk on.

Q. Might that be a profit of 20 or 15 per cent on the total costs of the Penn Stevedoring Company?

A. I don't think it is anything like that, no.

Exam. Walsh: You don't know?

[fol. 1734] The Witness: I don't know.

Exam. Walsh: The witness doesn't know.

By Mr. Hoffman:

Q. And the comments you have made with respect to the Item $82,023.48 that I have just referred to: would they or would they not be the same with respect to the other item on the same page, paid Aetna Cooperage and Stevedoring Company, $156,686.21?

The Witness: Read the question, please.

Mr. Hoffman: Withdraw the question.

By Mr. Hoffman:

Q. The item, $156,686.21, opposite the caption, "Paid Aetna Cooperage and Stevedoring Company" likewise is

the amount which the Pennsylvania Railroad paid the Aetna Cooperage and Stevedoring Company?

A. That is right.

Q. And you have made no study with respect to what the costs are for performing that service by Aetna Cooperage and Stevedoring Company?

A. No.

Q. You don't know whether there is an element of profit in that?

A. Yes. There is an element of profit.

Q. Do you know what the amount of that profit is?

A. No. I do not.

Mr. Hoffman: No further questions.

Mr. LaRoe: Could we have the record show at this point [fol. 1735] which of the companies shown on page 35 of this exhibit 148 are subsidiaries of the Pennsylvania Railroad?

Exam. Walsh: Can you answer that?

Mr. LaRoe: Don't look at your lawyer. Answer the question.

The Witness: I can answer it but you don't have to speak that way about it.

Mr. LaRoe: Go ahead and answer the question, please.

Mr. Miller: I don't know. If you know, tell him, Mr. Heywood.

The Witness: None of them.

Mr. Hoffman: What do you mean by subsidiary?

The Witness: Are we going to get into that kind of an argument?

Exam. Walsh: Wait a minute now.

Mr. LaRoe is conducting the cross examination. He is the man that used the word "subsidiary."

By Mr. LaRoe:

Q. Does the Pennsylvania Railroad have any financial interests in any of the companies on page 35?

A. Well, RF & P, yes. We own some of the stock.

Q. Does it have any financial interest in the Penn Stevedoring Company?

A. No, sir.

Q. None whatever.

A. Not that I have any knowledge of.

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Q. How about the Aetna Cooperage?
[fol. 1736] A. The same.

Exam. Walsh: It has no interest in it?
The Witness: No, sir.
Mr. Loos: Mr. Examiner, may we now have repeated on the record the statement made by Mr. Miller to the effect that there are many items in this exhibit that pertain to the line haul rate?
Mr. Miller: In the sence that there are many items in these exhibits which are not properly apportioned directly to the unloading, that was in the sence in which I intended the language to be understood; that is, what I had in mind was this: In our previous cost studies in this proceeding we have presented cost studies as to the cost of unloading this freight at New York and Philadelphia. This study is not confined to cost of unloading so that some of the services covered by these cost studies are or would be on a proper cost analysis, assigned to, or would be understood as covered by the line haul rate; and as not to be included within the services performed for which the unloading charge is compensation.
Mr. LaRoe: That is substantially the same.
Mr. Loos: I think that is clear.
Mr. Miller: If there was any thought that this study was intended to indicate cost of unloading, that is, that this $120 figure is cost of unloading to the Pennsylvania, or that we are relying upon that figure as a cost of unloading, certainly not.
[fol. 1737] Mr. LaRoe: That is very clear now.
Mr. Loos: And not in substantiation of the charge under litigation in this proceeding?
Mr. Miller: You mean that we are—you mean—no; we do not rely on $120 worth of cost to justify this unloading charge; no.
Mr. Fitzgerald: Mr. Examiner, may I ask from Mr. Miller's statement if it is not incorrect that exhibits No. 148 and 149 should be captioned "Unloading charges on fruits and vegetables" and that the record should be corrected to show a proper designation for those exhibits?
Mr. Miller: That is just the caption of the case, Mr. Fitzgerald. They certainly aren't intended to describe the cost

of $122.73 as being the cost of unloading on the Pennsylvania Railroad.

Mr. Fitzgerald: I would only say in answer to that, Mr. Examiner, that the New Greenwich Classification, pay yards and produce terminal, are not a part of the caption of the case, and yet they are part of the caption of the exhibit to which I referred.

Mr. Miller: I think the caption of those two exhibits is perfectly proper. I see no reason for changing it. Now, the exhibits have been thoroughly explained. We have told you that we are not relying on this. I am not going to change the exhibit, no.

[fol. 1738] Exam. Walsh: All right.

Any further questions of this witness?

Mr. Thornton: I have a question.

Cross examination.

By Mr. Thornton:

Q. Mr. Heywood, on Exhibit 148, on page 4 in your first column designated "Pier 27-28" four lines from the bottom you show an item of $3.43, and on the left is a designation "taxes, real estate, road and equipment".

Will you explain what you mean by the phrase "road and equipment"? That is page 4.

A. Well, in Harsimus Cove, which this is under, Harsimus Cove, we pay taxes on the property on two bases. You have to first have your main line and then the two adjacent thereto.

They are on two different bases and in the State of New Jersey we also pay a tax on the equipment in the State.

Mr. LaRoe: That is on all your equipment in the State whether it is used for this traffic or not; is that not true?

The Witness: That is correct. It is on the total equipment in the State, sir.

Mr. LaRoe: How does it get into Pier 27 and 28 then?

The Witness: That is not directly in Pier 27 and 28. It is Harsimus Cove, if you will note the top heading but it shows the distribution between the three points of delivery.

Mr. LaRoe: Does not the total 1285 on that page at the bottom have anything to do with Piers 27 and 28?

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[fol. 1739] The Witness: That is the cost of Harsimus Cove on those expense items there, of the cars that were delivered to Pier 27, 28 and 29.

Mr. LaRoe: That is clear. Thank you.

The Witness: I had to do it so you would see 27th and Henderson Streets separately on this thing of Harsimus Cove.

Exam. Walsh: Any further questions?

(No response)

Exam. Walsh: Any further questions of the witness?

Mr. Fitzgerald: Mr. Examiner, does that conclude the examination on exhibit 148? Should we now consider that it is proper to cross examine on Exhibit 149?

Exam. Walsh: Yes. Unless you want to adjourn at this time. It is 12 minutes to 1.

This traffic that you handled to Harsimus Cove over to Piers 27 and 28, you car floated over there, and you get that traffic, if it is coming from the South, you get it at Potomac Yards, usually?

The Witness: Yes, sir.

Exam. Walsh: Do you get any in through Hagerstown, N. & W.?

The Witness: There is a little comes through.

Exam. Walsh: How about the old NYP & N?

The Witness: No, only what comes off the peninsula itself.

Exam. Walsh: Then it is floated over to Piers 27 and 28?

[fol. 1740] The Witness: Yes.

Exam. Walsh: And they have been doing that for a long while?

The Witness: Oh yes. They have been doing that, well, ever since I got into this end of it.

Exam. Walsh: And you entered the game you said around '30 or '32?

The Witness: '30, '31; right in there.

Exam. Walsh: That would be over 20 years.

The Witness: Yes.

Exam. Walsh: And the Pennsylvania had been operating in that manner many years before that?

The Witness: Yes.

Exam. Walsh: I think the record shows that.

Mr. Loos: Would the Examiner ask him also where he gets the Western fruits?

Exam. Walsh: Where do you get them, from around Chicago?

The Witness: From the Western points, through both St. Louis and Chicago gateways.

Exam. Walsh: And the Pennsylvania then handles that into Harsimus Cove for carlot purposes?

The Witness: Yes, and delivers it into New York.

Exam. Walsh: And you have been doing that for many years?

The Witness: Yes.

Exam. Walsh: And I don't suppose you are a rate man?

The Witness: No, sir. I am not a rate man.

[fol. 1741] Exam. Walsh: I shall not bother you with that.

[fol. 1742] J. L. Heywood resumed the stand, testified further as follows:

Exam. Walsh: The hearing will be resumed, gentlemen.

Cross examination.

By Mr. Fitzgerald:

Q. Mr. Heywood, I only have a few questions. Are you familiar with Mr. Talbott's exhibits which to some extent at least, parallel those which you have submitted in this proceeding?

A. I have looked at them but I am not familiar with any detail of them, no, sir.

Q. Would you be surprised then if I told you that the comparable figures which he reached for costs of terminating cars at Philadelphia are in each case about 35 percent lower than yours?

A. No, nothing surprises me in figures.

Q. Have you any explanation of that very substantial difference?

A. No. I don't have any answer to it.

Q. Now, Mr. Heywood, it has appeared in the cross examination as respects your exhibit No. 148 that there are

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a large number of items included in your data which were not attributable to unloading, but which, to the contrary, might properly be considered a part of the linehaul charge; is that not correct?

A. No, sir. I admit nothing to that effect and I have [fol. 1743] stated nothing to that effect.

Q. Your counsel has stated of record it is a fact, hasn't he?

A. I would have to hear his statement before I agree with what he said. That statement was a little complicated to me.

Q. Would you like to hear it over again?

A. No, not now, unless you want to take the time. I will go on record and say one thing about these studies.

These are not supposed to show unloading alone. These are the cost of the delivering of perishable freight at pier 27, '8 and '9, a pier station, as compared with delivery of it at a team-track. That is what this is portraying.

Q. Then the caption "unloading charges" was perhaps an inadvertence to exhibits 148 and 149?

A. No. It is sort of in line entirely with what the Commission asked for, under the heading of their order.

Q. In all events, Mr. Heywood, is it a fair statement to make that the analysis in exhibits 148 and 149 include substantially the same types of accounts and are built up in substantially the same manner and therefore include the same general items of expense?

A. That is a correct statement. Both were prepared on the same basis.

Q. Now, Mr. Heywood, as respects page 19 of your exhibit No. 149, I just want to ask you a couple of questions about one item there. Do you recall my request to Mr. [fol. 1744] Miller, which may or may not have been referred to you direct, but as the result of which you and I had a telephone conversation a few days ago?

A. That is right.

Q. And I requested of you that you give me the basic data supporting the item of $7,091.03, captioned, "Wages earned at and Chargeable to Pennsylvania Produce Terminal, and appearing on Payrolls at South Philadelphia Freight Station." Did you not?

A. Yes, sir.

Q. Now, is it correct to state that your answer was substantially that the basic data were not available?

A. I said it was not readily available for me, from any of the records that we had at hand to give you the figure directly, because you wanted to know where the other time of the men were and I said we would have to say how many of these men were involved in the money represented, that I told you as truckers, and so forth, as against the chargeable to South Philadelphia.

Q. Well, Mr. Heywood, would you briefly, please, state for the record what you told me were the basic figures from which you arrived at this total of $7,091.03 for wages at the Pennsylvania Produce Terminal?

A. Yes. I told you that the manner interchangeable between our South Philadelphia freight station and our perishable station and the payroll is directly assignable as South Philadelphia and the charges are made based on the time given to the South Philadelphia Freight station by [fol. 1745] the foreman from the Produce Terminal, and that is the basis of the payroll and this is the basis of the foremen's time slips, that assign so much of the charge to the perishable out of the total money paid the trucker, stevedore and so forth.

Q. And the time you have—. How many loaders is included in that total figure?

A. I don't think I have that paper right here. It is with my rough papers.

Q. If I remind you, eight and seven-eighths loaders at $1.426 per hour?

A. That is correct.

Q. And 11⅜ truckers, at $1.402 per hour?

A. That is correct.

Q. And nine and three-eighths sorters——

A. At $1.426.

Q.—making a total of $7,042.91?

A. That is right.

Q. But these fractional figures represent then, as I understand it, an estimate based upon statements given you by the foremen as to the proportion of time spent by men between the Pennsylvania Produce Terminal and the South Philadelphia Freight Station, is that correct?

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A. Well, I wouldn't exactly say it that way. It is the foremen at the Produce Terminal's check of time of the man while working on produce; that plus the time made at South [fol. 1746] Philadelphia Freight Station makes the total of the time of the man for his payroll, amount allowed him on the payroll. There is no estimate. It is actual time he spent at these two stations interchangeably.

Q. How do you arrive at eight and seven-eighths men, then?

A. That is on the basis of the total men working, and how many hours.

Q. Do you have any figures from which you could determine for us the number of men?

A. I said I could give it to you on Friday. It would take time.

Q. I did request that you have that information available for me today, didn't I?

A. I told you I wouldn't get it today too, didn't I?

Q. Do you have the information available?

A. No, I do not. I told you we would have to go back and work it out and get the men involved and we can't be over here and in Philadelphia.

Q. Now, I believe you stated, Mr. Heywood, that these men load outbound l.c.l. freight at the South Philadelphia Freight station.

A. Yes. I think I did say that. I correct that. It is inbound freight at South Philadelphia. It is outbound at Federal Street.

Q. I thought this was Federal Street station.

A. No. This is inbound. It is the pier—excuse me. It is [fol. 1747] not the pier. It is the platforms between the team tracks and the produce terminal, the one between them, and that is the station that we receive our l.c.l in Philadelphia.

Q. Many of these men are floaters, I believe you said, and are paid on a daily basis?

A. That is right. Many of them are there waiting to know whether we need them that day.

Q. But you have no pay data at the hearing on the amounts paid by you to those men on any daily basis? Is that correct?

A. No. I have not, only this accumulation here.

Q. And of all the items of cost included in exhibit 149, consisting of 21 pages, that item of $7,000 is the only expense directly attributable to the unloading of perishable produce; is that not correct?

A. No, I wouldn't say that.

Q. What other items in that exhibit are directly attributable to produce?

A. There are other items that pertain to the agency, as foremen, and so forth, that are a hundred percent in there.

Q. The agent doesn't unload perishables, does he?

A. I didn't say agent, I said the foreman under the agency, who is a hundred percent time at that station.

Q. What other items of expense included in that exhibit directly apply to unloading?

A. I don't see where that has anything to do with this exhibit.

[fol. 1748] Mr. Fitzgerald: That is all.

Mr. Miller: Mr. Fitzgerald, are you satisfied you have all the information you want about this exhibit? Is there some additional information you want?

Mr. Fitzgerald: I would like to have the basic data on those employees.

Mr. Miller: What is it exactly you want?

Mr. Fitzgerald: I think my letter to you spelled it out, Mr. Miller.

Mr. Miller: I thought we fully complied with your letter. As I understood our conversation it was that you wanted to know the number of men and the rates of pay that went into this figure of $7,000 and I thought that had been supplied. Now, if there is some additional information you want we will be very happy to supply it.

Mr. Fitzgerald: The information that has been developed for the record, it seems to me, gives only one additional item, to what was in your exhibit, and that is the hourly rate. It doesn't give the number of men involved or the number of hours they worked or the number of days they worked or how many men were on a crew in any particular day.

Mr. Miller: Didn't Mr. Heywood give you the number of employees? Aren't these fractional figures for employees? Isn't that the number of employees?

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Mr. Fitzgerald: I think not.

[fol. 1749] Mr. Pettijohn: Fractional days, you mean, Mr. Miller?

Mr. Fitzgerald: It is only a man hour figure. It has no relationship to crews, as I see it.

Mr. Miller: What is the information you want?

Mr. Fitzgerald: I would like to know the number of men, the number of job classifications——

Mr. Miller: You have the number of job classifications. I am sure of that.

Mr. Fitzgerald: You have through.

Mr. Miller: Yes.

Mr. Fitzgerald: The number of men who worked during the month of December and the number of hours they worked. I am assuming that this hourly rate is an actual hourly rate and not some average that would have no relationship to what any individual man actually received.

Mr. Miller: That is the actual rate, isn't it, Mr. Heywood?

The Witness: Absolutely; the rate paid.

Mr. Miller: We will endeavor to supply the number of men and the number of hours going into this $7,000 figure. Is there anything else?

Mr. Fitzgerald: No.

Exam. Walsh: How soon can you do that?

Mr. Miller: I don't know. Do you know, Mr. Heywood?

The Witness: It will take us a few days in Philadelphia to go down to the payroll again.

[fol. 1750] Exam. Walsh: Do you want twenty days?

The Witness: Not that much.

Exam. Walsh: Ten days?

The Witness: Ten days is plenty.

Exam. Walsh: Furnish a copy of that to the Commission in ten days, and the parties of record?

Mr. Miller: Yes.

Exam. Walsh: All right.

Mr. Fitzgerald: May I ask one further question?

By Mr. Fitzgerald:

Q. Mr. Heywood, it is correct, is it not, that in response to my request that I be permitted to see the daily time sheets of these various employees as kept by the foremen

at the South Philadelphia Freight station you told me those were confidential records and could not be displayed to me?

A. That is correct. That is my statement.

Mr. Fitzgerald: That is all.

Exam. Walsh: That concludes your cross examination?

Mr. Fitzgerald: Yes, Mr. Examiner.

Exam. Walsh: Any further questions?

Mr. Miller: I have one question.

Exam. Walsh: On redirect.

Redirect examination.

By Mr. Miller:

Q. Mr. Heywood, it is my recollection that in the previous testimony in this case there was no testimony to the effect [fol. 1751] that the crews working at the perishable terminal and the crews working at South Philadelphia Freight station, were pooled. Do you know when that change in operating practice began?

A. No. I can't say at this moment, no.

Q. Do you know whether there is now a limitation on the percentage of extra men who can be carried on that joint payroll?

A. No, I don't know whether there is a limit on that.

Q. But the fact is, is it not, that at the present time the men are not maintained as separate employees at the perishable terminal and separate employees at South Philadelphia station?

A. No, sir.

Q. But rather, they are carried as a joint labor force which works at both stations; is that correct?

A. That is correct.

Mr. Miller: That is all.

Exam. Walsh: Any cross examination?

Any recross?

Mr. Wells: I understood, Mr. Examiner, he would provide opportunity tomorrow morning for looking at his working papers and I would then complete my cross examination.

Exam. Walsh: I understand he is going back to Philadelphia on an early train.

Mr. Loos: Can we go off the record, on these working papers?

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Exam. Walsh: Off the record.

[fol. 1752] (Discussion held off the record.)

Exam. Walsh: On the record.

Mr. LaRoe: Let the record show it is agreed by the Pennsylvania Railroad that they will make the working papers of Mr. Heywood available on Wednesday between now and Thursday, in Philadelphia; that counsel may go through and go over the papers with him or with people to be designated by him, and that following such examination a stipulation may be entered into, and if such stipulation can not be reached depositions may be taken, and made parts of the record.

Mr. Loos: That is agreeable to me.

Exam. Walsh: That is agreable to all the parties?

Mr. Miller: I wouldn't want that to be limited to Wednesday. Those papers will be there ready for examination at any time that is convenient.

The Witness: Any time. That is what I say, but I can't be there Thursday.

Exam. Walsh: Anything further with this witness?

Mr. Wells: May I ask just a very few questions?

Exam. Walsh: Proceed.

Recross examination.

By Mr. Wells:

Q. Mr. Heywood, for account 202, at Harsimus Cove, you showed an amount of $82.28, and the amount for that account at New Greenwich was $67 and a quarter, per equated ton mile, or track mile was it?

[fol. 1753] A. Track mile.

Q. Now, the cost from therefore at Harsimus Cove, for Account 202 was 22.35 per cent greater than at New Greenwich, why?

A. Well, there is a difference in the land over there. There is more maintenance necessary in that yard than there is—it is very close to the river, and downgrade, really on a natural hump you may say down to the river's edge, and also our maintenance may be governed somewhat under the budget as to the quantity of cars handled in one yard as compared with another.

Q. In other words, the number of cars handled at Atlantic then would cause the unit cost to vary considerably?

A. It certainly has some effect on it.

Q. Well, similar your account 214 for Harsimus Cove is 63.43 percent greater than the account 214 at New Greenwich; 218, 19.92 percent and 220, only 1.17 percent greater, whereas, the reverse is true as to accounts 212 and 216; those respectively at New Greenwich being 31.18 percent and 63.54 percent greater than at Harsimus Cover. Can you explain those?

A. Not off hand, no. That would be technically up to our operating department to determine what they had included in their program of maintenance in one territory as compared with another and it may happen in one year at one place and wouldn't happen in that same year at the other. That is why we try to go three or four or five years on maintenance. One year we admit is not quite sufficient.

[fol. 1754] Q. These are three year averages?

A. I understand that but within that three-year gap you may have wound up in one territory; at the end of this year, you hadn't put anything in that for two years into that other territory and you might go much heavier than you would in the other.

Q. Is the substance of what you are saying then that the longer period of time you use for your computation, the more representative is the nature of the unit cost resulting?

A. In respect to maintenance accounts, yes; I would say that is correct.

Q. You will agree that those differences that I have pointed out are very considerable, are they not?

A. They are, one of those is in our eastern division, and prior to May, the other one was in the northern zone, as we call it, and taking the three-year period it got into that part where we finally consolidated the New York Zone with the Eastern Region.

Now, we have but one zone in that territory.

Q. So that the one zone would be the same amounts that we were using in connection with Harsimus Cove——

A. The Harsimus Cove is another zone, it was at that time, in some of the past year, than the Greenwich yard in Philadelphia.

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Q. So some of those differences, that is, a difference in the accounting region that was used, might be the occasion [fol. 1755] for the great differences in the costs that were used by you?

A. It may be; according to their trams, as to what maintenance they were doing in certain sections.

Q. By the way, I notice that you said just now piers 27, 28, and 29.

A. Yes. I am so used to saying that, that it is just a normal thing to say. On this we did stick with 27 and 28.

Q. Well, the fact is that years ago the perishable piers of the Pennsylvania at New York City were those three, were they not?

A. That is correct; it is still at this time when there is overflow. It is possible it is used.

Q. But under usual conditions today you use only piers 27 and 28?

A. We only worked from December, 1950, on the two piers, 27 and 28.

Q. Is that because of a reduced volume of perishables being handled by the Pennsylvania Railroad?

A. Possibly more efficient handling.

Q. Possibly?

A. Yes.

Q. You can't point to any figures in your exhibit that will indicate more efficient handling, can you, Mr. Heywood?

A. Not when costs continually go up for material and wages alone, you wouldn't. They offset anything you do in a change in your operation for efficient operation. We [fol. 1756] would need entirely different rates if it wasn't for the fact that the offset of some of that wage and material has been offset by a change and a better operation.

Q. The question I asked was whether you can point to any figures in your exhibit—

A. I think it is reflected all the way through the figures.

Q. So that you can not point to any particular figure that indicates any improvement in efficiency of the Pennsylvania Railroad?

A. I don't say it doesn't show improvement in efficiency, no, sir. I do not. I said it is reflected all the way through the operation.

Q. But you can't point out a single instance anywhere in either of your exhibits, can you, Mr. Heywood?

A. I think the record will have to stand as I have stated it.

Exam. Walsh: That has been answered.

Mr. Wells: I assume Mr. Miller that some of the explanations, such as differences between the 20,000 and 21,000, either, will be included in the papers and we can cover those items and similar ones by stipulation?

Mr. Miller: I can't say that I know exactly what figures you are talking about but I can certainly tell you that you will have free access to all the working papers which went into the compilation of these two exhibits.

Exam. Walsh: Does that conclude your cross examination?

[fol. 1757] Mr. Wells: Yes.

Recross-examination.

By Mr. Pettijohn:

Q. Mr. Heywood, did you include all of the yard tracks within the yard limits in arriving at your cost at Harsimus yard and at Greenwich yard?

A. All the costs within the yard limit as we determined it, yes.

Q. Aren't some of those tracks linehaul tracks for the receiving and forwarding of cars and not properly chargeable to yard operations?

A. Not as far as I am concerned, no; the perishable traffic went over the same tracks as the other cars so they are all involved.

Q. What multiplier did you give your receiving and forwarding tracks as compared to your straight switching tracks?

A. On yard tracks, about 3.33, as compared with one for a road track.

Q. How did you classify your receiving and forwarding tracks?

A. I would have to go back to the chart to show you exactly where that lays, where the road starts and where

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the road linehaul to the interline track or whatever you wish to call it, meets.

Q. On Harsimus yard, on page nine of the exhibit, you show by expanding the hours, 34,175 miles for yard locomotives, do you not?

A. 34,000—I don't see that.

Q. Well, you have got five thousand, six hundred and ninety-five and nine tenths engine hours, have you not?

[fol. 1758] A. You are speaking of total on the page?

Q. That is right.

A. Okay. I haven't got it added. I will take your word for it.

Q. And you show that you have 46 locomotives on which taxes are assessed, do you not?

A. Where is that shown? Is that on that page?

Q. Page 14, I believe.

Exam. Walsh: You gave us page 9.

Mr. LaRoe: We are having a hard time following you because you gave us the wrong pages.

By Mr. Pettijohn:

Q. Page 14 you show 20 steam and 26 diesels.

A. That is right.

Q. Now, at 46 locomotives that is 743 miles per locomotive per month, is it not?

A. I guess so.

Q. And that it would average 29.7 miles on a 25-day month, would it not?

A. That is your figure. I will accept it.

Q. And at six miles per hour, that would be equivalent to about five hours work per locomotive per day, wouldn't it?

A. According to your figuring.

Q. Isn't it your figures? They are taken from there?

A. I haven't checked it.

Q. Do you consider the use of a switch engine at five hours a day efficient operation of a railroad?

[fol. 1759] A. I didn't say so.

Q. I thought you told Mr. Wells a little while ago that all of your statistics showed efficient operation and improved efficient operation.

A. That is what I did on that, yes.

Q. You still claim that that is efficient operation with respect to mileage?

A. If what you say are the facts, five miles, it must be good work, yes.

Q. In other words, you think a switch engine ought to work five hours out of 24 and that reflects efficient operation of a yard switch engine?

A. In Harsimus Cove it may have worked five hours but it may have worked beyond that. We stopped it at the yard limits. This doesn't say that locomotive worked five hours a day. That locomotive was used beyond the Harsimus Cove yard.

Q. For that many hours how many switch engines had you ought to have in the yard?

A. The ones that are shown on page nine, are the actual ones that worked there in the yard, which we could tie into.

Q. Page nine just shows the classes of locomotives, does it not?

A. Yes.

Q. It doesn't show the number?

A. It shows the engine hours made by it.

Q. It doesn't show the number of locomotives?

[fol. 1760] A. No, it does not.

Q. Were all of those 46 locomotives upon which you had taxes assessed in operation for the entire month of December?

A. Yes, sir. They were in operation in December.

Q. In the yard?

A. Off and on, not maybe every day.

Q. Exclusively in yard service?

A. Yes, sir.

Q. None in yard shops?

Exam. Walsh: The witness answered that question. He said they were exclusively in yard service. There is no use in arguing with the witness.

Mr. Pettijohn: I want to see the time reports of the switchmen, switch foremen, in charge of the engines at Harsimus Cove Yard during the month of December, each day.

I would like to have those records made available to me.

Mr. Miller: Are we finished with the witness?

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Exam. Walsh: Have we finished with this witness?

Mr. Pettijohn: Yes, sir.

Mr. Miller: I would like to offer exhibits 148 and 149 in evidence.

Exam. Walsh: Exhibits 148 and 149, Witness Heywood, are received in evidence, subject to the same objections as offered earlier by Mr. LaRoe and others.

[fol. 1761] (Respondent's Exhibits Nos. 148 and 149, Witness Heywood, were received in evidence.)

Exam. Walsh: The witness is excused. (Witness excused.)

The record will show at this time that any exhibit identified and discussed in evidence, will be received, unless specifically excluded.

Mr. Miller: There is an outstanding request for additional information. What is it you want, now?

Mr. Pettijohn: I want the yard, each yard foreman's time report, showing the locomotives, switch locomotive that he used, or that he had charge of each day in December 1950, in Harsimus Cove yard.

Mr. Miller: Mr. Examiner, we will refuse to furnish that information on the ground it is much too voluminous for any possible advantage to Mr. Pettijohn or any other protestant. We are perfectly willing to make available the records which we have on which these figures were based and to supply any working papers which Mr. Heywood has showing how these figures were computed. Mr. Pettijohn's request is that we go to the reports made by train conductors, and that we make available to him that enormous mass of material, and I would assume that he would want us to take off from that vast number of conductors' reports, the particular information he wants. We have done that. Mr. Heywood's working papers will show how it was done. Now, we are certainly willing to make that information [fol. 1762] available, but we do not propose to bring out a huge mass of records and supply them to Mr. Pettijohn when we have available for him the working papers on which this study was based.

Mr. Pettijohn: Mr. Examiner, in no other way can we determine how many engines actually worked in that yard during the month of December, and what engines worked in it.

Mr. Miller: I don't believe that is correct. I think that you will find all the information you want in Mr. Heywood's working papers, and you certainly do not, yourself, want to go through all those conductors' reports and certainly we don't propose to go through them again for you. We have done it once. That is enough.

Mr. Pettijohn: I don't want to argue with you, Mr. Miller, but I do want to go through those reports.

Exam. Walsh: All right. Respondents refuse to furnish the information. I shall not direct them to do so.

Next witness.

William R. Main was sworn and testified as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your full name and what capacity you are employed by the New York Central?

A. William R. Main, Trainmaster, River Division of the New York Central, Headquarters at Weehawken, New Jersey.

Mr. Brown: Mr. Examiner, this man's testimony has been [fol. 1763] distributed and I now offer him for cross examination.

By Mr. Brown:

Q. How long have you been employed by the New York Central Railroad Company?

A. Sixteen years.

Q. How long have you been trainmaster at Weehawken?

A. Five years.

Q. Describe briefly your duties as trainmaster at Weehawken?

A. I have direct supervision of switching and train operations in the Weehawken Terminal District.

Q. Do cars of fruits and vegetables consigned to Barclay Street move through your district?

A. Yes.

Q. Will you describe the movement of these cars of fruits

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and vegetables through your district for delivery at Barclay Street?

A. When the trains containing these cars arrive at the Weehawken Terminal District they are usually yarded in the East Bound Receiving Yard which is located in Weehawken proper. The way-bills on these cars are processed by the East Bound Yard Clerk and subsequently delivered by messenger to the floatbridge clerk. The numbers of the cars consigned to Barclay Street are drawn off these way-bills and a list of said cars is delivered to the Yardmaster.

The Yardmaster turns this list over to a yard conductor so that the cars that are to be floated to Barclay Street can [fol. 1764] be switched out. The yard engine then switches these cars out of the East Bound Receiving Yard, gathers them together and advances them to the float yard. The Yardmaster then advised the floatbridge clerk that a float for Barclay Street must be ordered from the Marine Department and placed in one of the bridges. After the float is placed, the floatbridge engine loads the Barclay Street cars and the floatbridge clerk advises the Marine Department that the float is ready for towing to Barclay Street.

Q. After the cars are loaded on the car float do you have anything further to do with the movement of the cars to Barclay Street?

A. No, they are then handled by the Marine Department.

Q. I note you state these inbound cars of fruits and vegetables for Barclay Street are usually yarded in the East Bound Receiving Yard. Where else are east bound cars for Barclay Street yarded?

A. North Bergen yard which is about a mile west of Weehawken.

Q. Under what circumstances is this North Bergen yard used in the handling of cars to Barclay Street?

A. Certain operating conditions, such as congestion or by close arrival of two or more eastbound trains, necessitates that an eastbound train be yarded in North Bergen.

Q. Is there any additional handling of Barclay Street cars from the North Bergen yard as compared with those from the East Bound Receiving Yard at Weehawken?

A. Yes. At North Bergen we make a preliminary separa- [fol. 1765] tion of the cars. It is then necessary to send an engine to move these cars into the East Bound Receiving

Yard at Weehawken. After placement in the Weehawken East Bound Receiving Yard these cars are handled in the same manner as if the cars had been yarded by the road train in the Weehawken East Bound Receiving Yard.

Mr. LaRoe: I have no questions.
Exam. Walsh: That concludes your testimony on direct. Any questions of this witness?
Mr. Loos: Did you identify your exhibits?
Mr. Brown: He has no exhibits.
Mr. Loos: I have one question, Mr. Examiner.

Cross examination.

By Mr. Loos:

Q. Mr. Main, in addition to your piers, at pier 17 and 33rd Street teamtrack, does the New York Central serve other points in the Manhattan area?
A. My jurisdiction is in New Jersey only. I have no jurisdiction in New York City.
Q. In what points in New Jersey within what is commonly referred to as New York Harbor area does the New York Central deliver freight?
A. Hoboken and Jersey City and Edgewater.
Q. Are those all team tracks?
A. They are.
Q. And are there also freight stations at those points?
A. Except at Edgewater.
Q. But at the other two there are freight stations?
[fol. 1766] A. There are freight stations at the other two.

Mr. Loos: That is all.
Mr. Brown: Mr. Examiner, do I understand this man's testimony will be taken into the record?
Exam. Walsh: Yes.
Mr. Brown: That is all.
Exam. Walsh: That is agreeable to the parties.

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Cross-examination.

By Mr. Wells:

Q. Mr. Main, do you know of any movement of citrus fruit or vegetables from Florida, delivered on the New York Central in Manhattan?

A. Not in my jurisdiction in Weehawken.

Q. Well, if there were any moving to Manhattan from Florida by the normal routes of movement it would have to move through Weehawken, wouldn't it?

A. That is correct.

Q. And you do not know of any citrus fruit or fresh vegetables from Florida moving that way?

A. Not for New York City delivery.

Mr. Wells: Thank you, sir.

Exam. Walsh: Any further questions of the witness?

(No response.)

Exam. Walsh: Witness excused.

(Witness excused.)

Mr. Brown: Mr. Dugan.

[fol. 1767] Exam. Walsh: Mr. Dugan has not testified previously?

Mr. Brown: No, he has not, Mr. Examiner.

Frank H. Dugan was sworn and testified as follows:

Direct examination.

By Mr. Brown:

Q. Will you state your name and by whom you are employed?

A. Frank H. Dugan, employed by the New York Central Railroad as assistant superintendent, New York Terminal District.

Mr. Brown: Mr. Examiner, this man's testimony has also been distributed and I now offer him for cross-examination.

By Mr. Brown:

Q. What is your full name?

A. Frank H. Dugan.

Q. You are employed by the New York Central in what capacity?

A. Assistant Superintendent.

Q. Where?

A. New York Terminal District.

Q. What does that cover?

A. It covers all New York Central freight lines south of Spuyten Duyvil to St. Johns Park, including all the trackage on the West Side of Manhattan Island as well as Pier stations. It does not include the main line track into Grand Central Terminal.

Q. How long have you been employed by the New York Central Railroad Company?

[fol. 1768] A. Thirteen years.

Q. Will you describe briefly your duties as Assistant Superintendent?

A. Supervisory capacity covering all train operations, switching operations and freight station operations in the given territory.

Q. Are you familiar with the operations in connection with the handling of fruits and vegetables consigned to team tracks on Manhattan Island and to Barclay Street?

A. Yes, sir.

Q. Do you have jurisdiction over the operation of trains containing cars of fruits and vegetables consigned to team tracks on Manhattan Island and to Barclay Street?

A. Yes, from Spuyten Duyvil south, except that cars of fruits and vegetables for Barclay Street are handled by the Marine Department from the 65th Street floatbridge to that station.

Q. Is there any other route via which cars of fruits and vegetables move to Barclay Street other than this 65th Street floatbridge?

A. Yes, via Weehawken and floated over to Barclay Street.

Q. Let us first consider the movement of cars of fruits and vegetables moving to team tracks on Manhattan Island.

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Will you describe the method of operation for handling these cars?

A. Various trains consisting of, among other types of freight cars of fruits and vegetables enter Manhattan Island [fol. 1769] for team track delivery at Spuyten Duyvil. Some cars are cut out at 79th Street and are moved to 42nd Street in which is known as a transfer move. Other trains containing these cars move directly into 42nd Street.

At 42nd street these cars of fruits and vegetables are pulled out of the trains and handled by a switch engine to the team tracks. Although under the tariffs specific instructions can be given to place a car on a particular team track other than 33rd Street Yard, that is rarely done. Where no specific instructions are given these cars of fruits and vegetables for team track delivery are handled at the 33rd Street yard. The result is that only in rare cases are cars of fruits and vegetables handled on team tracks at any point other than the 33rd Street Yard on Manhattan Island. In the 33rd Street Yard, these cars of fruits and vegetables are usually handled on the team tracks located between West 30th and West 32nd Streets and between Tenth and Eleventh Avenues. If these tracks are filled, cars of fruits and vegetables consigned to Manhattan Island for team track delivery will be handled on other team tracks in the 33rd Street Yard area.

Q. Mr. Dugan, I show you a map and ask you what it represents?

A. This map shows the tracks of the New York Central Railroad between 42nd Street and 33rd Street.

Q. Does that map indicate the tracks that are used in the switching operation of these cars of fruits and vegetables [fol. 1770] from 42nd Street to that portion of the 33rd Street yard you have testified to previously?

A. Yes.

Q. Will you mark that portion of the tracks and 33rd Street yard which are used in the switching operation from 42nd Street to 33rd Street Yard and that portion of the 33rd Street yard which you testified is used primarily for the handling of fruits and vegetables tendered for team track delivery?

Q. I now direct your attention to the handling of cars of fruits and vegetables that pass through your territory

for delivery at Barclay Street. Will you please describe this operation?

A. The cars for Barclay Street come into Manhattan Island in various trains the same as the cars for team track delivery. Some are out at 79th Street, others move directly in the train to 42nd Street. Those that are cut out at 79th Street are switched down to the 65th Street floatbridge and those that move into 42nd street are switched up to the 65th street floatbridge. At the floatbridge these cars are loaded on car floats and handled to Barclay Street by the Marine Department.

Mr. Brown: This man's testimony refers to a map of the tracks of the New York Central on Manhattan Island and I thought that I had left instructions to have that map reduced to exhibit form, but to my embarrassment this morning, I found out when I picked up these papers that that had not been done.

I do have the map here marked and with your permission [fol. 1771] I will file it as a late-filed exhibit. I will have it reduced into exhibit form and have it filed within the next ten days.

Mr. LaRoe: That is all right. You will supply copies of the map?

Exam. Walsh: To all parties?

Mr. Brown: We will do that.

Exam. Walsh: That will be the number following the last number.

Mr. Brown: I now offer this man for cross-examination.

Exam. Walsh: Cross-examination.

Mr. LaRoe: No questions.

Mr. Augello: No questions.

Exam. Walsh: Any question of the witness?

Mr. Loos: I have one.

Cross-examination.

By Mr. Loos:

Q. Can you give me the information about the points in the New York Harbor area on the New York side, served by the New York Central for delivery of freight?

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A. We have stations at 130th Street, 72d Street, 33rd Street, St. Johns Park, which, incidentally, is not a team track station.

Q. What is St. Johns Park? Just a straight house?

A. Carload station. It is a straight house, yes, you might call it.

Q. And they are delivered through the house, not through the tracks?

[fol. 1772] A. That is correct, pier 34, East River, and Barkley Street Station, the latter two being pier stations.

Q. What is pier 34 used for?

A. For all types of carload merchandise.

Q. Is it unloaded before it is delivered?

A. Yes.

Q. By the railroad?

A. Yes.

Q. And what is the Barkley Street station, a similar station?

A. A similar station.

Q. Now, at these other points you named, which are not pier stations, are there both team tracks and freight house facilities at those points, or are there some with one, and not the other?

A. There are team tracks in addition to freight houses at 130 Street, 72*th* Street, and 33rd Street stations.

Mr. Loos: That is all.

Cross-examination.

By Mr. LaRoe:

Q. At which of those stations are fruits and vegetables handled?

A. Fruits and vegetables are handled principally at 33rd Street Station, although they may be handled at any stations under the tariff?

Q. Well, your handling of fruits and vegetables at the pier stations is very small compared with the other railroads, isn't it?

[fol. 1773] A. I wouldn't be in position to say, sir?

Q. Do you know to what extent fruits and vegetables are

handled at your several stations in volume, number of cars? or otherwise?

A. The only pier stations at which we handle any fruits and vegetables is at Barkley Street and we have a figure yes, how much.

Q. How much is it?

A. I don't have it in my testimony.

Q. I will see if I can help you. Are these figures roughly correct, that on Manhattan the New York Central handles 12,144 cars, that is the year 1950, on team tracks, and on piers, only 1,888?

A. For the year 1950?

Q. Yes.

A. I would say that was relatively correct, yes, sir.

Q. How would you break down that 12,144 team track cars as between your several team track yards on Manhattan Island? Just a rough approximation.

A. If this figure includes just fruits and vegetables, I would say that pretty near 85 percent of it was handled at 33rd Street.

Q. And at what other team track yards would the remaining 15 per cent be handled?

Exam. Walsh: 72 or 130th?

The Witness: Yes. It would be 72nd Street, and 130th [fol. 1774] Street. It would have to be but I thought you possibly included our Barkley Street deliveries.

By Mr. LaRoe:

Q. Barkley Street is separate at 1,788 in addition to the one thousand. I am trying to get a picture as to where the other 15 per cent would be handled other than at 33rd Street.

A. I might say in that case that the handling at 33rd Street would even be greater than 85 percent; possibly 90 percent, because there is very little perishable fruits and vegetables handled at 72nd Street.

Q. If we take that 95 percent at 33rd Street and break that down as between vegetables on the one hand and citrus fruit on the other it would again be 90 or 95 per cent vegetables, wouldn't it?

A. I am not in any position to break that figure down.

Q. Well, you do know——

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A. We don't go into it that deeply.

Q. You do know that St. Johns Park is not a place for the delivery of citrus in volume, don't you?

A. That is correct.

Q. And you do know whether a great quantity of the vegetables handled at St. Johns Park, perhaps more than half, are potatoes?

A. We don't handle any perishables at all, to speak of there.

Q. No vegetables at St. Johns Park?

A. No, sir.

[fol. 1775] Q. You mean 33rd Street?

A. What was the question, again?

Q. Of the fruits and vegetables handled at 33rd Street, is not more than half potatoes?

A. I couldn't answer that question, sir. It is just perishables as far as I am concerned from an operating standpoint.

Q. And you can not define the perishables?

A. There are perishables of all types.

Q. You can't break it down any further than that?

A. Not on a figure basis, no, sir.

Mr. LaRoe: That is all. Thank you.

Exam. Walsh: Any further questions of this witness?

Mr. LaRoe: Just one other point that I overlooked.

By Mr. LaRoe:

Q. Can you clarify for us once more the extent to which the yards at which you unload carload freight other than fruits and vegetables at your own expense?

A. At all stations that I mentioned, we have freight stations as well as team track or pier facilities.

Q. I am not talking about pier tracks because you don't unload free of charge at team tracks.

A. No.

Q. Where are the stations, the houses at which you unload freight without an extra charge?

A. As I said before, at all our stations, 130th Street, 72nd Street, 33rd Street, and on the two pier stations and St. [fol. 1776] Johns Park.

Q. And are there any cases where you unload either fruits or vegetables at such stations without a charge?

A. No, sir.

Q. There are not?

A. No, sir.

Q. What are the food products if any that you unload at those stations without an extra charge?

A. Food products?

Q. Yes. Canned goods.

A. Canned goods.

Q. Dairy products, eggs?

A. Yes.

Q. They are unloaded without an extra charge at your Manhattan, at some of your Manhattan stations, are they not?

A. That is correct.

Q. In fact, all of those commodities that you handle, where do you unload them, you do so without charge, do you not?

A. Yes, sir, that is correct.

Q. Do you have any pier stations where such commodities are unloaded by you without charge?

A. Well, any of the commodities we have been talking about may be handled at any of the pier stations if they are so routed under the same circumstances.

Q. As a matter of fact, you would at one of your pier [fol. 1777] stations today unload, for example, citrus fruit juice or tomato juice without any charge whatever for the unloading?

A. That is correct.

Q. But if it happens to be not in the form of a canned juice but in the form of oranges and grapefruit and tomatoes, you would impose an unloading charge on it?

A. It wouldn't be my doing, sir. It would be affected by the tariff. That is all.

Q. The tariff makes that distinction?

Mr. LaRoe: That is all. Thank you.

Exam. Walsh: Any further questions on cross-examination?

(No response.)

Exam. Walsh: Witness excused.

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(Witness excused.)

Exam. Walsh: Next witness.

You were going to file a map. How long do you want to file it?

Mr. Brown: Ten days.

Exam. Walsh: You will file the map in ten days and it will be given a number then.

Mr. Brown: Mr. Haviland.

Exam. Walsh: You haven't testified in this case before?

Mr. Brown: No, he has not.

GEORGE HAVILAND was sworn and testified as follows:

[fol. 1778] Direct examination.

By Mr. Brown:

Q. Will you state your full name?

A. George Haviland, employed by the New York Central as a Float Inspector.

Mr. Brown: Mr. Examiner, this man's testimony has been distributed and I now offer him for cross-examination.

Exam. Walsh: It is agreeable to protestants that it be incorporated in the record?

(No response.)

By Mr. Brown:

Q. What is your full name?

A. George Haviland.

Q. By whom are you employed?

A. The New York Central Railroad Company.

Q. In what capacity?

A. Float Inspector in the Marine Department.

Q. How long have you been in the Marine Department of the New York Central Railroad Company?

A. Twenty-seven years.

Q. Have you always been in the Marine Department of the New York Central Railroad Company?

A. Yes.

Q. Tell us what other positions you have held in the Marine Department.

Q. I started as a deck hand, than a mate. I then went into the offices as an assistant dispatcher, also worked as a [fol. 1779] dispatcher and now hold the position as float inspector.

Q. Are you familiar with the marine operations of the New York Central insofar as placing of cars at Barclay Street Pier?

A. Yes.

Q. Please tell us what that operation is?

A. Cars for Barclay Street move on car floats via either the Weehawken floatbridge or via the 65th Street floatbridge on Manhattan Island. After the carfloat is placed at either of these floatbridges it is loaded with cars by the yard forces and when the float is ready for tow it is towed by a tug to Barclay Street. There is no set tow of these car floats from Weehawken or 65th Street to Barclay. Depending upon the volume of traffic or cars and need for quick delivery and other factors, car floats will move directly from Weehawken to Barclay Street or directly from 65th Street to Barclay Street. However, sometimes a carfloat will be partially loaded at Weehawken and then be towed to 65th Street to be filled out and then towed to Barclay Street.

Other times the car float will be partially loaded at 65th Street, towed to Weehawken to be filled out, and then towed to Weehawken.

Q. What is the carrying capacity of these car floats?

A. Ten cars, twelve cars, fourteen cars, and sixteen cars. We also have two small floats which we sometimes use in this operation.

[fol. 1780] Q. What is the carrying capacity of these two floats?

A. Six cars and eight cars.

Q. When do you use these two smaller car floats?

A. Whenever there is only a small amount of cars on hand or when there is a rush call for delivery of a small amount of cars in addition to the big floats.

Q. What happens as the car float approaches Barclay Street with the loaded cars?

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A. The car float is moored alongside the dock and tied up where it is unloaded by the pier forces. The tug is then released and proceeds to other jobs.

Q. Now, Mr. Haviland, will you tell us what the operation is in handling the empty cars out of the Barclay Street pier?

A. The car floats are handled by tugs out of Barclay Street in a similar manner as the tow into Barclay Street. The car float is towed to either Weehawken or 65th Street where the cars are pulled off and the carfloat made light for other jobs.

Exam. Walsh: Cross examine.

Mr. LaRoe: I have no questions.

Exam. Walsh: The witness is excused.

(Witness excused.)

Mr. Brown: Mr. Jarvis. Mr. Jarvis has been sworn.

W. C. Jarvis was recalled, testifying further as follows:

[fol. 1781] Redirect examination.

By Mr. Brown:

Q. You will state your full name for the record?

A. W. C. Jarvis, address, 466 Lexington Avenue, New York Central Railroad, New York.

Q. Mr. Jarvis, do you have an exhibit to offer in this case?

A. Yes, I have.

Mr. Brown: May we have that exhibit marked for identification?

Exam. Walsh: That will be 150.

(Respondent's Exhibit No. 150, Witness Jarvis, was marked for identification.)

Mr. Brown: This man's testimony and the exhibit marked 150 for identification has been distributed and I now offer this man for cross examination.

Exam. Walsh: It is agreeable to the parties that the statement be incorporated?

Mr. LaRoe: Yes.

By Mr. Brown:

Q. Kindly state your name and business address?

A. My name is W. C. Jarvis. My address is 466 Lexington Avenue, New York Central Railroad Company, New York 17, New York.

Q. In what capacity are you employed by the New York Central Railroad Company?

A. I am a Statistician in the Comptroller's Office.

Q. How long have you held this position?

A. Five years.

[fol. 1782] Q. Have you, at my request, made a study and prepared exhibits with respect to the costs of terminating cars of fresh fruits and vegetables at Pier 17 (Barclay Street, N. Y.) and at the team tracks on Manhattan Island at 33rd Street, N. Y.?

A. I have.

Q. Will you please tell us what exhibit 150 shows?

A. Page 1 of this exhibit, marked Pro. No. 1816 in the bottom left corner, is a summary of terminal costs of handling fruits and vegetables to Pier 17, via Weehawken and 65th Street, as compared with a team track delivery at 33rd Street on Manhattan Island, New York. The cost of placing a car for team track delivery at 33rd Street, New York, amounted to $22.30, as compared with a pier delivery cost via 65th Street, New York, of $38.02, and via Weehawken, New Jersey, of $43.94 per car.

Page 2 of this exhibit marked Pro No. 1817, shows the yard switching costs per car for 33rd street, New York, 65th Street Yard and Weehawken, New Jersey. These figures are arrived at by applying the system engine hour cost to the number of engine hours made during the month of December 1950 at the above named yares, resulting in a cost at 33rd Street of $7.55; for 65th Street Yard $5.72; and for Weehawken, New Jersey, $10.90.

The system engine hour cost was used here in the absence of actual time studies and has the effect of giving the same weight to the team track delivery as well as the pier de-[fol. 1783] livery. This method understates the costs as many small yards are included in the system figure, as compared with the yards involved in this study.

Pages 3 and 4, marked Pro Nos. 1818 and 1819, are state-

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ments showing the formula used in segregating "yard" and "other than yard" expenses for the year 1950. The Yard figure is divided by the system engine hours to arrive at a system engine hour cost as shown on page 2, Line 3.

Page 5, marked Pro No. 1820, shows the detail of the cost of floating operations for the month of December 1950.

Page 6, marked Pro No. 1821, shows the rental and insurance costs per car for Pier 17 (Barclay Street, N. Y.) for December 1950.

Page 7, marked Pro No. 1822, shows the computation in arriving at a non-revenue percentage which is applied to the assigned cost as shown on Page 1.

Page 8, marked Pro No. 1823, shows the computation in arriving at the amount of return on depreciated investment required per car.

Page 9, marked Pro No. 1824, shows unloading costs that were introduced at a previous hearing, and have been brought up to December 1950 on the basis of the wage rate levels that were in effect at that time.

Q. Can you tells us from the Exhibit you have prepared what the difference in cost is to the New York Central of [fol. 1784] handling cars of fruits and vegetables at Pier 17 as compared with the handling of cars of the same commodity at team tracks on Manhattan Island at 33rd Street.

A. Yes.

Q. Tell us what that difference is?

A. Cars to Barclay Street move via two float bridges, Weehawken on the Jersey side of of the Hudson River and 65th Street on the New York side of the Hudson River. As shown on page 1 of Exhibit 150, it costs the New York Central Railroad $38.02 to move a car through the 65th Street Yard, over the 65th Street float bridge, down the Hudson River to Barclay Street.

Via Weehawken it costs the New York Central $43.94 to move a car through the Weehawken Yard, over the float bridge and across the river to Barclay Street. For delivery at the team track on Manhattan Island at 33rd Street it costs the New York Central $22.30 per car to perform the necessary switching and move it through the yard, to the team track. These items of cost do not include the cost of unloading at Barclay Street, which is shown on page nine of the exhibit.

Q. Does your exhibit show the difference in and cost of switching services required on cars delivered at Pier 17 and those delivered at team tracks on Manhattan Island?

A. Yes.

Q. Will you tell us what that difference it?

A. Pages 1 and 2 of the exhibit show this difference to be [fol. 1785] as follows: At 33rd Street it is $7.55 per car. To Barclay Street via 65th Street it is $5.72 per car and via Weehawken $10.90 per car.

Q. From the study you have made and the exhibits you have prepared can you tell us whether there is any difference in costs resulting from the fact that the pier delivery does not require an investment in team track facilities?

A. Page 8 of the exhibit shows the computation of the amount required per car to provide return on depreciated investment in property. Lines 1 through 6 show the investment less depreciation as of December 31, 1950, in land, track and structures, and taxes of that portion of New York Central facilities used in switching and placing cars of fruits and vegetables for team track delivery on Manhattan Island. No investment figures for land or structures are shown in connection with 65th Street or Weehawken. Therefore, a difference in cost of $13.58 would result if only the investment in team track facilities is considered.

Exam. Walsh: Cross-examine.

Cross examination.

By Mr. LaRoe:

Q. You have heard the testimony of the previous witness to the effect that such commodities as canned goods and canned fruit juices, canned oranges, canned grapefruit juices are unloaded at some of your stations including your piers without any extra charge. Did you hear that testimony?

[fol. 1786] A. I did.

Q. Would you say there is any difference in cost or do you not know as between those commodities and the commodities that are here involved?

A. I don't know.

Q. You are not in position since you don't know, to say

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it costs any more to unload the citrus fruit than it does the citrus juice?

A. No. I don't know that, either.

Mr. LaRoe: I think that is all.

Exam. Walsh: Any further questions of the witness?

Cross examination.

By Mr. Wells:

Q. Mr. Jarvis, you indicated that you made a study for the preparation of your exhibit No. 150. What was the period of the study?

A. December, 1950.

Q. The calendar month?

A. Yes.

Q. And what study did you make? Was it a study of the operations or was it simply a compilation and computation from office records?

A. It was a compilation of office records.

Q. You made no study of the actual operation?

A. No, sir.

Q. Now, on page 9 what do you mean "test period, July 25, to July 30?"

[fol. 1787] A. That was the last hearing, if you remember.

Q. In other words, all that amounts to is that you took the data from the former exhibit in this proceeding and then expanded it on the basis of a 1950 adjusted labor cost, is that correct?

A. That is correct.

Q. So that no additional operational study of any kind was made for the month of December in connection with that particular quantity of units of fruits and vegetables?

A. No, sir.

Q. This was just vegetables though, wasn't it?

A. That is correct.

Q. There were no fruits involved in it at all?

A. No fruits whatever.

Q. Did you actually deliver any fruits at Barkley Street, Pier 17, in the month of December, 1950?

A. No, sir.

Q. You did not, no fruits of any kind?

A. No. Vegetables but not fruits.

Q. What vegetables—the only one I see there is onions; is that the only vegetable you handled at Barkley Street?

A. In December, 1950, that is correct.

Q. I didn't understand your answer. I am sorry. What was it?

A. December 1950, that is correct.

Q. The only vegetable you handled was onions?

A. Yes.

[fol. 1788] Q. Is that all the vegetables you ever handled at Barkley Street pier?

A. You mean during that period or some other period?

Q. Any time during the year.

A. No, sir.

Mr. Wells: I think that is all.

Exam. Walsh: Any further questions?

Mr. Augello: I have a question.

Cross examination.

By Mr. Augello:

Q. What other vegetables do you handle at Barkley Street, besides onions?

A. What period are you speaking of?

Q. The entire year of 1950.

A. Well, to my recollection, I think there was a carload of pears came in there, if I remember right, or something like that.

Mr. LaRoe: A whole carload?

The Witness: Yes.

By Mr. Augello:

Q. Did you handle potatoes?

A. Yes. We handled potatoes.

Q. Approximately how many cars of potatoes would you handle in the year 1950?

A. I don't know.

Q. Do you know how many cars of onions you handled in the year 1950?

A. No, I don't know.

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[fol. 1789] Exam. Walsh: Do you know what percentage of the unloading of fruits and vegetables onions constituted? Just approximately.

The Witness: I would say, you mean during the year 1950?

Exam. Walsh: Yes.

The Witness: I would say 65 percent.

By Mr. Augello:

Q. 65 percent are onions?

A. Yes.

Q. How about the other 35 percent?

A. Potatoes.

Q. And to your knowledge only one carload of pears?

A. Pears.

Mr. Augello: Thank you.

Exam. Walsh: Any further questions?

Mr. Loos: I have a question.

Exam. Walsh: Mr. Loos.

Cross examination.

By Mr. Loos:

Q. In your yard expenses, have you simply averaged the yard expense on the basis of the total number of cars, regardless of the character of commodity loaded in those cars?

A. Are you speaking, Mr. Loos, of the team track or the pier delivery?

Q. Whatever the yard may be. Do you make any distinction within that yard as between commodities that are fruits and vegetables and commodities of some other character?

A. No.

[fol. 1790] Q. So that your yard expenses represent an average cost per loaded car for all the cars handled in that particular yard?

A. Yes, sir.

Q. And in your floating expense, is the basis of that simply the dividing of the total number of cars floated into the total expense, without endeavoring to differentiate be-

tween the tugboat time or the car float time at different points?

A. That entails the whole harbor. That entails all floating.

Q. In other words, at page five of your exhibit, 9,318 cars, is that all of the cars floated by you, or is that just the cars floated to these particular points?

A. That is all the cars floated in New York Harbor.

Mr. Loos: Thank you.

Exam. Walsh: By the New York Central?

The Witness: By the New York Central.

Mr. Loos: That is all.

Exam. Walsh: Any further questions?

(No response.)

Mr. Brown: I offer exhibit 150 for identification in evidence.

Exam. Walsh: Exhibit 150, Witness Jarvis, is received in evidence.

(Respondent's Exhibit No. 150, Witness Jarvis, was received in evidence.)

Exam. Walsh: Witness excused.

(Witness excused.)

[fol. 1791] Exam. Walsh: Next witness.

F. H. Clark was sworn and testified as follows:

Mr. Miller: This witness is in addition to the information requested in the Commission's order, Mr. Examiner, you will recall that at our pre-hearing conference the protestants indicated that they would like to have some information as to comparative turnaround time on cars to the piers, as contrasted with cars to team tracks, and it was in response to that request that Mr. Clerk's statements and exhibits have been prepared.

The Witness: My service with the Pennsylvania Railroad covers a period of over 42 years, of which approximately 12 years was in the Accounting and Statistical sec-

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tions of the Operating Department. For a number of years I have been assigned to special duty under the supervision of the Superintendent of Freight Transportation, and the Chief of Freight Transportation. By their direction I have made many special studies and investigations of system-wide scope, requiring an intimate acquaintance with operating practices on the Pennsylvania Railroad.

Cars of standard gauge, with limited exceptions, are freely interchanged among the railroads of the United States. The user of railroad controlled cars, other than the owner, must compensate the latter on either of two bases—on an allowance per day per car (per diem basis) or on a rate per car per mile (mileage basis). The last method can be [fol. 1792] employed by railroads only for carrier owned refrigerator and tank cars. To adopt the mileage basis of payment such lines must advise the Secretary of the Operating Transportation Division of the Association of American Railroads of their desire to place their refrigerator cars on a mileage basis:

Atchison, Topeka and Santa Fe, Bangor and Aroostook, Boston and Maine, Canadian National Canadian Pacific, Delaware, Lackawanna & Western, Denver and Rio Grande Western, Grand Truck Western, Illinois Central, Louisiana and Arkansas, Northern Pacific.

Practically all of the railroad-controlled refrigerator cars in the United States are owned by the railroads shown in the fore-going list.

Freight cars of other than railroad ownerships, generally designated as private cars, are handled under the provisions of the Association of American Railroads Mileage Tariff, Series No. 7, which provides for the mileage basis of compensation with certain provisions applicable under specified conditions as to the equalization of empty and loaded mileage. The rates quoted in the aforementioned tariff are repeated in Rule 18 of the Code of Per Diem Rules adopted or concurred in by the vast majority of the railroads of the United States. At the present time, the applicable mileage rate for the commonly used refrigerator cars is 3 cents per mile. Some refrigerators built for particular purposes or of special construction are han- [fol. 1793] dled under a lower mileage rate.

In computing the mileage for refrigerator cars destined to New York no allowance is made for water movement between the termini of railroads in New York Harbor.

On cars destined to New York and Philadelphia the mileage rates used in computing the compensation to the owner of the refrigerator car does not include any remuneration for time cars are held at those terminals.

A Code of Per Diem Rules, along with the appendices thereto, governs the settlement for the use of railroad owned freight cars between all common carrier railroads.

Exhibit No. 151 attached hereto, consisting of two sheets, records the results of a study made to determine the average turn-around time of cars loaded with fruits and vegetables that were unloaded at each of three Pennsylvania Railroad stations in the New York-Jersey City area. Those stations are Piers 27-28 and Team Tracks at 37th Street in New York proper, and the Team Tracks at the "Ball Ground" in Jersey City.

As representative of the handling of cars unloaded at Piers 27-28 and the "Ball Ground", Jersey City, the period from Sunday, April 1 to Thursday, April 5, 1951, both inclusive, was taken. In this way an entire perishable market week was covered. Because of the limited number of perishable shipments received at 37th Street it was necessary to include an entire year's receipts so as to secure a [fol. 1794] reasonably comparable period of time and volume of perishable traffic. 1950 was taken since it was the latest full year.

Sheet one of the Exhibit compares the turn-around time involved in effecting deliveries at Piers 27-28 with that required in those cases where such deliveries are made at team tracks in the New York-Jersey City district. At items 3(a) and 4(a) the total times and the average time per car respectively, from the arrival loaded at Harsimus Cove Yard, Jersey City, until unloaded at Piers 27-28 or the team tracks studied are shown. At Items 3(b) and 4(b) the total time and the average time per car respectively, covering the time from the unloading of the shipments until the dispatchment of the empty cars from Harsimus Cove Yard, Jersey City are recorded. At Items 3(c) and 4(c) the total elapsed time and the total time per car respec-

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tively, from the arrival loaded at Harsimus Cove Yard until dispatched empty from that yard are set forth.

The results as indicated by Item 4(c) are as follows:

	Days	Hours	Minutes
Piers 27-28	2	7	55
Team Tracks	4	15	5

At sheet 2 of Exhibit No. 151 will be found the basic data supporting the figures appearing at sheet 1, separated for each of the three stations studied. A further breakdown of Items 3(b) and 4(b) of sheet 1 has been made in the case of 37th Street so as to show the total time and the average time per car from the time unloaded until returned to [fol. 1795] Harsimus Cove Yard empty, such statistics being indicated at Items 3(b-1) and 4(b-1) respectively, and separately the total time and the average time per car from the time returned empty to Harsimus Cove Yard until dispatched empty from that yard.

These latter data are recorded at items 3(b-2) and 4(b-2) respectively. Items 3(b) and 4(b) are so subdivided in the case of 37th Street shipments because the operation necessary to serve that station varies considerably from that incident to the handling of shipments destined to Piers 27-28 and the "Ball Ground", Jersey City.

In serving 37th Street, as the loaded cars arrive at Harsimus Cove Yard, Jersey City, they must be classified, handled, and rehandled if necessary, loaded on to car floats through the transfer bridges at Harsimus Cove Yard, floated across the Hudson River to 37th Street float bridge, at which point the cars must be removed from the car floats, switched out, and placed on the team tracks. After being made empty the cars are handled similarly in reverse order.

The longer time indicated at 37th Street than at the other two stations included in the exhibit is brought about by a number of factors, among which may be mentioned the longer time taken in unloading of cars at 37th Street: the intervention of legal holidays; the fact that no yard crews are maintained at 37th Street on Sundays or holidays, and but one yard crew on Saturdays, since the service require-

[fol. 1796] ments do not justify a greater complement of switching power or crews; by the necessity of disposing of refused shipments from the car by sale or otherwise, a procedure made much more difficult by the intervention of Saturday, Sundays and holidays.

In contrast with the aforementioned reasons for longer detentions to cars unloaded at 37th Street the operation to and from Piers 27-28 is a more expedited handling because loaded cars floated to the piers must meet the market hours. The cars cannot be removed from the floats, but the lading must be promptly unloaded to the piers and the floats and empty cars returned quickly to Harsimus Cove Yard. Any other procedure would make the commodities unavailable for display and auction purposes.

Since both the loaded and empty cars must pass through the transfer bridges at Harsimus Cove Yard, because of the much greater number moving to and from Piers 27-28, compared with the shipments destined to 37th Street, the Piers 27-28 equipment must be removed promptly from the tracks serving the transfer bridges, otherwise such bridges could not be used for the additional perishable shipments arriving eastbound and the empty cars returning westbound as well as consignments of perishable and other freight destined to or received from other terminal points in New York harbor, located on Manhattan or elsewhere.

Where the comparison is made between 37th Street and the "Ball Ground", Jersey City, it will be found that be- [fol. 1797] cause of the locations of the "Ball Ground" team tracks with respect to the rest of the Harsimus Cove Yard layout, it is possible to classify the loaded cars to tracks adjacent to or in proximity to those team tracks and later switch out and place such cars in the "Ball Ground" area. Correspondingly, the empty cars, while rehandled more than once, can be switched within the area of Harsimus Cove Yard, permitting a coordination of operations that are impractical when service in two disinct yards are involved, as is the case when consignments are destined for land delivery at 37th Street, New York.

During the year 1950 the turn-around time of refrigerator cars for the United States as a whole was 24.76 days. This information is published by the Association of American Railroads in their form CS-54-1B. This turn-around

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time, of course, represents the average time from point of loading until return of the car.

Florida traffic normally arrives in the New York district on the third afternoon after dispatchment from origin. California traffic ordinarily arrives on the ninth day after forwarding from origin. Assuming a return empty movement of equal time, and considering a full calendar day rather than the actual time of dispatchment and arrival, the total road haul would consume six days in the case of Florida traffic, and eighteen days in the case of California perishables.

If these figures are deducted from the average turn-[fol. 1798] around time of refrigerator cars for the United States as a whole, which was approximately 25 days during the year 1950, we would arrive at a figure of 19 days as representative of the terminal time in the case of the Florida traffic, and 7 days in the instance of the California business, or, in other words, 9-½ days at each terminal in the first instance, and 3-½ days at each terminal for the California perishables.

By Mr. Brown:

Q. Mr. Clark, in your statements you have made some comparisons of total turnaround park from origin of perishables in California and Florida with average turnaround times for refrigerator cars in the United States.

Do you have any additional information which would show a comparison of the turn around time in New York Harbor as compared with the total turnaround time for cars originating in Florida and California and returning to those points?

A. I have.

Mr. Wells: I object to that because the premise on which the witness is proceeding in the computation of the turn around time is not realistic. He is using a national average, and then attempting to say that the terminal time in one instance is a certain figure and the terminal time in the other instance is another figure, not from the actual turnaround time on the particular movement but from the United States average as a whole.

Mr. Miller: Mr. Well's comment is perfectly justified

[fol. 1799] with respect to the statement which was circulated and it was not intended that that comparison with average turnaround times throughout the United States would have any definite relevance as with respect to our figures as to turnaround time at these two points. It was intended as a very rough approximation to give some idea of what this turnaround time out of New York, what part it had to play in total turnaround time for cars from origin back to origin, and I freely admit it is very poor comparison. This question is intended to improve that comparison somewhat and to ask whether Mr. Clark has any definite information as to total turnaround time to Florida traffic and California traffic.

Mr. Wells: I have no objection to the facts being put in the record but I was objecting to your comparison with that so-called comparison that you have in the printed statement where it purports to show that the turn around time, for example, on the Pennsylvania Railroad in a movement from Florida, is nineteen days terminal time, as against nine and a half days with your competitors and yourself averaged out in a movement from California.

Mr. Miller: What are you talking about?

Mr. Wells: I am referring to the fact that——

Mr. Miller: Where is it?

Mr. Wells: On the fourth page:

"We would arrive at a figure of nineteen days as representative of the terminal time in the case of Florida [fol. 1800] traffic and seven days in the instance of California business."

Mr. Miller: That speaks for itself. They are pure mathematical computations.

Mr. Wells: You are not contending that those are representative of the terminal time from the two origins?

Mr. Miller: No. By no means.

Exam. Walsh: With Mr. Miller's explanation you are willing to withdraw your objection, are you?

Mr. Wells: I don't understand just exactly what he is driving at but I respectfully submit that as conceded by Mr. Miller, the computation of the nineteen days and the seven days is not representative of the respective terminal time.

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Mr. Miller: I think that is obvious on the fact of the statement.

Mr. Matson: Why don't we leave out the last paragraph then?

Mr. Miller: I would prefer to leave it in. I think it is a reasonable approximation.

Exam. Walsh: Let it go in.

The Witness: We had better get an exhibit number on here.

Mr. Wells: I move to strike the last sentence.

Mr. Miller: No. I don't want to strike any of it. Admittedly, it isn't a representative study but what I have done is to make and what I have asked Mr. Clark to do is to give [fol. 1801] some idea of how this terminal time in New York compares with a very rough computation, based on a national average figure, and the only purpose of it is to give the reader a very rough approximation of where this New York turnaround time would stand in the national picture.

Exam. Walsh: All right. Leave it in.

Mr. Miller: For identification, Mr. Examiner, I would like to have——

Exam. Walsh: 151 is the next exhibit.

(Respondent's Exhibit No. 151, Witness Clark, was marked for identification.)

By Mr. Miller:

Q. Now, to get back to my question, have you made additional computations, Mr. Clark in which you compare this turnaround time, as shown in your exhibit 15, with actual turnaround times from Florida and California?

A. I have.

Q. Will you state the results of those computations and the basis for them?

A. In the statement previously submitted covering the turn-around time of cars of perishable unloaded at Piers 27-28 and 37th Street, New York and "Ball Ground" Jersey City, I compared at sheet 4 the approximate turn-around time of cars originating Florida and California with that for refrigerator cars in the United States as a whole. Since the submission of that statement I have selected at random a few cars, included in basic data used in the study of the

[fol. 1802] turn-around time of cars unloaded at the three stations studied, and ascertained the waybill dates for 17 shipments originating in Florida and eight shipments originating in California and Mexico. I then computed the elapsed times from the waybill dates for these shipments until the dates unloaded in the New York-Jersey City area, counting both the first and last days as twenty-four hours in each instance. Separately, I calculated the elapsed time from the waybill dates, until the empty cars were dispatched from Harsimus Cove Yard, Jersey City. Seven of the 17 cars originating in Florida were unloaded at the "Ball Ground" Jersey City and ten at Piers 27-28.

Three of the eight cars originating in California and Mexico were unloaded at the "Ball Ground" Jersey City and five at piers 27-28. The statistics are summarized in the statement below:

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[fol. 1803]

Corrected

Originated	Unloaded at	No. Cars	Elapsed Days From Waybill Date Until Unloaded	Elapsed Days From Waybill Date Until Empty Car Dispatched From Harsimus Cove Yard	Avg. Time per Car From Waybill Date Until— Unloaded	Dispatched Empty From Harsimus Cove Yard
Florida	"Ball Ground", J. C.	7	66	77	9.43	11.00
Florida	Piers 27–28, N. Y.	10	58	72	5.80	7.2
Total		17	124	149	7.29	8.76
Calif.-Mexico	"Ball Ground", J. C.	3	41	46	13.67	15.33
Calif.-Mexico	Piers 27–28, N. Y.	5	67	70	13.40	14.00
Total		8	108	116	13.50	14.50

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[fol. 1804] Under tariff provisions receivers of perishable in New York have a holding privilege whereby cars of perishable may be kept in Jersey City pending disposition. Perishables from west of the Mississippi River and all citrus, regardless of origin, are held on arrival at Harsimus Cove Yard unless previously received release orders are on hand, and other perishables from the South are held if hold orders are received prior to the arrival of the cars. Likewise, cars of perishable for Piers 27-28 arriving on Fridays and Saturdays must be held at Harsimus Cove Yard for the Sunday night market since that is the first market after Thursday night.

If allowance is made for such time in the foregoing statement the averages there indicated would be changed to the following figures:

Origin	From Waybill Date Until Unloaded Less Hold Track Time	From Waybill Date Until Dispatched Empty From Harsimus Cove Yard less Hold Track Time
Florida	6.53	7.94
Calif-Mexico	11.75	12.75

If the averages in both statements outlined above are doubled, on the assumption that the empty return movement would entail the same time as the loaded handling, and those results compared with the turnaround time for refrigerator cars in the United States as a whole, then we would have the following:

[fol. 1805]

From Waybill Date Until	Total Turnaround Time Shipments from Florida	California	U. S.
1. Unloaded NY-JC	14.70	27.00	24.76
2. Dispatched empty from Harsimus Cove	17.52	29.00	24.76
3. Unloaded NY-JC less hold track time	13.06	23.50	24.76
4. Dispatched empty from Harsimus Cove less hold track time	15.98	25.50	24.76

When consideration is given to the fact that the average for the United States as a whole includes all movements in the United States, between short haul points as well as between the extremities of the country, whereas we have selected for comparison only shipments originating in the most distant perishable producing areas of the United States, it is apparent that the services accorded by the railroads in the New York-Jersey City area are favorable to

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the trade. None of the foregoing calculations make any deductions for diversions, reconsignments, or time on hold tracks enroute from origins to destination. They do, however, include a proportion of the originating terminal times included in the interval between the billing dates and dispatchments of the cars.

When comparison is made with the times from billing dates until dispatchment empty from Harismus Cove Yard there is included a time factor from unloading until for- [fol. 1806] warding empty that belongs in the empty return movement. Doubling those particular averages when comparing with the United States compound these errors.

By Mr. Miller:

Q. Mr. Clark, do you know when the peak periods for number of unloads on piers 27 and 28 are?

A. During the winter months.

Q. What do you mean by winter months?

A. Well, in this case, it would probably be February or March.

Mr. Miller: That is all from this witness, Mr. Examiner.

Exam. Walsh: Cross-examine.

Cross-examination.

By Mr. LaRoe:

Q. I am not sure I get your major philosophy here. I tried to follow you. Are you taking the position here that the service rendered on the fruit and vegetable cars here involved is better in quality than the service rendered on other refrigerator car traffic?

Mr. Miller: We are not taking any position of that sort.

Mr. LaRoe: Thank you for that.

By Mr. LaRoe:

Q. Now, may I ask you, you say in your statement here: "Freight cars of other than railroad ownership generally designated as private cars are handled under the provisions of the mileage tariff," and that is the applicable mileage rate, it is three cents a mile.

I take it that you deduct from that that the number of days required in transit has absolutely no effect on the [fol. 1807] railroad cost; is that your position?

A. It does not affect the cost, such as has been presented in this hearing.

Q. Of course, it represents cost to somebody, but your point is that it doesn't represent cost to the railroads?

A. It does not represent cost to the railroads, for such cost studies as has been here presented.

Q. But you would admit the economic waste, if there were an undue detention of cars, regardless of whether the railroads bear that cost or not?

A. I don't know whether there is an economic waste.

Q. When cars are not used?

A. We have in railroad operation periods of time when we have a surplus of equipment. That is part of the railroad game, not only in refrigerators, but hopper cars, box cars, at times.

Q. How long has it been since you had a shortage, a surplus of refrigerator cars?

A. It hasn't been too long. There has been a particular demand in the last year but there have been times. Furthermore, the refrigerator car element surplus——

Q. I am sorry, but you didn't answer the question.

What is the latest month that you can remember when there was a surplus of refrigerator cars?

A. I don't have any month definitely in my mind. I would [fol. 1808] have to refer to the "AAR" statistics to give you that actual months.

Q. What is the last year when you remember you had a surplus of refrigerator cars, or the last season when you had a surplus of them?

A. I have no recollection definitely as to that. That is the reason I don't want to be specific but in general I adhere to the statement as made to you that there have been times.

Furthermore——

Q. Just a minute.

A. I want to finish my answer, too.

Q. You may finish your answer, but I have got to pin you down on this: have you finished your answer?

A. Well, I don't know. You interrupted me twice. I wanted to bring out the point that refrigerator cars are

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generally of private ownership, the majority of them, so the surpluses or shortages are something that involves not only the railroad but the owners of those cars.

Q. Have you known of any surplus of refrigerator cars in the year 1950?

A. I don't think there were any.

Q. Have you known of any surplus in the year 1949?

A. Now you are going back to the point where my memory does not carry me.

Q. You have a longer memory than that, haven't you?

[fol. 1809] Mr. Miller: Objection. The witness has said three times now that he didn't recall precisely when the last surplus was. We are not interested in this witness' powers of recollection. All we are interested in here is the facts. If he says he does not know, he does not know.

By Mr. LaRoe:

Q. Do you know whether there was any period in 1949 when there was a surplus of refrigerator cars?

A. I am not going to answer that question that I know or don't know, for the reason that you are trying to pin me down to specific figures and I do not carry them in my mind. No man would; no operating man can tell you surpluses as of a particular time without referring to his statements, which shows that fact.

Q. And, of course, you could not take any year prior to 1949 and state as to any such year whether there was a surplus of refrigerators?

A. Not at the moment.

Q. That satisfies me.

Mr. LaRoe: That is all.

Exam. Walsh: Any further questions?

Cross-examination.

By Mr. Wells:

Q. Mr. Clark, how does the Pennsylvania Railroad render service that requires the use of refrigerator cars insofar as the provision of equipment is concerned?

A. How do they?

Q. Yes.

[fol. 1810] A. By contract.

Q. With who?

A. For instance, fruit growers express cars.

Q. As a matter of fact, the Pennsylvania Railroad owns about a third of the stock in the Fruit Growers' Express Company, does it not?

A. Not quite a third. We own a good share of it.

Q. So that the point you were making a moment ago in answer to Mr. LaRoe was that regardless as to whether there may be a loss of the fruit Growers' Express Company, which is a subsidiary of the Pennsylvania Railroad and the Atlantic Coast Line Railroad, and the other railroads that participate in the particular movement, regardless of what loss that company may sustain, there is no direct loss to the Pennsylvania Railroad Company in its corporate capacity when a refrigerator car whose legal title is somewhere else sits idle and not in movement, is that your point?

A. That is a pretty long question. I don't know whether you are trying to get the legal sense out of it or just the practical sense.

Q. I am trying to find just exactly — is your position about there being no cost to the Pennsylvania Railroad Company in connection with refrigerator cars that are not turned around fast.

A. In the——

[fol. 1811] Mr. Miller: Let me answer that one.

Mr. Wells: The witness is testifying and I want the witness' answer.

Exam. Walsh: This witness is qualified to answer. This witness is capable to answer. He can answer this question and if he is not able to answer we will have your views.

Mr. Miller: If Mr. Wells will ask for a statement of fact I want this witness to answer. If he is asking for a statement of the position of the respondents in this case, I want to answer because that is my function. I don't think it is a proper question to the witness.

Mr. LaRoe: May we have the question read?

Mr. Wells: I submit it is proper cross examination on the direct testimony this particular witness gave.

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Mr. Miller: It is not a factual question at all.
Exam. Walsh: Read the question, please.

(Question read.)

Exam. Walsh: Now, he is addressing it to Mr. Clark.
Mr. Wells: Yes, sir.
Exam. Walsh: He said, "Your position"; he didn't say the position of the Pennsylvania Railroad or the carriers in general. Now, may you answer that?
The Witness: My statement, Mr. Wells, was that insofar as these costs that have been presented in this case are concerned, the time element in relation to refrigerator cars [fol. 1812] does not enter into the picture. Now, inferentially, if the Pennsylvania Railroad is directly connected with the earnings of the Fruit Growers' Express, that is an entirely different thing.

By Mr. Wells:

Q. Well, so far as the Fruit Growers' Express Company is concerned, it is simply a general situation of the railroads, including the Pennsylvania Railroad, isn't it?
A. That is correct.

Mr. Donadio: That is a question of law. I object to that question.
Mr. Wells: There is a question of fact, whether it is such an agency.

By Mr. Wells:

Q. What did you say the average turnaround time from Florida was?
A. This last statement?
Q. I want whatever the fact is, if you can give it to us at the present time, but I am getting at the point as to the assumption you indulged in as to filing out and determining the turnaround time.
A. Well, I am not certain I am going to give you the answer you are seeking because I am not sure I understand your question.
Q. What is the average turnaround time of refrigerator cars from Florida to New York City?

A. As computed by the method which I have just mentioned, I have it on two bases, and including two unloading points; namely, the "Ball Ground" at Jersey City and at [fol. 1813] piers 27, and 28, New York; the check of the 17 cars which I made indicated an average time per car from waybill date to the unloading date as 14.70, from the waybill date until dispatched empty from Harsimus Cove Yard, 17.52, without any deduction for hold track time.

Q. And does that include an actual determination as to the empty return movement of those cars?

A. It does not. It was determined in the manner I told you. I doubled the time loaded.

Q. Do you have any facts whatever to submit of record to show whether that assumption on your part is supported by the actual facts?

A. The actual fact would be probably a lesser figure than this.

Q. You mean a lesser figure in what respect?

A. From what I just read to you.

Q. You think the average trunaround time then from the day of loading in Florida to the day of unloading in New York and return empty to point of origin in Florida would be less than the 14.7?

A. Yes, sir.

Q. And on what do you base that statement?

A. Because the percentage of empty to loaded movement is not a hundred.

Q. What is that percentage?

A. It varied. It will run in the neighborhood, anywheres from maybe five to 91 or 92, something like that, depending on what time you take.

[fol. 1814] Q. So that you are not stating that in your opinion the representative terminal time on traffic from California is a different figure than the representative terminal time at New York of traffic from California?

A. You mean as to my method of calculating?

Q. I mean as to the question I asked you.

A. I don't understand your question. I will have to understand it before I can answer it.

Q. Specifically, you stated in your sworn testimony that the representative time, or a figure of nineteen days, is rep-

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resentative of the terminal time in the case of the Florida traffic. Is that true?

A. On the basis as there set forth it is true, with the qualification.

Q. Is nineteen days representative of the terminal time in the case of Florida traffic?

A. On the basis as stated in my statement which you are quoting, it is.

Mr. Miller: Mr. Wells, I think you didn't hear the witness correctly. I think that nineteen-day figure was turnaround time, wasn't it? Not time in New York Terminal.

Mr. Wells: Quote: We would arrive at a figure of nineteen days, as representative of the terminal time in the case of the Florida traffic, unquote.

Mr. Miller: I see your point now. I didn't understand you.

Mr. Wells: It is on page four of his prepared statement.

[fol. 1815] By Mr. Wells:

Q. And then you compare that with seven days, in the case of California and I am asking you, are those two figures contained in your testimony representative in your judgment of the actual terminal time on Florida traffic and California traffic?

A. They are not the actual time and it is so stated. The basis for it is there. That is one reason I gave this additional statement which has better foundation in fact.

Q. Well, as a matter of fact, the prepared statement doesn't have any foundation of fact, does it?

A. Which prepared statement?

Q. The one that you presented, Mr. Clark; page four, the one I have been talking about.

A. I believe Mr. Miller has given you a full explanation of the purpose why that was put in, and certainly there is nothing hidden there at all. It is set right out in front of you as to how it was determined. Under the short time I was given, I didn't get into this case, but until a few weeks ago, and I couldn't give you anything better at that time, but in the interval I did work up a few cars here. I would have done it for more, had we had longer time.

Q. You don't know of any factual basis for making the

statement those figures given there are the actual terminal time.

A. They are not the terminal time.

Q. Are they representative of the terminal time?

[fol. 1816] A. Outside of the statement.

Q. As a matter of fact.

A. No. They are not.

Mr. Wells: Thank you.

The Witness: My additional statement proves that.

Exam. Walsh: Any further questions of the witness?

Mr. Loos: I have a question.

Exam. Walsh: Mr. Loos.

Cross-examination.

By Mr. Loos:

Q. You couldn't recollect any period when there had been a surplus. Can you recollect within recent years periods when there have been shortages of refrigerator cars?

A. This last year there have been shortages.

Q. Now, you referred to private ownership of refrigerator cars. By that, you didn't mean it was shipper ownership, did you?

A. Yes, they could be—well, we speak of them carelessly perhaps, in railroad work, any other than a railroad-owned car, we call a private car.

Q. That includes the car lines, like the Pacific Fruit Express Company and the Fruit Growers Express Company, does it?

A. Yes.

Q. You refer to those as private cars?

A. Yes.

Q. And also the packers cars?

A. Yes, sir.

[fol. 1817] Q. And of course those are shipper-owned cars, are they?

A. That is right.

Q. Did you ever hear*d* of a fruit or a vegetable from California moving in a shipper-owned car?

A. No, I have not.

Q. When you speak of the delay, of any delay, in New

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York terminals of a refrigerator car not costing any money, you mean by that do you not that it does not cost the Pennsylvania Railroad Company any money because it is a mileage basis and not a per diem basis?

A. In the sense of the cost studies as here presented, yes.

Q. Isn't that all you mean, the extra days aren't paid for by the Pennsylvania Railroad because it is not on a per diem basis, it is on a mileage basis?

A. In the cost sense, that is correct, yes.

Q. You don't mean to say it is no disadvantage to the Santa Fe Railroad, for example, if a Santa Fe refrigerator car is held in New York fifteen or twenty days during a period of car shortage?

A. I am glad you put that qualification in there, because there could be some advantage of having it in New York, if they had too many cars on their lines.

Q. I said in a period of car shortage.

A. I know, I agree with you.

Q. And if the car shortage is so severe that it results in [fol. 1818] the failure to move traffic that otherwise would have moved if there hadn't been a car shortage, and thereby the Pennsylvania Railroad is deprived of a car of fruit that it otherwise would have received, isn't that a disadvantage to the Pennsylvania Railroad?

A. I imagine our traffic people would say so.

Mr. Loos: That is all.

Exam. Walsh: Any further questions of this witness?

Mr. Hoffman: I have a few questions.

Exam. Walsh: Mr. Hoffman.

[fol. 1819] Cross-examination.

By Mr. Hoffman:

Q. You have indicated here very plainly, Mr. Clark, that insofar as these studies are concerned they do not reflect any difference in costs to the terminating carriers by reason of the acceleration, if any, of the turn-around time; isn't that correct?

A. They do not include and shouldn't include——

Q. Did you give any study to the question of the benefits that might accrue, financial benefits that might accrue to that carrier by reason of an acceleration in the turn around time?

A. I think we just covered that a minute ago here in other ways.

Q. Isn't it true that in so far as the shipper is concerned, you do use the time element for the purpose of assessing charges?

A. That is right.

Q. And——

A. I suppose you have in mind demurrage?

Q. Yes.

A. Yes.

Q. In the case of demurrage on the terminal end, would that accrue to the particular railroad having control of the car at that time?

A. It would.

Q. And to that extent the railroad would be benefited?

A. Well I don't know as it would be benefited.

Demurrage is more or less of a penalty charge anyway. [fol. 1820] It isn't because we want it.

Q. But the railroad receives that charge without making any counter compensation to the company that may own the car?

A. You mean in the way of reimbursement?

Q. In the way of reimbursement.

A. That is right.

Q. And to that extent it is benefited?

A. Which?

Q. The terminal carrier.

A. It is taking in money. I can't agree with you that it is necessarily benefit.

Mr. LaRoe: We will assume that is a benefit.

The Witness: You will have to assume it. I won't agree to it.

Mr. Hoffman:

Q. Now on page 2 of your statement you say "Practically all of the railroad controlled refrigerator cars in the United

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States are owned by the railroads shown in the foregoing list."

A. That is right.

Q. What percentage of the total refrigerator cars are owned by railroads?

A. 98.2 of these particular ones.

Q. I mean of the total.

A. All privately owned, and all—I don't know.

Q. Wouldn't it be a very small percentage?

[fol. 1821] A. I just said I didn't know.

Q. You have no idea?

A. No. I don't know.

Q. No estimate?

A. No estimate.

Mr. Hoffman: I think I could answer that.

By Mr. Hoffman:

Q. The largest owner of refrigerator cars in the United States is the Pacific Fruit Express, isn't that true?

A. Of the railroads?

Q. Of all refrigerator cars in the United States.

A. Well not knowing what percentage the railroads are of the total I can't answer your question.

Q. You have heard of Pacific Fruit Express?

A. Indeed yes. In fact, I can tell you how many cars they are that they have but I don't know the grand total ownership you are trying to get me to give a percentage based on.

Q. In the next sentence you state "Freight cars of other than railroad ownership generally designated as private cars are handled under the provisions of the association," and so forth. Do you mean they are refrigerator cars or do you mean freight cars?

A. I mean refrigerator cars.

Q. So the statement "Freight cars" should be changed——

A. Wait a minute. Maybe I answered you a little too hastily.

Let's look at the tariff; cars owned by shippers.

[fol. 1822] Q. Does that include refrigerator cars?

A. The tariff reads mileage allowances and rules govern-

ing the handling of, also payment of mileage and equalization of mileage on cars owned by shippers.

Q. And that includes refrigerator cars as well as ordinary freight cars?

A. Yes.

Q. Well now you made a study, did you, of the number of cars that might be held on the Jersey side, pursuant to orders of the shippers, as compared with a number of cars that are not directed to be held?

A. No. I didn't compare that with anything but in working up this statement, or rather the statement I just made in the record I had to determine the cars that I had used as the basis for calculating the turn around time that were held in the Harsimus Cove Yard.

Now, that doesn't quite cover what you have asked there.

Q. No, so you did not make any specific study of the percentage of cars that are not held, that are delivered immediately upon arrival or as soon as possible?

A. No. I only determined those that were held and the time they were held to deduct it from the grand total.

Mr. Hoffman: No further question.

Mr. Loos: May I ask just one more question, Mr. Examiner?

Exam. Walsh: Mr. Loos: further cross examination.

[fol. 1823] Further cross-examination.

By Mr. Loos:

Q. Would you be willing that the shipper own refrigerator cars in which he ships fruits and vegetables?

A. That he should own it?

Q. Yes.

A. I don't think that is a question for me to answer. That is a policy question for the management.

Mr. Loos: That is all.

Exam. Walsh: Any further questions?

(No response)

Exam. Walsh: As I understood you to say, the tariff provides for holding those cars at Harsimus Cove if they arrived sort of late?

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The Witness: The tariff provides that any perishable shipments from west of the Mississippi River, and all citrus, will be held in Harsimus Cove Yard unless release orders have been received prior thereto for, or rather and southern perishable other than citrus will also be held if an order has been received to hold it, then from an operating practice, standpoint, we hold arrivals on Friday, and Saturday, and Sunday, up to a certain time, that are destined to Piers 27, 28, because naturally we couldn't move them over to the piers, so they go to the hold tracks.

Exam. Walsh: Do you know if tariffs make any provision for delivery of the traffic to the consignee?

The Witness: I don't understand your question, Mr. Examiner.

[fol. 1824] Exam. Walsh: Do you know if the tariffs make any provision for delivery of the traffic to the consignee? Do you know if tariffs make any provision for delivery to the consignee? Do you understand that?

The Witness: I think I do. Of course, I am not a traffic man and I believe I don't understand it in the sense you are asking it anyway. You mean for instance a carload shipment must be unloaded on a team track by receiver?

Exam. Walsh: Well, delivery made to the consignee, in some way. Do tariffs provide for that, or do you know?

Mr. Miller: I don't know that there is any specific language in the tariff saying we will deliver freight to consignees: Certainly, implication of the tariffs is that all freight is delivered to consignees.

Mr. Wells: Doesn't the particular tariff here involved say that the consignees will not be permitted to take delivery until after it is unloaded onto the Pier 27?

Mr. Miller: Certainly not in so many words.

Mr. Wells: Well, the position of the Pennsylvania Railroad, so far as I understand, has not changed since the former hearings when you stated that we would not be permitted to take delivery while in the freight car on the float, is the point I am getting at.

Mr. Miller: Our position has not changed from our position at the last hearing, that is correct.

[fol. 1825] Exam. Walsh: Proceed.

I thought you might know that answer.

The Witness: I am sorry, Mr. Examiner, I don't quite

grasp it. I don't remember any tariff saying in so many words just how deliveries shall be effected; as a general proposition.

Exam. Walsh: Any further questions?

(No response)

Exam. Walsh: Witness excused.

(Witness excused)

Exam. Walsh: Do you offer the exhibits?

Mr. Miller: I would like to offer Exhibit 151 in evidence, Mr. Examiner.

Exam. Walsh: Exhibit 151, Witness Clark, received in evidence.

(Respondents' Exhibit No. 151, Witness Clark, was received in evidence.)

Exam. Walsh: We will take about a five-minute recess.

(Short recess)

Exam. Walsh: Come to order.

Mr. Donadio: Mr. Examiner, the next witness, Mr. Talbott, Mr. Examiner, has already testified in this case on other occasions, and his testimony to be presented in this case is in the form of questions and answers in written form, and a copy of it has been distributed to all the parties of record, together with three exhibits and with your permission, may we have those exhibits identified as Exhibit [fol. 1826] 152, which apply to the exhibit marked "Pro No. 1." The first exhibit will be 152.

Exam. Walsh: It will be marked Exhibit 152, for identification.

(Respondents' Exhibit No. 152, Witness Talbott, was marked for identification)

Mr. Donadio: "Pro No. 2" will be 153, Mr. Examiner, and in the left-hand corner, "Pro No. 3" will be Exhibit No. 154.

(Respondents' Exhibits No. 153, and 154, Witness Talbott, were marked for identification.)

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Mr. Donadio: Now, Mr. Examiner, in the testimony, there are references to exhibits and on page 2, may we have inserted Exhibit 152 at the top of the page and the spaces to page 6 will also be with reference to 152, and on page 6 at the top of the page 6 insert Exhibit 153 and 153 will go into pages up to 9.

Exam. Walsh: To and including 9?

Mr. Donadio: There is nothing on 9. The blank space on 9 will be Exhibit 154, to the end.

May his testimony be copied in as though read?

Exam. Walsh: Yes.

Mr. LaRoe: That is agreeable.

E. M. TALBOTT was recalled, having previously been sworn, testified as follows:

Direct examination.

By Mr. Donadio:

Q. State your name and address for the record.

[fol. 1827] A. My name is E. M. Talbott. My address is Room 906, Baltimore and Ohio Building, Baltimore, Maryland.

Q. What position do you hold with the Baltimore and Ohio Railroad and what has been your experience?

A. I am employed as a special accountant, office of the Comptroller of the Baltimore and Ohio Railroad, Baltimore, Maryland.

During the past 30 years, I have filled various positions in the Accounting Department of that Company. During the past 15 years I have been engaged principally in the preparation of operating costs and accounting data, including field studies, especially in connection with rate cases before the Interstate Commerce Commission and the Public Utility Commissions of the various States in which the Baltimore and Ohio operates.

Q. Have you recently made a study and prepared some exhibits dealing with the costs of terminating fresh fruits or vegetables at the Baltimore and Ohio terminals at Philadelphia and New York?

A. I have made a study based on the operations for the month of December 1950 and prepared three exhibits, showing the terminal costs incurred incident to terminating fresh fruits or vegetables at Philadelphia and New York for presentation in this case.

This- exhibits are identified as Pro. Nos. 1, 2 and 3, as indicated in the lower-left-hand corner. My exhibit 152 shows costs of terminating a car of fresh fruits or vegetables on both the auction sales platform and the team tracks at the [fol. 1828] Perishable Products Terminal, located on Delaware Avenue, Philadelphia, Pa.

My Exhibit 153 shows the cost of terminating a car of fresh fruits or vegetables at 26th St., New York.

My exhibit 154 shows the expense incurred in connection with terminating a car of fresh fruits or vegetables at Pier 22-23, North River, New York.

Q. Will you describe exhibit Pro. No. 1 and identified as No. 152 dealing with the operations at Philadelphia?

A. My exhibit Pro. No. 1 and identified as Exhibit 152 consists of 7 pages. Page 1 shows the recapitulation of the charges which are detailed on pages 2 to 7 of the exhibit. As indicated in column (1) on page 1, the terminal costs incurred in connection with terminating a car of fresh fruits or vegetables at the auction sales platform amount to $75.94, whereas the terminal costs for terminating a car at the team tracks amount to $27.66, as shown in column (2).

Q. Will you continue to explain your exhibit?

A. On page 2 of my Exhibit 152 I have shown the expense pertaining *the* the agent's office, other than the platform unloading expense. At the Perishable Products Terminal, the Baltimore and Ohio maintains a separate agency to handle the fresh fruit and vegetable traffic. The amount shown on the first line for salary of agent and office force, office supplies and stationary, represents expense incurred [fol. 1829] during month of December 1950. The expense shown for heat is the average per month for the year 1950 and represents a portion of the total heating expense at the terminal assigned to the agent's office on floor space basis. The restaurant at the Perishable Products Terminal is operated to satisfy the demands of the fresh fruit and vege-

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table trade and the loss for the month of December, amounting to $610.21, is therefore included on page 2.

The last item, amounting to $53.37, represents the portion of taxes, depreciation, maintenance and interest on investment allocated to the office. The total expense on page 2 amounted to $5,023.96. A total of 518 cars of traffic were handled during the month, resulting in an average cost per car of $9.70. This cost applies equally to the auction sales and team track traffic and has been so listed in columns (1) and (2) on page 1.

Q. What does page 3 of this exhibit show?

A. Page 3 of my exhibit 152 shows the platform expense in connection with terminating the traffic on the auction sales platform. The unloading operation is handled by Baltimore and Ohio forces. The items of expense are listed in detail. As indicated, the costs applicable to traffic handled over the auction sales platform during December 1950 totaled $16,140.32. 371 cars were unloaded, resulting in an average cost of $43.50 per car. This amount has been shown in column (1) on page 1.

Q. What does page 4 of your Exhibit 152 show?

A. Page 4 of my Exhibit 152 details the expense which is [fol. 1830] common to all cars handled in the yard adjoining the Perishable Products Terminal. As indicated, this expense totals $2,074.60 which, when divided by the total number of cars handled in the yard, namely, 1,655, results in an average cost per car of $1.25. This average cost per car has been shown in columns (1) and (2) on page 1.

Q. What does page 5 of your Exhibit 152 show?

A. On page 5 of my Exhibit 152 I have detailed the expenses in connection with the yard engine operations at the Perishable Products Terminal. The cost of $ .97 per hour shown for Diesel locomotive repairs represents the actual maintenance cost as taken from the records. The cost per locomotive hour of $19.67 for transportation expense was developed by dividing the total cost of operating all yard locomotives at the terminal by the total yard locomotive hours involved.

Depreciation and return on investment were calculated to amount to $1.85 per locomotive hour at this terminal, based on the use of 13 Diesel yard locomotives.

The total amounts to $22.49, resulting in a cost of $ .375 per locomotive minute. Based on operations during the month of December, the average yard locomotive time for handling cars at the Perishable Products Terminal amounted to 20.1 minutes per car. This results in a cost of $7.54 per car. This cost applies equally to auction sales platform cars and team track cars and the amount has been [fol. 1831] shown in columns (1) and (2) on page 1.

Q. What does page 6 show?

A. Page 6 shows the cost of hauling rubbish from the team tracks, which amounted to $115.00 for the month of December 1950. A total of 115 cars were handled on the team tracks, resulting in an average cost of $1.00 per car. This amount has been included in column (2) on page 1.

Q. What does page 7 of your Exhibit 152 show?

A. On page 7 of my Exhibit 152, there is calculated the taxes, depreciation, maintenance and 6% interest on the depreciated investment on the facilities involved in the termination of this traffic. The data are shown in three columns. In column (1), there are shown the costs related directly to the traffic terminated on the auction sales platform, averaging $10.31 per car. In column (2) are shown the costs related directly to the team track cars, averaging $4.53 per car. In column (3) are shown the costs related to all cars using the yard, averaging $3.64 per car. These average costs have been shown in columns (1) and (2) on page 1 of the exhibit.

The investment costs for land and structures are the actual costs as charged to Acct. 701—Road and Equipment Property and reported to Bureau of Valuation of the Interstate Commerce Commission.

The road depreciation as shown in the depreciation accrued since January 1, 1943, the date of the depreciation [fol. 1832] accounting was inaugurated by the order of the Interstate Commerce Commission.

The maintenance expenses shown in column (1) are the average maintenance costs for the past five years—1946 to 1950, inclusive. The maintenance costs related to the facilities in column (3) are included on page 5.

The number of cars used as a divisor for each of the columns represents the average number of cars per month

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using the facilities for which costs are included in the respective columns.

Q. What does your exhibit marked Pro. No. 2 and identified as Exhibit 153 show?

A. My exhibit 153 which consists of four pages, shows the terminal costs incident to terminating fresh fruits or vegetables on the team tracks at 26th Street, New York, during December 1950.

Page 1 shows the summary of the costs which are detailed on pages 2 to 4, inclusive.

As indicated on page 1, the terminal cost incident to terminating a car of fresh fruits or vegetables on the team tracks at 26th Street, New York, during December 1950, amounted to $70.46.

The station clerical expense, shown on the first line as $1.29 per car is the average cost for all carload traffic moving in and out of the New York area. The agency work at New York for all the New York traffic is handled in the [fol. 1833] office of our terminal agent located on the second floor at Pier 22-23. This cost includes office force, light, heat and a pro-rated portion of the rent applying to the space used for the office.

Q. Will you continue to explain your exhibit?

A. On page 2 of my Exhibit 153 there are shown the costs incident to the maintenance and operation of 26th St. Yard for the month of December 1950. The expense is set up in two columns. Column (1) includes expense common to all cars using the yard. Column (2) includes only that expense applicable to fresh fruit or vegetable traffic.

Under the caption "Maintenance of Way and Structures" the costs included for the track accounts—202 to 220, inclusive, represent the average costs per month for the year 1950. The expense included for Account 227 represents the average per month for repairing all driveways in the yard, based on five years—1946 to 1950, inclusive. The records do not indicate the particular driveways which were repaired during this period.

The expense listed for Account 241 represents the average cost per month for the five year period—1946 to 1950, for repairing the float bridge. The charge to Account 266

covers depreciation for month of December 1950 on the float bridge and driveways.

Under "Transportation (Excluding yard switching)", there are shown the charges to Accounts Nos. 373 and 376, Station employees and expenses. The station expense [fol. 1834] which pertains to all the traffic handled in the yard is shown in column (1). The station expense which pertains wholly to the fresh fruit and vegetable traffic is shown in column (2).

Under "Yard Switching", there is shown the expense incurred during December 1950 in connection with operation of the yard locomotive. This expense relates to all the cars using the yard.

The total expense listed in column (1) was divided by 1308, the total number of loaded cars arriving at and departing from the yard during December 1950 to arrive at an average cost of $12.35 per car.

The total cost in column (2) which relates only to the fresh fruit or vegetable traffic, was divided by 205, the number of such cars which were unloaded on the team tracks during December 1950, to arrive at an average cost of $18.20 per car.

The total yard cost applying to a car of fresh fruit or vegetable traffic is $30.55 as indicated. This cost has been included on page 1.

Q. What does page 3 of Exhibit 153 show?

A. On page 3 of my Exhibit 153, there is calculated the interest at 6% on the depreciated investment in the facilities at 26th St. Yard and the taxes. The data are shown in two columns. The figures in column (1) are applicable to all the traffic using 26th St. Yard. The figures in column (2) re- [fol. 1835] late only to the cars handled on the team tracks. The number of cars used as divisor for each of the columns represents the average number of cars per month using the facilities during the year 1950. An average cost of $6.86 was determined for the total expense included in column (1) and an average cost of $12.58 in column (2), resulting in a total cost of $19.44 for a car of fresh fruits or vegetables. This cost has been listed on page 1 of the exhibit.

Q. What does page 4 of your Exhibit 153 show?

A. Page 4 of my Exhibit 153 shows the expenses involved

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in the marine operation in New York harbor. The expenses total $89,640.84, which when divided by the number of cars floated during December 1950 result in an average cost of $19.18 per car. This average cost per car has been shown on page 1.

The expenses as shown on page 4 for Account 323—Repairs—are based on the average costs for the five year period—1946 to 1950, inclusive.

Q. Describe your exhibit Pro. No. 3, identified as Exhibit 154 dealing with the operations at Pier 22-23, North River, New York, N. Y.

A. My Exhibit 154 consists of four pages. Page 1 shows recapitulation of the charges which are detailed on pages 2 to 4.

As indicated on page 1, the terminal costs incurred in connection with terminating a car of fresh fruits or vegetables on the station platform at Pier 22-23, North River, [fol. 1836] New York, amount to $119.86 per car.

The station clerical expenses shown on the first line as $1.29 per car is the average cost for all carload traffic moving in and out of the New York area. The agency work at New York for all the New York traffic is handled in the office of our terminal agent located on the second floor at Pier 22-23. The station clerical costs include office force, light, heat, and a pro-rated portion of the rent applying to the space used for the office.

Q. What does page 2 of your Exhibit 154 show?

A. Page 2 of my Exhibit 154 shows the station costs incident to unloading a car of fresh fruits or vegetables at Pier 22-23 during December 1950. The various items of expense are listed in detail. The total expense of $14,108.09 when divided by the number of cars unloaded during the month results in an average cost of $68.49 per car, which amount is shown on page 1.

The expense in connection with recoopering of bad order packages has been excluded from these costs.

Q. What does page 3 of your Exhibit 154 show?

A. Page 3 of my Exhibit 154 shows the miscellaneous pier station costs other than unloading costs. These costs relate to all the traffic handled on Pier 22-23. The expenses are

listed in detail and the total of $24,531.11, which when divided by 794, the total number of loaded cars handled in December 1950, results in an average cost of $30.90 per car. [fol. 1837] This amount is shown on page 1.

All the expenses listed on page 3 are the actual expenses incurred during month of December, 1950, except those under Accounts 227-241—Station and pier maintenance. This expense is based on the average per month for the five year period—1946 to 1950, inclusive.

Q. What does page 4 of your Exhibit 154 show?

A. Page 4 of my Exhibit 154 shows the expenses involved in the marine operation in New York harbor. The expenses total $89,640.84, which when divided by the number of cars floated during December, 1950 result in an average cost of $19.18 per car. This average cost per car has been shown on page 1.

The expenses for Account 323—Repairs, included on page 4, are based on the average cost for the five year period—1946 to 1950, inclusive.

Mr. Donadio: The witness is available for cross examination.

Cross-examination.

By Mr. LaRoe:

Q. Mr. Talbott, I have only one point. Your testimony is very clear, and I just wanted to ask you this one question.

Your figures come out pretty high, higher than some of the other railroads, nearly $120, page 1 of your Exhibit 154.

I think you would be frank to admit, would you not, that because of the small volume of traffic which the B. & O. [fol. 1838] handles,—of this particular traffic—the unloading costs, for example, are inflated by reason of that fact more than they would be if you handled a volume more akin to that of the Pennsylvania and the Erie?

A. Well, I would say the labor cost would be lower if we had a larger volume.

Q. And isn't that true also of some of the other costs, that the small volume which you handle, being only about one-tenth of what the Erie handles, for example, produces a higher unit cost than it otherwise would?

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A. I don't think that applies equally to the other elements of costs, because the facilities are handling about all the traffic they can handle over them and we have only charged against this particular traffic a portion of the cost of the facilities, so the only element of cost which would be lower if you had a greater volume, that is, I mean lower per ton, would be the unloading cost.

Q. Do you handle on your B. & O. Pier other fruit—other food products than fruits and vegetables?

For example, do you handle canned goods?

A. Oh yes, we handle most any commodity.

Q. Do you handle canned citrus, for example?

A. We handle a general variety of canned goods of most any commodity.

Q. And when you unload canned citrus on your pier you [fol. 1839] don't charge for it do you?

A. We make charges according to tariff and I don't think there is any tariff charge on citrus fruit.

Q. Are you aware of the increasing competition between canned citrus fruit and citrus fruit?

A. Well, I am not so well acquainted with that angle of it.

Q. Don't you know of it from your own consumption?

A. I know we consume more of the frozen and canned than of the fresh.

Q. Isn't that tendency increasing in your family and other families?

A. I don't know. I assume that it is.

Mr. Donadio: Mr. LaRoe, before you go any further I just want to have the record clear on your questions about unloading free other commodities at these pier stations. You are referring to New York, are you not?

Mr. LaRoe: Yes.

I just wanted to bring out very clearly for the record that canned citrus fruits is unloaded by the Baltimore and Ohio Railroad at its piers without any charge whatsoever, whereas a charge is imposed, if it doesn't happen to be in the canned form, and the witness, as I understand him, agrees with that and he also agrees as to the increasing competition between them. That is all.

Exam. Walsh: Any further questions on cross examination?

[fol. 1840] Mr. Wells?

Cross-examination.

By Mr. Wells:

Q. Mr. Talbott, what was the total number of cars handled on the pier station on the B. & O., as shown by your exhibit No. 152?

A. You mean a total of all cars or just perishable traffic?

A. Well let's take perishable traffic at the moment.

Mr. Donadio: What exhibit did you say, Mr. Wells?

Mr. Wells: Excuse me, 152 is Philadelphia.

By Mr. Wells:

Q. What is the total at Philadelphia?

A. Philadelphia, at our perishable products terminal we unload only perishable traffic.

Q. What is the total perishable traffic then? You are using the month of December, are you?

A. Yes.

Q. Well, on page 4 you have 1655 cars handled in the yard and then can you add the average number of cars handled a month at page 7? Will that correspond, columns 1, 2 and 3?

A. The figures——

Q. Does that mean there were 2160 cars handled at the Philadelphia perishable terminal in December, 1950?

A. No.

The figures in the first two columns are included in the third column, the total, average number of cars per month.

Q. You mean the 393 and the 287 are a part of the 1480; [fol. 1841] is that correct?

A. That is correct, yes.

Q. What happened to the other 175 cars then as between the yard operation and the perishable terminals?

A. I will have to dig back into my working papers to explain that. I have detail of all that in my papers.

Q. I thought maybe you could answer quickly without going into that.

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Is the answer one of them is an average that you got from somewhere and the other is the actual figure?

A. No. They are all actual figures. These are all actual figures.

Q. Well, on page 7 you say "Average number of cars handled per month." What do you mean by that?

A. Well, average per month, this was based on a year, and it was the average per month for a year.

Q. In other words, you took the year 1950, the number of cars, for example, for column 1, would be 12 times 393?

A. That is correct.

Q. And what were the actual number of cars in that category for the month of December, 1950? Was it 371 from page 3?

A. 371.

Q. As shown on page 3, is that right?

A. That is correct.

Q. So that your average for the year then, or per month, [fol. 1842] would have been some 22 difference?

A. That is right. In developing my cost for return investment and depreciation, I used the average cars per year but on my direct operating expenses for December I used the actual for the month.

Q. In what particulars did you use actual expenses for the month of December?

A. I used them in practically all particulars; all the expenses in this study are actual for the month of December, except—well, all of them, maintenance costs are based on the average for several years.

The operating costs are actual for the month.

Q. What about page 4? Is that actual? Yard operation, track maintenance, transportation?

A. Maintenance cost is the average for the year.

Q. You mean you took the total for the year and divided by 12 and said that is it?

A. Yes.

Q. Regardless of engine hours, or track mileage or anything else, is that right.

A. Well, that is the actual cost in that particular yard. We maintained records showing the cost of maintaining those particular tracks.

Q. So that what you did was to take the year's cost and divide it by 12 regardless of the use then in the month of [fol. 1843] December, is that right?

A. Well, that may be so, but maintenance cost don't relate to a month. Maintenance cost don't relate to a month. You may put in a lot of rail in January and no more the balance of the year.

Q. That is another reason why it is more accurate from the average standpoint to use more than a year's time in computing that, isn't it?

A. Well, not for your operations, because your operation relates to the month's business, closer than maintenance or depreciation.

Q. Where did you get the 97 cents as the per hour cost of maintenance of Diesel locomotive repairs on page 5?

A. We have a record on the Baltimore and Ohio showing what it costs us to maintain that particular type of Diesel locomotive, and the hours——

Q. Systemwide?

A. Systemwide but that particular type of locomotive. I don't think they are used all over the system. They may be used only in two or three yards on the system.

Q. At any rate it is a systemwide average for that particular class of locomotive, is that correct?

A. Yes.

Q. For what period of time?

A. That was for the year, the last year.

Q. 1950?

[fol. 1844] A. Yes.

Q. That is a pretty high average compared to the 70.07 for Diesel, per hour, at Harsimus Yard, and 80.7 for the New York Central and 83.4 for all engines at Harsimus Cove, according to the exhibits in this proceeding. Do you have any explanation or knowledge as to your, why your average on that amount should be so much higher than anybody else's?

A. I doubt very much if there is anything unusual about that. Most of these railroads, the Diesels are new, and as they get a little older they are going to cost more to repair them, so if the cost varies that much it wouldn't mean anything to me as a railroad man.

Q. In other words, you don't think that the computation

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with respect to maintenance is very accurate and reliable?

A. I didn't say that. I said the variation. You wanted to know if the variation meant anything. You quoted 80 cents in one place and I think mine were 97 cents.

Q. Referred to a computation of 70.07 per hour as the average cost of Diesel engines at Harsimus Cove Yard.

A. Do you know how old those locomotives are?

Q. No, sir. Do you know the age you were computing?

A. They are several years old.

Q. How old?

A. At least five years old.

Q. What was the difference between the average per [fol. 1845] hour repair cost in 1950, as against 1948, for those particular locomotives?

A. I don't think I have those details with me but I have them in Baltimore. I don't have them with me, but a new Diesel locomotive is like a new automobile. It doesn't cost as much the first year and the costs are liable to go up after it is two or three years old.

Q. Haven't you had some experience with some new lemons that did cost something the first year?

A. No, I haven't.

Q. Well, at any rate, in order to properly evaluate the unit costs that you have, considerable information would be needed to determine whether particular amounts were representative or not, is that right?

A. No.

Mr. Donadio: Do you mean to make comparison with someone else? He has enough information to justify his own figures but he has not got the information to make comparison with the New York Central, the Pennsylvania, or anybody else.

Mr. Wells: Or as to whether his own operation is efficient and economical.

Mr. Donadio: Well, I think there is no question about that. I will testify to that.

Mr. Wells: I think that is all.

Exam. Walsh: Any further questions of this witness?

Mr. Loos: May I ask, Mr. Talbott——

[fol. 1846] Cross-examination.

By Mr. Loos:

Q. In addition to the point shown in your exhibit of 26th Street, New York, and Piers 22 and 23, does the Baltimore and Ohio deliver freight at any other points in the New York Harbor area?

A. You mean this kind of traffic or any freight?

Q. Any kind of freight.

A. We have, I think Pier 39, or 39th Street, up in that section. I think that is the only other one, 39th Street.

Q. Pier 39?

A. I think it is Pier 39.

Q. It is a pier station?

A. That is right.

Q. Is that the only one?

A. That is the only one I recall.

Q. Is that a station at which package freight is delivered?

A. Yes.

Q. Are the cars floated over to that station?

A. That is correct.

Q. And are the cars unloaded?

A. That is correct.

Q. By the railroad?

A. That is right.

Q. Is any charge made for that unloading?

A. Only what the tariff provides. I am not a traffic man. [fol. 1847] Q. You don't know of any tariff provision for that?

A. I don't know of any, no.

Q. Is that unloading of that freight, is that the kind of freight to which you testified in answer to Mr. LaRoe's questions as to the kind of freight that was unloaded, canned goods, and other package freight?

A. If that's the kind that is given to us to transport that would be unloaded there, whatever is given to us to transport.

Exam. Walsh: Any further questions?

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Cross examination.

By Mr. Kaplan:

Q. Mr. Talbott, can you tell us what percentage of the unloads at Piers 22 and 23 are fruit and vegetables, and what percentage represents other types of freight?

Mr. Donadio: Over any particular period?

Mr. Kaplan: During the period of the survey.

The Witness: There was a total cars unloaded at Pier 22 and 23 of 794 cars.

By Mr. Kaplan:

Q. During what month?

A. December, 1950.

Q. And out of the 794 cars how many were fruit and vegetables?

A. 206.

Q. Does the same staff of employees unload fruit and vegetables as unloads the other?

A. No, entirely different crew. We unload—the day forces are carried on our own pay-roll, but the fruit operation is handled by contractor, entirely separate force.

[fol. 1848] Mr. Kaplan: That is all.

Cross examination.

By Mr. LaRoe:

Q. Your figures are what you pay the contractor?

A. Absolutely.

Q. Do you have his costs?

A. I don't know. We only have what he charges us plus his percentages, and so forth. These are his actual costs. He bills us the actual labor cost and adds on a 15 per cent overhead which I have shown on page 2 of my exhibit.

Q. What you have got in your exhibit as your cost is not his cost, but what he bills you?

A. What he bills us, but for that particular month we had one of our inspectors of accounts from the New York office work with the contractor and check his operation completely, and we pretty well know these are actually the cost figures.

Q. Now, wait a minute.

Mr. Donadio: It is a cost plus proposition.

By Mr. LaRoe:

Q. As a matter of fact, it is cost plus 15 per cent, isn't it?

The Witness: It is actual cost plus 15 per cent.
Mr. LaRoe: That is what I thought. That is all.
Exam. Walsh: Any further questions?

(No response)

Mr. Donadio: That is all.
[fol. 1849] We offer exhibits——
Mr. Fitzgerald: Just a minute, Mr. Donadio. I would like to ask a few questions.

Exam. Walsh: Mr. Fitzgerald.

Cross examination.

By Mr. Fitzgerald:

Q. Mr. Talbott, I am not quite clear on a couple pages of your exhibit 152 as to how to account for the difference in number of cars. You have said that 371 cars represented the number, actual number of cars unloaded in December at the auction sales platform; is that correct?

A. That is correct.

Q. Now, what does the figure 518, on page 2 of that exhibit, refer to?

A. That includes platform cars plus the team track cars.

Q. The team track cars are shown on page 6 of that exhibit, are they not?

A. Yes.

Q. 115 cars?

A. That is right, yes.

Q. That doesn't jibe, does it?

A. Well there is a reason for it. I can tell you if I go back in my papers. I can tell you what it is. The other cars would be the private sales cars included in that total. The 518 includes the team track cars and the private sales cars and also the platform cars.

[fol. 1850] Q. Is there any private sale at the Philadelphia Perishable Products Terminal?

A. Well, there is what you call—yes—there is a private

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sale platform there, the property leased from the B. & O. Railroad Company for those receivers, American Stores, I believe, Food Fair, or somebody.

Q. Isn't that the team track?

A. No.

Mr. Donadio: That is adjoining.

The Witness: As a divisor on page 2 I have used total number of cars of fruit received at the terminal for all purposes, because the agent handles those private sale cars as well as the team track cars and as well as the platform cars.

By Mr. Fitzgerald:

Q. I am not questioning your figures. I wanted to clarify the exhibit.

A. Does that explain it?

Q. Then I am to understand that there are perhaps 32 cars not accounted for as between auction and team track in your total of 518, and that that represents cars delivered to platform for private concerns?

Chain stores, possibly?

A. The difference are the private sales.

Q. Now, this exhibit, and I refer particularly to page 2, contains a loss due to operating a restaurant, and you make an average cost per car, which includes that figure.

[fol. 1851] A. That is right.

Q. That has no connection, does it, Mr. Talbott, with the unloading of fruits and vegetables, the operation of a restaurant by the B. & O. Railroad?

A. It is in connection with the operation of the terminal because it is there simply to accommodate that particular traffic.

Q. You think they wouldn't bring the refrigerator cars to the B. & O. Terminal if you didn't have a restaurant?

A. Well, they wanted it and we are operating it.

Q. Now, on the last page of your exhibit, what is the rate of depreciation you have used there, Mr. Talbott, in the auction sales building?

A. In the building?

That is the rate set up and approved by the Commission. I don't know exactly here what rate it is. It is a rate approved by the I. C. C. It is the rate we charge off every year, every month, to our account.

Q. I think the Pennsylvania used one and a half per cent. Would that be the same?

A. Well it is about that. For a large building it would be about one and a half per cent. I wouldn't want to say exactly. I could let you know.

Q. I don't think that would be necessary.

As respects the item on page 3 of your Exhibit 152—and all of my questions are directed toward Exhibit No. 152—the second item is platform labor, $9,379.18.

[fol. 1852] At my request you recently arranged to permit a representative of my client's, Mr. Donald T. Ward, to review with you your basic records supporting that item; is that not correct?

A. That is correct.

Q. And that figure is arrived at, I believe, by adding to your total incentive payments, so-called, of December, of $7,100.00, a certain small amount of additional labor for unloading cars on an hourly basis of only $4.20, to which you added 4 per cent overhead for administrative labor, payroll taxes, and vacation allowance, and in that way arrived at your total of $9,300; is that correct?

A. That is correct.

Q. And Mr. Ward went over those complete figures with you and secured a complete breakdown of the determination of that $7100?

A. I showed them to him. I don't know what he determined or what he took with them. I showed them to him.

Mr. Fitzgerald: That is all.

Exam. Walsh: Any further questions of the witness?

Mr. Donadio: I offer, Mr. Examiner, exhibit 152, 153, and 154, and ask they be so marked and received as a part of the record in this proceedings.

Exam. Walsh: Exhibit 152, 153, and 154, Witness Talbott, are received in evidence.

(Respondents' Exhibits 152, 153, & 154, Witness Talbott, were received in evidence.)

[fol. 1853] Exam. Walsh: Do you know of any other stations, other than New York and Philadelphia, at which the Baltimore & Ohio makes a charge for unloading freight, of any character, similar to the charge made here?

The Witness: As I understand it we make a charge at all

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other points for all other carload freight.

Exam. Walsh: For instance where, a separate charge?

The Witness: Baltimore, Chicago——

Exam. Walsh: You mean you make a separate charge for unloading freight at Baltimore?

The Witness: Yes, carload freight, yes.

Mr. Miller: Is that true at Philadelphia?

The Witness: At Philadelphia, yes.

Mr. Fitzgerald: Mr. Examiner, may I ask——

Exam. Walsh: Wait until I finish this. I will give you a chance again.

Now, what character of freight?

The Witness: Any character of carload freight, at any other place.

Exam. Walsh: At what physical point or location do you make the delivery—that is, when you perform the unloading at Baltimore, Philadelphia, or wherever else, on other freight?

The Witness: Well at Baltimore there is a perishable terminal where the perishable traffic is unloaded, and if we unload it we charge for it.

[fol. 1854] Exam. Walsh: And is the perishable shed your property?

The Witness: Our property, yes.

Exam. Walsh: Is it leased to anybody?

The Witness: It is not.

Mr. LaRoe: Do you ever perform the unloading service yourself?

The Witness: I am not so sure about the perishable traffic at Baltimore.

Exam. Walsh: I want you to be sure. I am looking for specific and correct information.

The Witness: We unload the forwarder traffic there and charge for it definitely at our freight houses.

Mr. LaRoe: Forwarder traffic is in a class by itself. As to ordinary traffic, you knew perfectly well that at that house in Baltimore you don't unload that freight. That is unloaded by the consignees.

The Witness: I think perishable traffic is unloaded by the consignee, but there is a tariff charge that would apply if we did unload it.

Mr. LaRoe: In theory, yes.

Exam. Walsh: Where would you place it when you unloaded it? That is what I want to know.

The Witness: There is a perishable products terminal at Baltimore.

Exam. Walsh: Would that be delivering it to the consignee's property, either wagon or warehouse or piece of [fol. 1855] land?

The Witness: He backs up and takes it away.

Exam. Walsh: You unload it on his wagon?

The Witness: No, not on his wagon.

Exam. Walsh: When you charge him—I am not talking now about those charges at Philadelphia or New York; I am talking about the charges for unloading other freight—when the Baltimore and Ohio performs the unloading, do they place it on the station platform, or do they make delivery of it to the property of the consignee, either a warehouse, a team track, a truck or wagon?

The Witness: My only acquaintance has been with these forwarder traffic. We unload the carload traffic at Chicago and Cleveland and different places, but I would rather not answer you specifically. I would rather find out tonight if you want.

Exam. Walsh: Possibly that could be a question for counsel.

Mr. Donadio: I think, if the Examiner please, that the tariffs will pretty well show just what the situation is with respect to the unloading at other places.

There is an unloading charge at Philadelphia that has been in effect for several months which covers all traffic at Philadelphia.

Exam. Walsh: Is it similar to the unloading charge for fruits and vegetables?

Mr. Donadio: Different amounts, but it is of the same nature. It covers all unloading of freight from a car to a [fol. 1856] platform, station platform; and as I understand it it contemplates nothing more than the unloading of the physical unloading of the freight from the car to the platform, the station platform.

Exam. Walsh: Does that apply in instances where the consignee can unload the freight, is in a position to unload the freight?

Mr. Donadio: Under the tariff at Philadelphia as I un-

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derstand it it doesn't contemplate that the consignee will unload the freight.

Mr. LaRoe: That is confusing. May I be permitted to ask counsel this question?

Is there any other place that you know of where the railroad imposes a charge on the consignee when it unloads the car, without at the same time giving the consignee the option to unload, if he wishes to, and giving him access to the freight?

Mr. Donadio: At Philadelphia, the tariff that is now in effect at Philadelphia gives the consignee no opportunity to unload or do his own unloading.

Mr. LaRoe: I am asking you "any other place except those involved in this issue here," Baltimore, Chicago, Cleveland,——

Mr. Donadio: This Philadelphia situation isn't involved specifically in this issue because it covers other freight. What we are concerned with here as I understand it are fruits and vegetables and you asked if there were other places. Philadelphia is one of them, a tariff which recently [fol. 1857] went in effect provides for a charge for unloading dry freight, if you want to call it that, or domestic freight or any kind of freight, package, carload freight.

Mr. LaRoe: Would that give the—without giving the consignee the privilege of unloading?

Mr. Donadio: As a matter of fact, that privilege is not given.

Mr. LaRoe: Is there any other place in the United States where that is true?

Mr. Miller: Pittsburgh.

Mr. Wells: Well now, I think we are getting this all confused. I would like to have the record show that tariff reference and specific items if we are going into something that has developed recently about new tariff provisions and comparable provisions of that sort.

Personally, I have never heard of a place anywhere, except Philadelphia and New York, on perishables, where any unloading charge was attempted to be assessed if the consignee did not and was not able to get to the car.

Mr. Loos: Mr. Examiner, I think perhaps one question might clear this up.

Isn't it true, Mr. Donadio, that at Philadelphia and at all

other points other than New York, a shipper can take team track delivery and you have facilities to give him team track delivery if he wants it?

[fol. 1858] Mr. Miller: We do in New York.

Mr. Donadio: B. and O. has 26th Street team track there and any shipper can take delivery.

Mr. Loos: As long as it is well understood and admitted on the record that the present track facilities are utterly inadequate.

Mr. Miller: No, sir.

Mr. Donadio: I won't admit that.

Mr. Loos: We don't need to argue that all over again. It is certainly in the record.

Mr. Miller: Certainly it is not.

Mr. Smith: What is in the record is correct, Mr. Loos.

Mr. Hoffman: Mr. Examiner, there was clear testimony on this in previous proceedings.

Exam. Walsh: This may be a good time to get this cleared up. After all, there must be a proposed report or some kind of a report. I have before me here the argument in this proceeding, on July 24, 1950, as to the latest proposed report and Mr. Smith was conducting the argument and he criticized a sentence in the Examiner's findings which reads, and I am quoting, "Heretofore, it was generally assumed that compensation for those services"—that is, the unloading services—"was included in the line haul rate, or in special divisions allowed delivering carriers."

Now, I think you criticized the word "assumed". I should like to know for the record where the charge for [fol. 1859] unloading was included prior to the time that these present charges became effective; that was, November 1st, 1948.

I should like to know where those charges were included in the charges for unloading so that when I may be preparing this report again I will get away from assumptions.

Mr. Smith: You can look at that either one or two ways, Mr. Examiner.

It is perfectly true that until these unloading charges became effective the only money we got paid for the through service from California, we will say, to the piers at New York was the line haul rate. You can look at it that way: Or you can look at it from the stand point that we per-

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formed the unloading free of charge over a long period of time.

Mr. LaRoe: If the Examiner then had said instead of using the word "assumption" that the unloading service has in fact always be- included in the line haul rate prior to the effective date of these new charges he would have been right.

Mr. Donadio: No, he wouldn't have.

Mr. Miller: No. If he had said there was no separate charge made for unloading prior to these charges he would have been correct.

Mr. LaRoe: All right. We will get it that way then, no separate charge through all the years for half a century or more was made in addition to the line haul rate for the [fol. 1860] performance of this service.

If the Examiner had so stated and had avoided the word "assumption" or "assumed" he would have been correct, would he not?

Mr. Miller: That is correct.

Mr. Smith: I don't know why we should quibble about language. The fact is clear that until these loading charges went into effect we received nothing for the unloading service except the general income we got, which were the line haul charges.

That is perfectly clear. It is obvious.

Exam. Walsh: Is there a contention by respondents that the charge for making delivery was not included in the through rate, which embraced line haul and which should also include or embrace delivery?

By implication the carrier must tender the shipment for delivery to the consignee.

Mr. Miller: That is right.

Mr. LaRoe: Mr. Examiner, may I say on that point that we do not like the emphasis that is throughout this case on the word "unloaded." What we claim we are entitled to is simply delivery, customary delivery, on these piers, and we don't get it without paying extra for it.

Our legal point is that there must be reasonable simple delivery, and the only kind of simple delivery they can give on these piers is pier delivery because they don't give us access to the car until it is placed on the pier, so we claim [fol. 1861] we are being charged here for simple delivery

of freight at these stations, and that these stations are the customary stations.

Mr. Miller: By the same sign, Mr. Examiner, it is equally true we have not included in our costs in justification of the unloading any of the costs which are incurred in the course of making delivery to consignees. There are costs involved in making that delivery, but none of those costs have been included in our cost studies in justification of these charges.

Exam. Walsh: Now, for instance, you don't have to go into detail, into the specific figures.

Mr. Miller: Well, in general, the delivery function on the piers consists of indentifying the property and transferring possession to the receiver, just as in the case of any other property.

Exam. Walsh: Where does that identification take place?

Mr. Miller: On the piers.

Exam. Walsh: Where do you transfer the property to the consignee?

Mr. Miller: On the piers.

Exam. Walsh: At what point?

Mr. Miller: Wherever the freight is located on the piers.

Exam. Walsh: After the freight is placed at a certain location on the piers?

Mr. Miller: Yes.

[fol. 1862] Exam. Walsh: That is where you make delivery?

Mr. Miller: Yes.

Mr. LaRoe: There isn't any transfer to the consignee except that he goes there and picks it up?

Exam. Walsh: The unloading that is performed at the pier, and I am not including Philadelphia, that will come later—but isn't the unloading that is performed at the piers a result of carrier disability to make delivery?

Mr. Miller: No.

Exam. Walsh: Of course, you have a right to answer your way, of course.

Mr. Miller: It is an additional service performed in the case, in the course of this particular kind of delivery. That is true everywhere.

Exam. Walsh: Why don't you make delivery to the consignee before you perform the unloading?

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Mr. Miller: Why don't we perform the unloading afterward?

Exam. Walsh: No, to the consignee before you perform unloading?

Mr. Miller: Because it would make it an awkward situation.

Exam. Walsh: What?

Mr. Miller: It would result in an awkward situation.

Mr. LaRoe: Awkward because we are denied access to the car float.

Mr. Miller: By no means.

[fol. 1863] Exam. Walsh: And that awkwardness as to the situation is a result of the physical——

Mr. Miller: The kind of delivery.

Exam. Walsh: Yes. And it is a carrier disability.

Mr. Miller: No.

Mr. Donadio: There is another element if the Examiner please, inherent in this situation, and that is the labor situation up here. The consignees couldn't come on these railroad piers and start with their gangs of men and unload these cars. If they did there would be a lot of broken heads within a very short time.

Mr. Kaplan: That is not so at all. I object to that. If that is in the record, I want to say labor relations have been very peaceful in New York.

Mr. Donadio: The point I am making is that no consignee could bring a group of men on the piers, on the floats, and have them unload the cars.

Mr. Kaplan: The railroads wouldn't let us.

Mr. Donadio: You couldn't do it even if you were let.

You would have to hire the same people the railroads hire. I think that is important in answer to the question the Examiner put.

Exam. Walsh: The unloading is performed by unionized gangs, groups.

Mr. Donadio: Particular groups, Stevedores.

[fol. 1864] Exam. Walsh: Were those separate unloading charges that you put on, that became effective November 1, 1948, were they established because of the increases, the very large increases that were then given to those labor unions, and those labor unions had been performing

that service for you for many years, hadn't they, prior to that time?

Mr. Donadio: That is so.

Mr. Smith: I think that had a bearing on it. I think at the first hearing one of our witnesses explained rather fully the background and pointed out that at one time these costs weren't so heavy, and no extra charge was made for them until finally the point was made, was reached where the charge became so burdensome we felt we did have to make a charge.

Exam. Walsh: It was when those increases became apparent to you that you proposed to establish the separate unloading charges that are now in effect?

Mr. Hoffman: In the meantime we were subjected to successive increases in the line haul rates under numerous ex parte proceedings which should have taken care of them.

Mr. LaRoe: May I ask Mr. Smith a question at that point, which I don't think is an unfair question?

At that point, why would it not have been fairer to impose upon the shipping public only the increase in the labor cost over and above what you had borne for a long period of time, instead of going back and imposing on the shipping [fol. 1865] public also the cost that you had borne for all these years?

Mr. Smith: I think, frankly, we felt we were entitled to recoup our costs a hundred per cent. It oft-imes happens that a burden is very light and you don't pay any attention to it, then the burden becomes heavy and you look into the matter and you decide you should get a new dollar back for the whole old dollar. I think that is the explanation of that.

Exam. Walsh: How do you perform unloading at the points other than—I am talking about New York, at points other than the piers?

Is that performed by your non operating employees, like freight handlers, checkers and truckers?

Mr. Donadio: There is no unloading at team tracks.

Exam. Walsh: I mean at other stations.

Mr. Donadio: Pier stations?

Exam. Walsh: Yes.

Mr. Miller: Well take the situation in Philadelphia as an

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example. The unloading of this freight is performed by station labor at this perishable products terminal.

At other stations, where we performed unloading of other freight, it is handled by the same class of employees who pick up the freight out of the car and take it out and put it at a place of rest on the platform in substantially the same fashion as is done with this freight.

Exam. Walsh: So that if you had not a contract with the [fol. 1866] Seaboard Unloading, Seaboard Refrigeration Unloading Crews, or the Penn Stevedoring Organization at New York, the unloading would be performed by your own non operating employees, and by those I mean freight house warehouse men.

Mr. Miller: That is right.

Exam. Walsh: Freight house employees, freight handlers?

Mr. Miller: Freight handlers, truckers.

Exam. Walsh: And so forth?

Mr. Miller: Yes.

Exam. Walsh: Now, I should like to know for the record how the increases in the rate of pay to the unionized non railroad employees who now perform the unloading, how that rate of increase compared with the rate of increase that you gave your non operating employees who would have performed that service——

Mr. Smith: I think they were about the same, Mr. Examiner,——

Mr. Miller: The increases were handled somewhat differently in that these non operating increases for our own employees were a part of a National agreement, whereas the increases for employees of contractors at our pier stations were handled between the contractor and his own employees. I think I can say that in one hundred per cent of the cases those contractors' employees got the same increases as were applied nationally for non operating railroad employees.

Exam. Walsh: Now then, were the railroad rates increased, railroad freight charges increased, giving con- [fol. 1867] sideration to the increases given to non operating employees as well as to the other railroad labor?

Mr. Miller: Oh yes.

Exam. Walsh: So that your present rates reflect the increases in the cost of operation?

Mr. Miller: Yes.

Exam. Walsh: And you have admitted that the increase that has been given in the pay to the unloading gangs, that is, the non railroad unloading gangs, that that increase has been no greater than the increase that was given to your non operating employees?

Mr. Miller: That is right.

But, Mr. Examiner, you seem to have neglected the fundamental in this proposition, that we were entitled to assess charges for unloading freight at New York and Philadelphia for many years, as soon as the practice of assessing charges for unloading became general throughout the Eastern District.

Now, as to our right to assess such charges, representing the cost of performing the service, plus a small increment, that right was established many years ago by virtue of the uniform practice throughout Eastern District.

Now, if for some years we forewent assessing those charges and postponed the date when such charges should be begun at New York and Philadelphia to a date later than those charges became effective at other points, we certainly [fol. 1868] are still entitled to assess charges here the same way as we have done for many years at all other points.

Exam. Walsh: At what other point or points on the Pennsylvania system, or on respondents' lines, other than New York and Philadelphia where you have performed unloading and made charges for it have you not given the consignee, first, an opportunity of performing its own unloading?

Mr. Miller: Oh, on that point——

Mr. Smith: The consignee has the opportunity here of ordering team track delivery.

Mr. Miller: The consignee never gets delivery of the freight until after it is unloaded. On no occasion, no matter where the unloading is performed, the consignee never gets delivery of the freight, never gets possession of the freight until after it is unloaded and placed on the platform. That is true, everywhere.

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Mr. LaRoe: There is no other place I know of in the United States where the railroads do not include in the line haul rate a simple reasonable delivery to the consignee and here they don't make that reasonable simple delivery. They put it on a car float, to which they deny us access.

Mr. Miller: We equally deny them access when they ask for unloading at any other platform.

Mr. Thornton: Nobody is asking for it here.

Mr. Hoffman: Mr. Examiner, on the occasion of the last [fol. 1869] hearing, my recollection is that we developed testimony, and I think I brought it out on cross examination, that with respect to citrus other than Philadelphia and New York, we are permitted access to the car and the matter of unloading is optional, as set forth in the tariff, and even more important in all those other cities, the railroad can give us access because they have adequate team track facilities; and therein lies the difference between New York and the other cities, is the inadequacy of the carrier here to give us team track facilities.

In so far as the pier is concerned, it is admitted in this record that we are not given access to the car. Instead of unloading the car, being permitted to unload the car, we are permitted to unload the pier platform; and to access an unloading charge here is to access on us a double unloading charge.

We are requested to pay the unloading charge from the car to the platform, and then we have to assume and absorb the unloading charge, so to speak, from the pier platform to our own trucks.

Mr. LaRoe: That is right.

Exam. Walsh: I suppose this is a good place to adjourn.

Mr. Loos: Before we get too far away from it, may I refer to the remark Mr. Miller made a moment ago when he said that all these years the railroads have had the right to charge for this unloading. Now that I deny. At New York they didn't have that right and they don't have it today and that is the whole point at issue in this case, [fol. 1870] and you can't just assume the point at issue in this case.

Mr. Miller: Mr. Examiner, we do have one other witness for respondents.

Exam. Walsh: Tonight?

Mr. Miller: He will take just a very few minutes.

Mr. Fitzgerald: Mr. Examiner, before Mr. Talbott is excused, I inadvertently interrupted the Examiner previously. There has been some difficulty hearing back here but there are one or two questions I wished to ask before he is excused.

Exam. Walsh: All right.

By Mr. Fitzgerald:

Q. Cars unloaded at the auction sales platform at Philadelphia, shown in your Exhibit 152, was 371, is that correct?

A. That is correct.

Q. And under your tariff, the consignee is not permitted to unload those cars so they had to be unloaded by the carrier, that is also correct, is it not?

A. If they wanted to be unloaded on the platform. Of course, they could take delivery in the team track for them.

Q. And 115 cars were delivered at team track, but as to the cars in excess of those delivered at auction platform and at team track, which you stated were also arrivals at the perishable products terminal, who unloaded those cars?

A. The consignee.

[fol. 1871] Mr. Fitzgerald: That is all.

Cross Examination.

By Mr. Montgomery:

Q. Mr. Talbott, according to your exhibit 152 it would appear that your 371 cars unloaded by pier delivery, and 115 team track—isn't it a fact, as was brought out in the last hearing, that team track facilities in Philadelphia are not ample or sufficient for team track delivery of all the cars coming into the terminal?

A. In Philadelphia?

Q. Yes.

A. I think they are.

Q. You think they are?

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A. Yes. I would think so.

Q. But it is a fact, however, that the majority of cars are delivered at pier delivery by the railroad under the charge?

A. At the platform?

Q. That is right.

A. Where the consignee desires to take delivery.

Q. Where the consignee is not permitted access for the purpose of unloading the cars, but they are unloaded by the railroad and the consignee is charged for it; isn't that correct?

A. They are unloaded on the platform where the consignee desires to take unloading. He could unload them on the team track.

Q. Now, just one other question here. In your exhibit [fol. 1872] 152, the figures which you have submitted here include many items including the costs in the line haul, as well as terminal charges and unloading charges, do they not?

A. My cost studies were based on what I thought the Commission wanted. I thought they wanted a complete cost of the unloading of team track cars, compared to platform cars?

Q. And that includes—you have not segregated to show what is allocated only to the unloading charge, but you have just included every other item, including your costs of maintenance, repair, your railroad, tracks, locomotive and everything?

A. This is complete terminal cost of unloading each type of car.

Q. In other words, this is what you thought the Commission wanted but you have not segregated it so as to show what the actual costs are of unloading?

A. That is correct. The unloading costs are included in here but they are not set out separately.

Mr. Wells: Mr. Examiner, I wonder if I might ask one additional question?

Mr. Donadio: I would like to get this cross examination over with now.

Mr. Wells: This is a matter that has arisen by reason of the discussion that has been here on the record and some questions that were asked.

Mr. Donadio: It is not due to any redirect. That is the only purpose of recross, to take care of redirect.

[fol. 1873] Exam. Walsh: Proceed, Mr. Wells.

Cross examination.

By Mr. Wells:

Q. I would like to ask, the historical background of the lack of an unloading charge on citrus fruit, delivered at Philadelphia, are you familar with the fact that the method of handling at Philadelphia, say, in 1926, at the time of the docket 16939, was exactly the same as at New York City?

A. No. I am not acquainted with that. That is beyond my time.

Mr. Wells: That is all.

Exam. Walsh: Witness is excused.

(Witness excused.)

Mr. Wells: Mr. Examiner, in connection with the discussion I should like to read into the record——

Exam. Walsh: Suppose you have somebody introduce that as an exhibit.

Mr. Wells: All right.

Exam. Walsh: That would be better.

Exam. Walsh: The next witness, please.

Mr. Miller: Mr. O'Neill.

The occasion for this witness, Mr. Examiner, is only the fact that the Reading Company did not reply to the Commission's order to make cost studies, and we wanted to explain the reasons for their failure to reply.

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C. J. O'Neill was sworn and testified as follows:

[fol. 1874] Direct examination.

By Mr. Miller:

Q. Mr. O'Neill, will you simply explain to the Examiner in your own words the circumstances which gave rise to the fact that no special reply was made by the Reading Company to the Commission's order of investigation, which gave rise to this hearing?

A. Cars of fresh fruits and vegetables for team track delivery on the Reading Railway System in Philadelphia are principally handled at the perishable products terminal, which is a joint operation with the Baltimore and Ohio Railroad, and the Baltimore and Ohio being the operating company, their witness has reported on that operation, which includes our cars handled at that point.

During the period selected to study, which was December of 1950 in this case, we did not handle any cars of fresh fruits or vegetables, for team track at any other of our other Philadelphia stations.

Q. Do you have any figures as to the annual volume of team track deliveries by the Reading Company of fresh fruits and vegetables?

A. For the 11 months of 1950, we did handle 34 cars of fresh fruits and vegetables. That was 29 cars of vegetables and 5 cars of fruit, a total of 34 cars.

Mr. Miller: That is all, Mr. Examiner.

Mr. Kaplan: Nothing to New York?

[fols. 1875-1887] The Witness: Reading don't go into New York.

[fol. 1888] Proceedings of June 5, 1951

E. S. Root previously sworn, further testified as follows:

Cross examination

By Mr. Loos:

Q. Mr. Root, have you checked the paper I gave you yesterday when you were on the stand?

A. I have.

Q. And since then it has been mimeographed and copies have been distributed.

Have you checked the mimeographed copy against the original, or had it checked?

A. I have.

Mr. Loos: I would like this paper, Mr. Examiner, to be identified by exhibit number, please.

Exam. Walsh: This will be 155.

(Protestants' Exhibit No. 155, Witness Root, was marked for identification.)

[fol. 1889] By Mr. Loos:

Q. Now, Mr. Root, in addition to the 28th Street yard—at 28th Street you have a team track and a freight house?

A. That is right.

Q. And industrial tracks?

A. Yes.

Q. And in addition to the Duane Street piers and the 28th Street yard, does the Erie also deliver freight at Piers 28, 67 and No. 7?

A. They deliver freight at Piers 48, 67 and Pier 7 is a shipside operation. The figures that appear in our exhibit relate to import bananas.

Q. And Pier 7 is not a pier operated by the Erie?

A. That is correct.

Q. And at Piers 48 and 67 package freight is received, is it?

A. Yes, sir.

Q. But not fruits and vegetables?

A. No, sir.

Q. In addition to the points already mentioned, does the Erie also operate a yard at 149th Street?

A. It does.

Q. And does it there have a team track?

A. It does.

Q. And industrial?

A. I am not too sure about industrial. There is a freight house.

[fol. 1890] Q. And at 149th Street you receive package freight?

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A. There is l. c. l. and carlot, both.

Q. Do you receive any fruits and vegetables there?

A. We receive some fruits and vegetables there. I think in the year 1950, the principal commodity of that type was grapes.

Q. Now, when you made your study, embodied in your Exhibit No. 146, did you in making your study and quoting operations, and of the switching operations in the various yards, so far as the yards you examined were concerned, cover also cars going to some of these other points?

A. That is correct.

Q. And in that sheet marked Exhibit 155, are the figures there figures that are taken from your work sheet, showing the time or hours or other items, expenses, etc., involved in connection with cars going to some of these other points but related to, or corresponding to, the figures shown in your exhibit?

A. That is correct.

I would like to make one or two qualifications, though.

Q. Certainly.

A. The item on the first sheet, the first item, Monmouth Team Track, the Item of 15.32 minutes, is only based on one car. There was only one car during the test week. The figures on the third page showing the pier rentals, miscellaneous station employees, maintenance and insurance, those appearing on the forth page, are not generally taken [fol. 1891] from our work papers in connection with Exhibit 146 but were specially developed at your request.

Q. And for which I thank you, Mr. Root.

Exam. Walsh: Sheets 3 and 4 of Exhibit 155?

The Witness: That is correct.

By Mr. Loos:

Q. Now, will you refer to page 2 of your Exhibit 146?

Line 7 shows Float Bridge switching at the 28th Street yard. Do you have a corresponding operation at the 149th Street yard?

A. Yes, sir.

Q. But you don't have any figures for that, do you?

A. No, sir. They are not in my exhibit.

Q. And would you be able to give any comparison of the

operation at 149th Street, or 28th Street, so far as the Float Bridge operation is concerned?

Do you think it would be about the same or would 149th Street likely take more time or less time?

A. You are speaking just of the Float Bridge expense?

Q. Float Bridge switching.

A. I would *just* it would be about the same, yes, sir.

Q. Line 8 shows—line 8 of page 2 of your exhibit—shows the team track switching at the 28th Street yard and you have a similar operation at 149th Street, have you not?

A. Yes, sir.

Q. Would you judge that the operation at 149th Street [fol. 1892] would be about the same as at 28th Street?

A. Yes, sir.

Q. Now, will you turn to page——

A. If anything, due to the volume, it would be higher but I think it would approximate the same figure.

Q. Will you turn to page 9, lines 1 to 7 of that page, show miscellaneous employees at 28th Street yard.

A. Yes, sir.

Q. And Lines 8 to 12, police protection?

A. Yes, sir.

Q. At the same time that you are handling cars for the team tracks, or the same days, you are also handling cars, are you not, for the industry tracks and the freight house?

A. That is correct.

Q. Would these figures of miscellaneous station employees and police protection that you have for the team track cars apply also to the cars going to the industry tracks and the freight house or would they be something different?

A. Well, this is only the proportion of the cost applicable to team track cars.

Q. But would there be similar costs applicable to the freight house?

A. There are some similar costs.

Q. And to the industry tracks?

A. Well, there would be no cleaning yard, I don't think, at [fol. 1893] the industry tracks.

Q. But there would be some similar cost, would there not?

A. Not as much.

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Q. The industry tracks would not be as much. Now, would the freight house be as much or more, just generally?

A. I think it would be less.

Q. Now will you turn to page 10? There you show miscellaneous station employees applicable to the fruit and vegetable operations at the Duane Street piers, Lines 1 to 10.

A. Yes, sir.

Q. You have corresponding operations at these piers, do you not, for merchandise traffic?

A. Yes, sir.

Q. And are your accounts in connection with those merchandise operations at Piers 19, 20 and 21, consolidated with the similar operations at Pier 48?

A. Yes, sir.

Q. And that is the occasion, is it, for the figures on page 2 of the exhibit marked 155 for identification, beginning "Miscellaneous Station Employees?"

A. That is correct.

Q. Now, comparing those two columns, the one marked "Fruit and Vegetables, Duane Street," and the other marked "Merchandise," and "Pier 48," is it not correct that for some of the services covered in the first column, Fruit and Vegetables, Duane Street, in lines 1 to 7, the [fol. 1894] corresponding services on merchandise are performed by the contractor? For example, receiving and delivery clerks, line 2?

A. I am afraid I would have to find that out definitely. I am not sure. I am not positive.

Q. You wouldn't say, though, that the merchandise is handled without anything at all for receiving and delivery clerks, would you?

A. I think that that is in—that is included in the contractors' cost but I don't want to state that positively. That is my impression.

Q. The point is that the items in these two columns are not wholly comparable, are they?

A. That is right. There is, for example, on Item 4, these electricians and helpers that we have. While there is some expense applicable to that, it is not included over in the second column. None of these expenses that we have in the first column are applicable to the merchandise operation.

Q. But if you take the totals of each column, including what you pay the contractor, then you have the total expenses for fruits and vegetables and the total expenses for merchandise, haven't you?

A. Covering these particular items, yes, sir.

Q. Now referring still to page 10, miscellaneous station employees, lines 1 to 9, do you have corresponding services [fol. 1895] performed and expenses at Pier 67?

A. We have some expenses that would be similar; not anywheres near to the extent we have in connection with the fruit operation but there are some expenses.

Q. How would it compare with the merchandise operations at Pier 48?

A. Well, I think—there is some, yes, expense. As to what it is, I don't know.

Q. Do you think it would be more or less than the expense at Pier 48?

A. I think it would be less than at pier 48.

Q. Page 17 of your exhibit, which refers to the return on investment, in marine property, per car. You show in line 6, Float Bridge, Jersey City, an item for return on investment, but I do not see on the page anywhere a return on investment for Float Bridge at 28th Street.

A. That is correct. The Float Bridge at 28th Street is fully depreciated.

Q. Does that same situation hold true at 149th Street?

A. No, I do not think so.

Mr. Loos: Mr. Examiner, the exhibit referred to in the heading of Exhibit 155 as Exhibit F, E. S. Root, is Mr. Root's Exhibit No. 146, and with the identification that has been made by Mr. Root, and with the verification of figures made by him, I would like to offer as our exhibit, this No. [fol. 1896] 155 at this time, or later, whichever Your Honor prefers.

Exam. Walsh: You may offer it now.

Mr. Loos: I offer Exhibit 155.

Mr. Smith: If the Examiner please, I have no objection at all to the receipt in evidence of Exhibit 155 but I would like to make this observation:

We don't know, of course, what Mr. Loos intends to use the dat- for, that is shown on Exhibit 155. As the witness

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has said, these figures appear in his papers. By not objecting to Exhibit 155, I don't want to be foreclosed from criticizing whatever use Mr. Loos may make of these data.

Exam. Walsh: That is agreeable to you, Mr. Loos?

Mr. Loos: Sure. I should be the last to ask you to excuse yourself from criticism of anything that I do.

Exam. Walsh: It seems to me all parties have the right to criticize the exhibit introduced by any other party.

Mr. Smith: I merely made that statement because of the unusual circumstances here where the figures in 155 were produced through my own witness.

Mr. Loos: That is all I have.

Exam. Walsh: Exhibit 155 is received in evidence.

(Protestants' Exhibit No. 155, Witness Root, was received in evidence.)

Mr. Wells: May I ask one question, Mr. Examiner?

Exam. Walsh: Mr. Wells.

[fol. 1897] Cross examination.

By Mr. Wells:

Q. Mr. Root, on page 2 of your Exhibit 155, line 13, near the bottom, you show an amount of unloading revenue. Is that computed solely at the unloading charges in the tariff under investigation here?

A. This is not my exhibit.

Mr. Loos: It is my exhibit, Mr. Wells.

Mr. Wells: Of Exhibit 155.

The Witness: The unloading revenue, yes. That is the amount of money we have received under the tariff charge.

I should make this observation, that amount might be as much as $1,000 or $1,500 out because this figure is taken from the station operation report. It does not represent the actual accounting record but it is very close to it.

By Mr. Wells:

Q. In any event there is no amount included in that item of $685,000 for any amounts that may be the line-haul rates for that service?

A. That is correct.

Mr. Wells: Thank you, sir.

Exam. Walsh: You said that the Erie has team track facilities at 149th Street station?

The Witness: Yes, sir.

Exam. Walsh: You don't have any industrial facilities there?

The Witness: I don't recall whether we have or not. [fol. 1898] Exam. Walsh: What is the extent of the team track facilities? I mean as to number of cars that can be placed; do you know?

The Witness: No, I do not know, Mr. Walsh. The reason we did not include 149th Street in preparing the study for 149th Street, it is not located on Manhattan Island.

Mr. LaRoe: Where is it located?

The Witness: In the Bronx.

Mr. Loos: It is a rather small operation, isn't it?

The Witness: It is.

Exam. Walsh: Thank you. You are excused, Mr. Root.

(Witness excused.)

Exam. Walsh: The next witness, please.

JOHN F. ST. GEORGE was sworn and testified as follows:

Direct examination.

By Mr. Thornton:

Q. Will you give your name, please?

A. John F. St. George.

Q. Mr. St. George, what is your employment with the City of New York?

A. I am employed as an assessor in the Office of the Corporation Counsel.

Q. Were you requested by the Corporation Counsel to appraise certain properties located in Manhattan and prepare a report on certain blocks located in Manhattan, on the west side of Manhattan?

[fol. 1899] A. I was.

Q. I show you this, as Exhibit 156, Mr. St. George. Is this the report that was prepared by you, consisting of two volumes?

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A. Yes, sir.

Q. Does that report contain a letter of transmittal to the Corporation Counsel's office setting forth the manner in which you conducted that appraisal?

A. Yes, sir.

Q. Does it also set forth a summary of your appraisal figures?

A. Yes, sir.

Q. Does it set forth your qualifications as an assessor and an appraiser of real property in the City of New York?

A. Yes, sir.

Q. Does this report contain by official block, lot and section number, all properties contained within certain blocks on the West Side of Manhattan?

A. Yes, sir.

Q. Does it also contain a summary of sales of property, the analysis?

A. Yes, sir.

Q. Do you also in this second volume, associated with your primary volume, does it contain photographs of each and every property located within these blocks in the Borough of Manhattan?

[fol. 1900] A. Yes, sir.

Q. When you made this appraisal, Mr. St. George, did you personally inspect the properties within these blocks?

A. Yes, sir.

Q. After you prepared this report, Mr. St. George, did you cause to have a report transmitted to the engineering firm of Ford, Bacon and Davis?

A. Yes, sir.

Mr. Thornton: That is all.

I would like to have this marked as the next exhibit.

Exam. Walsh: The large one will be marked Exhibit 156 and the smaller one, the second one, 157.

(Protestants' Exhibits Nos. 156 and 157, Witness St. George, were marked for identification.)

Mr. Thornton: The witness is available for cross examination.

Exam. Walsh: Cross examine.

Mr. Smith: No questions.

Exam. Walsh: Any questions of this witness?

(No response.)

Exam. Walsh: The witness is excused.

(Witness excused.)

Mr. LaRoe: Mr. Poor.

L. H. Poor was sworn, and testified as follows:

[fol. 1901] Direct examination.

By Mr. LaRoe:

Q. State your name and address for the record, please.

A. My name is L. H. Poor, and my business address is 39 Broadway, New York City.

Q. What is your position with the firm of Ford, Bacon & Davis, Inc., and what has been your experience?

A. I am now employed as a Senior Engineer in the Report Department of Ford, Bacon & Davis, Inc.

For 22 years after graduation from the Massachusetts Institute of Technology in 1923, I was employed by the Pennsylvania Railroad. During this time I held positions of Assistant Yardmaster and Yardmaster in such terminals of the Pennsylvania Railroad as Washington, D. C., Baltimore, Maryland, Chester and Enola, Pennsylvania.

From 1937 until 1945 I was engaged in making special transportation and economic studies for the Vice President of the Eastern Region, in Philadelphia.

Since my employment with Ford, Bacon & Davis, Inc., in November, 1945, I have been engaged continuously with transportation studies for bus lines, street railways, and steam railways in the United States, Canada, the Hawaiian Islands and Mexico. These studies have included the preparation of exhibits giving testimony before the Illinois Commerce Commission, The Public Utility Commission of New Jersey, and an arbitration court in Quebec.

[fol. 1902] In connection with marketing studies for public utility companies in this country and in Canada, I have been responsible for preparing exhibits and giving testimony before the Federal Power Commission.

Q. Have you recently made a study dealing with the costs of terminating fresh fruits and vegetables in New York?

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A. As Engineer in charge I have been responsible for making a study for the Port of New York Authority covering the construction and operating costs which would be involved in expanding railroad team track facilities in Manhattan to handle the fresh fruits and vegetables currently being delivered at pier stations.

Q. Is this document the report to which you refer?

A. Yes, sir.

Q. Was this report entitled, "Report—Cost of Expanding and Operating Railroad Team Track Yards on Manhattan Island to Accommodate Fresh Fruit and Vegetable Traffic Normally Unloaded at Pier Stations dated May 14, 1951" prepared by you or under your direction?

A. This report was prepared by me with the assistance of several of my associates working under my direction.

Q. Is it true and correct to the best of your knowledge and belief?

A. Yes, sir.

[fol. 1903] Q. Has that study been incorporated in a volume which has been distributed to the parties and also supplemented by a later study?

A. Yes, sir.

Q. What was the reason for the supplement?

A. The original report, which is dated May 14, 1951, contained information received from the City of New York in a letter dated May 2. On receipt of our copy of Exhibit 156 it was discovered that certain of the figures in Exhibit 156 did not agree with the figures supplied us in the letter of May 2. Consequently we revised the affected figures and prepared the supplemental report.

Q. Did that supplemental report make fundamental changes in the original, or only minor changes?

A. I would consider they were only arithmetical changes.

Q. And not affecting basic material?

A. Of no significance.

Mr. LaRoe: May we have the original study of Mr. Poor marked for identification as 158 and the supplemental Exhibit 159?

Exam. Walsh: That is correct.

(Protestants' Exhibits Nos. 158 and 159, Witness Poor, were marked for identification.)

By Mr. LaRoe:

Q. I want to ask you also whether the changes made by any of the railroad witnesses in their figures, minor corrections made yesterday, will have a sufficient effect on the results of your study to change your figures? In other words, is the result changed enough to bother with those differences?

[fol. 1904]

A. In my judgment the difference is of no material importance.

Q. Not of sufficient importance to confuse us by making the changes in your results?

A. I think it would be preferable to let the results in my report stand as they are.

Q. Now, one more question:

In the Commission's Notice of October 10, 1950, appears this language:

> "And any difference in costs resulting from the fact that pier delivery does not require an investment in team track facilities."

How did you interpret that?

A. My interpretation of that would be that that comparison implied handling similar volume of cars on a team track, as they are handled on piers, or vice versa.

Q. And did you make your study accordingly?

A. That was the basis of our study.

Q. In other words, the basis of your study was to determine whether any difference in cost resulting from the fact

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that pier delivery does not require an investment in team track facilities, would involve a study of the investment in Manhattan real estate required for such team track space [fol. 1905] to take care of the pier cars; is that right?

A. We were requested in our commitment to develop team track facilities to accommodate the present fresh fruit and vegetable traffic now handled at railroad pier stations. That was our study. Obviously, to complete such a study, it was desirable to make some comparison of the costs involved with the existing costs, and on that basis we have shown certain tables in the text of our report on pages 40

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and 41, which compare the estimated cost of delivering fresh fruit and vegetable traffic at adequate team track facilities on Manhattan Island, with the cost of delivering and unloading that traffic at pier stations, as shown in the railroad exhibits.

Q. But you have largely used the railroad figures, of course, have you not?

A. In so far as operating expenses are concerned, we have relied entirely on railroad figures.

Q. And also on figures supplied by the City of New York as to the New York real estate values?

A. In so far as cost of land, cost of real estate is concerned, we have relied on the information provided by the City of New York.

Q. Do you think that the language which I read from the Commission's notice, namely, any difference in cost resulting from the fact that pier delivery does not require an investment in team track facilities, can reasonably be [fol. 1906] interpreted to mean only a study of present pier costs and present team track costs?

Mr. Smith: Mr. Examiner, I don't see any point in getting into an argument as to the meaning of the Commission's notice. All we are interested in here, as I understand it, are the facts. Mr. Poor has told us what he has done and the facts speak for themselves.

Mr. Donadio: I would like to add to the objection by saying that I don't think this witness has been qualified as an interpreter of the language in Commission's notices and orders.

Mr. LaRoe: We will let the Commission interpret its own.

Exam. Walsh: He had to interpret the Commission's notice in some manner in order to proceed with this study. You might ask him how he interpreted this.

By Mr. LaRoe:

Q. You reached an interpretation quite different from that which the railroads reached; is that correct?

A. Based on the testimony I heard yesterday, yes, sir.

Mr. LaRoe: That is all for the present.

Exam. Walsh: Cross examine, please.

Mr. Smith: No questions.

Mr. Donadio: I have no questions.
Exam. Walsh: The witness is excused.

(Witness excused.)

Mr. LaRoe: I want to offer the two exhibits, Mr. Examiner, 158 and 159.
[fol. 1907] Exam. Walsh: Exhibits 158 and 159, Witness Poor, will be received in evidence.

(Protestants' Exhibits Nos. 158 and 159. Witness Poor, were received in evidence.)

Gordon Stedman, previously sworn, further testified as follows:

Direct Examination.

By Mr. Wells:

Q. Mr. Stedman, have you been sworn as a witness in this proceeding at a former hearing?
A. I have.
Q. And for the record here, are you the Acting Secretary-Manager of the Growers and Shippers League of Florida?
A. Yes, I am.
Q. In the usual and ordinary course of business of that Association, does it maintain permanent records of transcripts and exhibits in proceedings before the Interstate Commerce Commission in which that Association is a party?
A. It does.
Q. Is this document, which I hand you, namely, a copy of the official transcript, official stenographer's minutes, Volume pages 1391-A to 1579, Docket 16939, Railroad Commissioners of the State of Florida versus Aberdeen & Rockfish Railroad Company, et al, hearing at Jacksonville, Florida, on April 23 and 24, 1926, a part of your permanent records?
A. Yes, it is.
[fol. 1908] Q. I will ask you whether or not there is also

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in your permanent records a copy of Witness J. J. Neal's Exhibit No. 79?

A. Yes.

Q. And was that Exhibit No. 79 in Docket 16939, being a proceeding involving the line-haul rates on citrus fruit from Florida to destinations including New York, New York, and Philadelphia, Pennsylvania, and the report in 144 I. C. C. 603, was Mr. Neal a witness on behalf of respondent railroads?

A. He was.

Q. And that Exhibit No. 79, to which I referred, and which you have in your file, was that an exhibit purporting to show on behalf of the respondents certain terminal costs, including unloading costs on citrus fruit at New York piers 27, 28 and 29?

A. It was.

Mr. Miller: May I see it, Mr. Wells?

Mr. Wells: Yes, sir.

Mr. Miller: You are talking about ancient history as far as I am concerned.

By Mr. Wells:

Q. Mr. Neal was the occupant of what position with the Pennsylvania Railroad Company?

A. He was Special Agent of the Pennsylvania Railroad System.

Q. In the Accounting Department?

A. In the Accounting Department.

Q. I refer you to page 1527 of the record where Mr. [fol. 1909] Neal was testifying in Docket 16939 with respect to Exhibit No. 79, and ask you to read into the record the paragraph to which I have directed your attention.

A. (Reading):

"The cost as shown on page 1 of the exhibit is $33.92 per car, or $2.60 per ton. The average loading is 13.05 tons for fruits and vegetables, covering shipments from Atlantic Coast Line Railroad, Seaboard Air Line Railway, and Florida East Coast Railway, for the period

September 1, 1924, to August 31, 1925, as per Exhibit No. 36, Sheet 1, Witness W. D. McCaig."

Q. Now, I invite your attention also to the testimony of Mr. O. S. Lewis, a witness in that proceeding, and ask you what was Mr. E. S. Lewis' position?

A. Mr. O. S. Lewis was Freight Traffic Manager of the B. & O. Railroad, Baltimore, Maryland.

Mr. Miller: Mr. Wells, how much is there of this?

Mr. Wells: Just one short paragraph.

By Mr. Wells:

Q. For brevity, may I ask that you read into the record from page 1548 of the testimony of Mr. O. S. Lewis, just the one paragraph, please?

A. (Reading):

"Obviously it is a physical impossibility for the consignee to get a truck alongside a car, car cut, on a car float, and as the only practical way to get to the cars [fol. 1910] in the outside tracks of the float is through the cars on the inside tracks, it becomes necessary for the railroad to undertake the unloading."

Mr. Wells: Mr. Examiner, I do not intend to burden the record with any additional excerpts, although they are available should counsel desire to inspect them, and the purpose for which I am presenting this is to demonstrate clearly in the record here that in the Line-Haul Freight Rate case involving the freight rates from Florida to New York and Philadelphia, there was testimony on behalf of the respondent rail carriers respecting the very costs that are involved in this particular proceeding.

Mr. Donadio: Just a moment, Mr. Wells: I wonder if I could clarify the situation respecting Mr. Lewis' testimony?

Mr. Wells, Certainly.

Mr. Donadio: Was he referring to New York or to Philadelphia or some place else?

I haven't objected to your method of putting this stuff in but it certainly doesn't comply with the rule.

Mr. Wells: I appreciate that I could have had an exhibit

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prepared. He was referring to Pier 22, and the paragraph immediately preceding reads:

> "The trade requires that the property be ready for delivery early in the morning so the movement from Pier 62 to Pier 22 and the subsequent unloading must [fol. 1911] be at night. It is our custom to float each night all cars for which placement orders have been filed up to 5 p. m."

So that the particular reference——

Mr. Donadio: Does that say New York or Philadelphia? In those days—the reason I want to be clear about that is that in those days delivery of fruits and vegetables at Philadelphia were at piers.

Mr. Augello: Have you a pier at Philadelphia?

Mr. Donadio: There were then. I am talking about ancient history times.

Mr. Augello: Do you know whether or not you have a pier at Philadelphia?

Exam. Walsh: Off the record.

(Discussion off the record.)

Exam. Walsh: On the record.

Mr. Wells: Mr. Examiner, I regret that I misstated when I answered the question of Mr. Donadio a moment ago, because the transcript of the testimony of Mr. Lewis, the Freight Traffic Manager of the B. & O., was referring to Pier 22, Delaware River, Philadelphia, and at that time I agree with Mr. Donadio that the fruits and vegetables were floated to the pier and unloaded on the pier in the similar manner as now exists at Piers 27 and 28 in New York City.

Exam. Walsh: It is my recollection that the change was made from the Delaware river-front to the present sta- [fol. 1912] tion, I think in 1927. That is my recollection.

Mr. Donadio: I don't know what year it was. I know it is different now than it was at the time Mr. Lewis testified.

Mr. Fitzgerald: Mr. Examiner, I believe that is made

clear in the record of the last hearing. I think the record will show it was in 1927 some time.

Mr. Smith: I think that is correct.

By Mr. Wells:

Q. Mr. Stedman, considerable reference was made in the testimony and exhibits of Mr. Hodkinson regarding the high and low prices on certain days in April, 1950, on the auction market in New York City of oranges and grapefruit from Florida.

I hand you a publication, an official publication, and ask you to state for the record what it is?

A. This is the Annual Fruit and Vegetable Report, published by the Florida State Marketing Bureau, Jacksonville, Florida.

Q. For what season?

A. For the season 1949-1950.

Q. I ask you to turn to page 46 and refer to the part of that official report reading "Percentage of all freight express bought and truck shipments sold at auction," and state what was the percentage of Florida oranges sold at auction in the season 1949-1950?

A. For the season 1949-1950, 23 per cent of the oranges were sold at auction.

[fol. 1913] Q. And what was the percentage of Florida grapefruit sold at auction in that season?

A. Grapefruit, 30 per cent.

Q. And tangerines?

A. 38 per cent.

Q. Those percentages, shown in that report, are for all Florida// citrus fruit marketed interstate; is that correct?

A. That is right.

Q. And it is not segregated and the percentage is not shown for the New York market alone?

A. No, it is not.

Q. Do you know whether or not all of the Florida citrus fruit delivered in Manhattan is sold at auction or not?

A. It is not.

Q. But the deliveries are made on Piers 27 and 28?

A. Deliveries are made on the piers.

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Q. Are fresh vegetables shipped from Florida and delivered in Manhattan and sold at auction or not?

A. To my knowledge the only fresh vegetable that is sold at auction at all is tomatoes.

Q. And the others are not sold at auction?

A. They are not sold at auction.

Q. Now with reference further to Mr. Hodkinson's testimony on the high price, and the low price, is there any significance to the use of the high and the low price on a particular date?

[fol. 1914] A. None whatsoever, because it does not take into consideration the quality, the pack, the brand, or the volume of fruit being sold on that particular date.

Q. Or the size?

A. Or the size, or grade.

Q. What is this document which I hand you?

A. This is a document covering commercial shipments, average prices for ten auctions, on Florida and California oranges, compiled by the growers' administrative committee from records of the Federal-State Market News Service, and the Florida Citrus Exchange.

Q. The Growers' Administrative Committee is the official committee operating under the United States Secretary of Agriculture in connection with the Agricultural Marketing Act, is it?

A. It is.

Q. Will you refer to that document and state what were the average auction prices—and is that weighted average?

A. Yes, it is.

Q. —on Florida oranges for the week ending April 7, 1950?

A. For the week ending April 7, 1950, the price was $5.43.

Q. What is the corresponding price in the corresponding week of 1951?

A. $4.23.

Q. And for the week ending April 14, 1950?

[fol. 1915] A. $5.26

Q. The corresponding price for the similar week in 1951?

A. $4.25.

Q. The week ending April 21, 1950?
A. $5.19.
Q. The corresponding week in 1951?
A. $4.74.
Q. And the week ending April 28, 1950?
A. $4.96.
Q. And the similar week in 1951?
A. $4.31.
Q. Will you refer please also to the same averages for Florida grapefruit in the week ending April 7, 1950?
A. The price was $5.41.
Q. The corresponding week in 1951?
A. $3.85.
Q. The week ending April 14, 1950?
A. $4.96.
Q. And the corresponding week in 1951?
A. $3.79.
Q. The week ending April 21, 1950?
A. $4.91.
Q. And the corresponding week in 1951?
A. $4.00.
Q. And the week ending April 28, 1950?
[fol. 1916] A. $5.26.
Q. And the corresponding week in 1951?
A. $3.71.
Q. And those are the weighted average prices which are used by the Growers' Administrative Committee in the performance of its official functions under the Agricultural Marketing Act?
A. They are.

Mr. Wells: I think that is all on direct.
Mr. LaRoe: I have no cross examination but I would like to get one point cleared up.
What is, just in a word, the present picture of the citrus fruit industry in Florida, as related to the juices versus the natural fruit?
The Witness: You mean the quantity that is being shipped fresh as compared to that that is going into cans?
Mr. LaRoe: Yes.
The Witness: There is a little better than 50 per cent going into cans at the present time.

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Mr. LaRoe: As compared to what, we will say, a decade ago?

The Witness: Oh, I haven't the figure but I would say that it has doubled in that period of time.

Mr. Miller: What has doubled?

The Witness: Well, from 25 per cent to 50 per cent.

Exam. Walsh: That is the canned fruit?

The Witness: That is right.

[fol. 1917] Mr. LaRoe: Do the oranges and grapefruit that move north in the natural fruit come into competition with the juices? Is there competition in the average household?

The Witness: They certainly are in competition.

Mr. LaRoe: Is it very keen competition?

The Witness: It is keen competition.

Mr. LaRoe: Is there or is there not a tendency today for the juices to gain in public favor more rapidly than the natural fruit does?

The Witness: Juices in cans have gained very rapidly and much more rapidly than fresh fruit.

Mr. LaRoe: And does that have or does it not have a tendency to reduce the quantity of natural fruit that is shipped from Florida to the north?

The Witness: It has reduced it to some extent, but because of the growth of the citrus industry in Florida, the fresh fruit is maintaining just about its balance that it has obtained during the past five years.

Mr. LaRoe: But not gaining as the juices are?

The Witness: No, it is not.

Mr. LaRoe: That is all. Thank you.

By Mr. Wells:

Q. Mr. Stedman, in order that the picture may be fully shown, and correctly, when you have referred to canned citrus juice, are you including there just the canned citrus juice, or what is known in the industry as a single strength [fol. 1918] juice, or what product are included in that term as you have used it?

A. Including both, what is commonly known as single-strength juice and frozen fruit concentrates.

Q. Are you also including the citrus sections, canned?

A. Yes.

Q. And the development as to the frozen citrus juice concentrated has been within the last two or three years; is that true?

A. That is correct. The industry has been in operation about four years but the big growth has been in the last two years.

Mr. LaRoe: I didn't ask you about the grapefruit sections but is there competition that is keen there, in the average family, between the grapefruit in its natural state and the grapefruit sections? Can you substitute one for the other?

The Witness: Yes. There is very keen competition between the two.

Mr. LaRoe: You understand, don't you, that under this proposal here if you ship the natural grapefruit to New York you pay this unloading charge?

The Witness: Yes, sir.

Mr. LaRoe: And if you ship in cans the grapefruit sections to the same pier, unloaded on the same pier, that there is no unloading charge?

The Witness: That is correct.

[fol. 1919] Mr. LaRoe: That is all.

Exam. Walsh: Any cross examination of the witness?

Mr. Smith: No questions, sir.

Mr. Wells: That is all, Mr. Examiner.

Exam. Walsh: The witness is excused.

(Witness excused.)

Exam. Walsh: We will take a short recess.

(Short recess taken.)

Exam. Walsh: We will resume the hearing, gentlemen.

Mr. Fitzgerald: Mr. Ward.

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DONALD T. WARD was sworn, and testified as follows:

Direct examination.

By Mr. Fitzgerald:

Q. Will you give your name and address?

A. My name is Donald T. Ward and the business address is Fidelity-Philadelphia Trust Building, Philadelphia, Pennsylvania.

Q. What is your occupation?

A. I am Chief Industrial Engineer, associated with the firm of Worden & Risberg, management consultants and industrial managers.

Q. In order to clarify the record, it is correct, is it not, that you are entirely unrelated to the Donald W. Ward who appeared in earlier hearings in this case as a witness for the protestants?

[fol. 1920] A. Yes, that is correct. I am unacquainted with the Mr. Ward whom I understand testified at earlier hearings. I have never had any connection or relationship with the Philadelphia Terminals Marketing Association, of which that Mr. Ward was General Manager at the time of the previous hearing, nor have I had any connection with this proceeding until about April 15, 1951.

Mr. Fitzgerald: Mr. Examiner, Mr. Ward's testimony has been distributed to all parties.

Exam. Walsh: We will copy it in the record.

Is that agreeable to the parties?

Mr. LaRoe: Yes.

By Mr. Fitzgerald:

Q. Will you please state your education and experience as an industrial engineer?

A. I graduated from the Sheffield Scientific School of Yale University in 1929 and between that time and 1947, when I became associated with Worden & Risberg, I was successively engaged as industrial engineer with General Electric Co., Grinnell Co., manufacturers of sprinklers, for about 15 years, and for about two years as plant manager for American Chain and Cable Company at Camden, New Jersey.

I am in my fifth year with Worden & Risberg and am now

Chief Engineer engaged in making surveys and analyses and installing cost controls, maintenance and control installations and management studies for numerous corporate enterprises, governmental agencies and the like. I was previously President of the Philadelphia Chapter of the [fol. 1921] Society for Advancement of Management.

Q. Will you give an illustration of the type of work you are now engaged in?

A. At the present time, I am making operating analyses of the Departments of the City of New York, our firm having been engaged by the City as consultants for this purpose.

Q. Have you previously given testimony in public hearings in your capacity as industrial engineer?

A. Yes. In 1947, I testified in public hearings before the United States Senate Post Office Committee on behalf of the Publishers' Association, and in 1949 testified at hearings conducted by the State of Maryland concerned with the reorganization of the State's institutional set-up, our firm having been engaged as consultants by the State in that matter.

Q. Have you recently made a study of unloading of fruits and vegetables at railroad terminals in Philadelphia?

A. I have. The firm of Worden and Risberg was consulted concerning the preparation of engineering studies of carlot unloading of fruits and vegetables at the Pennsylvania-B & O terminals at Philadelphia and Baltimore.

Q. Over what period was your survey made and what is your opinion as to the representative character of this period?

[fol. 1922] A. Field studies were conducted during the two weeks period April 25-May 9, 1951. While the volume varies materially between certain week days, our studies take this fact into consideration.

From an analysis of car unloading records of the United States Department of Agriculture we established that from a seasonal point of view the period covered by our survey presented a normal volume. In my opinion, therefore, the period selected for making time studies was sufficiently representative for our purpose. Additional time would have been merely cumulative.

Q. Where and how were your surveys made?

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A. Our engineering studies were made at Pennsylvania Produce Terminal, Delaware and Oregon Avenues, Philadelphia, the Philadelphia Perishable Products Terminal of the B. & O.—Reading Railroads at Delaware Avenue and Wolf Street and Pennsylvania Railroad Produce Terminal at Baltimore, Maryland, by a graduate engineer in the employ of our firm who reported to and was supervised by me and Mr. Risberg, a partner of the firm.

Q. Now, Mr. Ward, inasmuch as the record contains rather voluminous detail as to the physical layout of the two produce terminals at Philadelphia, I will not ask you to describe the facilities and equipment except as you may deem it necessary in the course of your testimony.

I now ask you if you have prepared an analysis covering [fol. 1923] your time studies?

A. I have. Request is made that Exhibits 160 to 169 be marked for identification.

Q. Before discussing your exhibits separately, do you wish to make any general comments respecting the operations covered by your surveys?

A. The manner of bringing cars to the unloading platforms has been previously described in other testimony, and since such operation has not changed, it will not be repeated herein. We have observed that the railroad, in any case, is notified well in advance of what cars are to be brought in for unloading that night.

For Sunday's unloading, by far the heaviest of the week, the railroad is generally notified by 2:30 Saturday afternoon and on other days by 4 o'clock of the afternoon of the same day. Observation indicates that it is seldom earlier than 10 o'clock that unloading actually begins, and usually it starts around midnight, so that at least six to eight hours time is available to the railroad for bringing in the proper number of men to perform the work required.

Prior to unloading, the car seals are inspected by the R. P. I. A. personnel and/or the Railroad's General Foreman, to insure that the freight has not been tampered with. The actual unloading operation as carried on at both railroads is the same in principle; however, the method of unloading differs slightly.

[fol. 1924] At the Pennsylvania Railroad "A" platform, a crew of six is used with functions divided as follows:

Two unloaders work in the freight car, lifting crates on to four-wheeled hand trucks; two truckers are engaged in moving the loaded trucks to the platform point of temporary storage; there, two more men sort and stack the freight according to style, size, etc.

When the trucker pushes his loaded truck to the point at which the stacking is being done, he relinquishes it to the sorter and takes an empty truck, which has previously been unloaded, back into the freight car for loading. Consequently, there is no appreciable delay in waiting for the unloading of any truck.

At "B" Platform of the Pennsylvania Terminal, the operation varies slightly, depending on the work load, the type of freight, and its condition.

The merchandise here consists primarily of vegetables, and the packs are of different types—from crates and baskets to an assortment of paper, cloth, or burlap bags, etc.

The unloading crews are comprised of four men—two in the car and two trucking—with the stacker and sorter being employees of the consignee, who also inspect and reject or set aside freight considered doubtful as to quality.

The equipment used is a two-wheeled hand truck with a five-foot wooden extension over the lip, instead of the four-[fol. 1925] wheeled type used on the "A" Dock or at the B & O Terminal. The amount loaded on the truck will vary with the type of freight which is being unloaded. While it has been claimed by respondents in earlier hearings that the inspection performed by the consignee's men slows down the over-all operation, our time studies have shown any such delay to be insignificant.

At the B. & O. Terminal the operation is the same as at the Pennsylvania "A" Platform, except that an extra man with a small tractor is used. This man services a number of crews and tows a string of loaded, coupled platform trucks from the car to the proper platform location, returning with empties.

Q. Will you summarize the results of your time studies, referring to each supporting exhibit as necessary?

A. We have regarded unloading as "the service of moving the freight from the cars to locations on the piers or station platforms," which is the respondents' definition as stated in one of their briefs in this case. In our observa-

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tions, the time included has been from the moment that the unloaders open the car door to the time that the last material is sorted and stacked from a particular car by the group which is charged with unloading that car.

Six nights of studies in all were conducted at the Philadelphia Terminals. Time recorded is actual watch time, be-
[fol. 1926] ginning with the first car and continuing until the completion of the last car. Therefore, total hours, in all cases, include any "waiting" time that may have occurred, plus time required for the sporadic performance of any extraneous tasks that may have been required.

Also, the hourly rate for unloading labor was given at the Pennsylvania Terminal as $1.57, and this is the figure used throughout, even though a piece-work arrangement is in effect at the B. & O. Terminal.

Actually, with piece work, the cost should be less through more productive effort, so using $1.57 per hour should be on the conservative side.

Our first study was made at the "A" Platform of Pennsylvania Terminal, Wednesday, April 25th, as shown by Exhibit 160. The number of cars checked was 6 with total man-hours—unloading crews—of 40.14 or an average of 6.69 man-hours per car. The labor cost for actual unloading operation at $1.57 per hour was $63.02, with average labor cost per car of $10.50. The total amount billed the Auction Company was $280.99 at an average cost to Auction Company of $46.83 per car.

On Sunday, April 29, at the B. & O.-Reading Terminal, as shown by Exhibit 161, we checked 21½ cars. The total man-hours—unloading crews—of 127.62 averaged 5.93 man-hours per car. The labor cost for actual unloading operation at $1.57 per hour was $200.36 with average labor cost
[fol. 1927] per car of $9.32.

The total amount billed to Auction Company was $1015.32 at an average cost to Auction Company of $7.22 per car.

On Wednesday, May 2, at Pennsylvania Terminal, as shown by Exhibit 162, we checked 12 cars, with total man-hours—unloading crews—of 79.80 or an average of 6.65 man-hours per car. The labor cost of actual unloading

operation at $1.57 per hour was $125.29 or an average labor cost of $10.44 per car. The total amount billed to Auction Company was $578.23 or an average cost to Auction Company at $48.18 per car.

On Thursday, May 3, at Pennsylvania Terminal, as shown by Exhibit 163, nine cars were checked with total man-hours —unloading crews—of 63.60 or an average of 7.06 man-hours per car. The labor cost for actual unloading operation at $1.57 per hour was $99.85 with average labor cost of $11.09 per car. The total amount billed to Auction Company was $430.44 or an average cost to Auction Company of $47.82 per car.

On Sunday, May 6, at Pennsylvania Terminal, as shown by Exhibit 164, 15 cars were checked with total man-hours—unloading crews—of $85.20 or an average of 5.68 man-hours per car. The labor cost for actual unloading operation at $1.57 per hour was $133.76 or an average labor cost per car of $8.92. The total amount billed to Auction Company was $708.22 or an average cost to Auction Company per car of $47.21.

[fol. 1928] On Sunday, May 6, at B. & O. Products Terminal, as shown by Exhibit 165, 20 cars were checked with total man-hours—unloading crews—of 111.60 or an average of 5.58 man-hours per car. Labor cost for actual unloading operation at $1.57 per hour was $175.20 at an average labor cost per car of $8.76. The total amount billed to Auction Company was $877.69 or an average cost to Auction Company per car of $43.88.

Q. It is correct, is it not, that the foregoing surveys apply to the operations of unloading citrus and other fruits for sale at auction and that they do not include unloads at "B" Platform of the Pennsylvania Product Terminal of perishable produce handled at so-called private sale as distinguished from auction sale?

A. That is correct.

My Exhibits 168 and 169, however, cover additional surveys which were made at "B" Platform.

On May 2, three cars of Florida tomatoes were checked on "B" Platform. Total man-hours eight, direct labor

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cost at $1.57 per hour $12.56, total amount billed consignee $58.77.

On May 3, four cars of Florida potatoes, one car of tomatoes and two cars of onions were checked. Total man-hours 30.28, total direct labor cost at $1.57 per hour $42.83, total amount billed consignees $171.38.

On May 6, 1951, twelve cars of assorted commodities were checked. Total man-hours 45. Direct labor cost [fol. 1929] $70.65. Amount billed consignees $263.68 as shown by Exhibit 168.

For all cars studied at "B" Platform the average direct labor cost per car was $5.73 while the average unloading charge billed was $22.45 per car as shown by Exhibit 169.

Q. What studies were made at Baltimore?

A. In view of the fact that at Baltimore the consignees are permitted to perform their own unloading, a trip was made to observe operations, determine man-hours per car involved, and obtain an estimate of direct labor cost, as well as total cost, including all overhead charges, etc.

On the morning of May 8 the following information was gathered:

On 10 cars checked the total man-hours—unloading crews—were 54.46 or an average of 5.44 man-hours per car. The total crew cost was $78.85 or an average crew cost per car of $7.89 as shown by Exhibit 166.

In addition to the above figures, it was determined from the Auction Company that total cost, including all charges, amounted to $16.50 per car. This contrasts with an average of $46.59 per car at Philadelphia. Furthermore, there appeared to be no basic differences between the Terminal operations at Baltimore as contrasted with Philadelphia.

Q. What is the source of the figure in the last column of each of your Exhibits 160, 161, 162, 163, 164, and 165, headed "Billed to Auction Company," and in your Exhibit [fol. 1930] 168, headed "Billed to Consignee?"

A. This is in all cases the tariff unloading charge assessed by the railroad against the Auction Company on a separate freight bill issued in connection with each car and includes 3 per cent Federal Tax.

Q. What are your conclusions as to the ratio of true labor costs to the tariff unloading charges as assessed by the carriers against the consignee?

A. Exhibit 167 contains a summary of the studies made. As can be seen, a total of 83½ cars was involved at Philadelphia for sale at auction with a total direct labor cost of $797.48 as contrasted with a total unloading charge billed by the carriers to Auction of $3890.82. The ratio is almost 5 to 1.

Q. What is the basic difference between the unloading operations as observed by you at Baltimore as compared to Philadelphia and what conclusions have you reached with respect to difference in costs of the two unloading operations to the consignee?

A. Essentially the same operation as at Philadelphia exists at the Terminals in Baltimore, Maryland. However, the actual total expense to the Auction Company at Baltimore is a stated $16.50 per car, which includes all unloading cost, rent, salaries, general overhead, etc. Yet, for the same benefits the Philadelphia consignee must suffer a sur- [fol. 1931] charge of nearly $30 per car because (a) the tariff is unreasonably high, and (b) he is not permitted to do his own unloading, as is the practice elsewhere.

If Philadelphia platform cars unloaded in April, 1951, were instead unloaded in Baltimore, the cost to the consignees would be $11,500 versus an actual tariff cost of $32,000.

Q. In your opinion are the labor costs involved in the unloading operations at "A" and "B" platforms of Pennsylvania Produce Terminals comparable so as to justify the same unloading charge as now prescribed by tariff, based upon your study of actual operations?

A. No, the average direct labor costs are shown to be from 35 to 50 per cent less at "B" than at "A" platform for our studies. The reason for this great variance is in considerable part that "B" Platform cars are customarily unloaded by four railroad employees with two employees supplied and paid by the consignee to perform sorting and stacking operations which must be paid in addition to the unloading charge. This operation is performed by railroad

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employees on "A" Platform but the tariff unloading charge is the same in each case. I may say, however, that the average billing per car of $22.45 shown on my Exhibit 169 is probably somewhat lower than the annual average would be, due to the fact that some commodities were running light loads at the time of our survey and as indicated in Exhibit 168 our study included some part-cars.

[fol. 1932] Q. Are you familiar with warehousing and unloading procedures and accounting practices as they are applied to warehouse operations in American industry?

A. Yes. I have made numerous analyses, controls and have set up systems in this connection.

Q. What is your opinion of the cost of unloading as asserted by the respondents in this case as compared to cost of handling of such operations in industry?

A. In private industry a large user of fruits and vegetables would have similar platform, warehouse, labor and overhead requirements as do the railroads. One of the largest processors of foods in the country has the following total standard costs for unloadings:

Celery—75 pound crates, $11.30 per 20-ton car.
Beans—100 pound bags, $6.80 per 20-ton car.
Potatoes—100 pound bags, $9.80 per 20-ton car.

These figures are typical and cover all expenses, even to building investment, maintenance, janitor service, and the like. With such figures existent in industry, it is difficult to see how the carriers can justify an average charge of over $46 per car.

The receivers, however, could operate their own Terminal for much less than $46 per car. Aside from the cost experience of Baltimore produce people, industry has shown that a large receiving and warehousing department which [fol. 1933] is a fairly simple operation requiring relatively little capital investment from industrial management standpoint, can be operated for far less than the tariffs presently being charged to Philadelphia consignees.

Q. Your time study analysis shows that the prime labor cost of unloading a car of produce at "A" Platform in Philadelphia is $9.55. In your opinion what would be the maximum extent to which this labor cost might be increased

to include all proper items of indirect labor expense, supervision and general overhead, based upon standard accounting practices in private industry?

A. Usually the multiplier employed in industry to translate direct labor costs of unloading into a figure representing all costs including properly chargeable indirect labor expense and general overhead should not exceed 50 to 60 per cent. For example, the multiplier of the Food Processor previously referred to is an actual 47 per cent. A 100 per cent factor would certainly be excessive in any case. Yet, even with this multiplier the total unloading cost would only be $19.10 or less than half of the present average tariff.

Mr. Fitzgerald: I offer for identification Mr. Ward's exhibits which have been marked Roman numerals I to X, inclusive, all of which have been distributed to the parties under the rules.

I believe those exhibits will become——

[fol. 1934] Exam. Walsh: 160 to 169, inclusive.

(Protestants' Exhibits Nos. 160 to 169, Witness Ward, were marked for identification.)

Mr. Fitzgerald: I offer for identification Exhibits Nos. 170 and 171, which have been distributed to all the parties, and which are marked respectively Roman numerals XI to XII.

Exam. Walsh: They will be so marked.

(Protestants Exhibits Nos. 170 and 171, Witness Ward, were marked for identification.)

By Mr. Fitzgerald:

Q. Now, Mr. Ward, in accordance with the Examiner's rule, your prepared testimony has been written into the record without the necessity of its being read, and I will ask you a couple of supplemental questions:

As a management consultant, what is your opinion of the efficiency of the present operation as conducted by the carriers at the Pennsylvania Produce Terminal of the Pennsylvania Railroad, and the Philadelphia Perishable Products Terminal of the B. & O., Reading, about which you have already testified?

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Mr. Donadio: I object to the question. That asks for a conclusion of this witness, which I submit he is not qualified to give.

Exam. Walsh: Read the question, please.

Mr. Donadio: In spite of his experience or his education and present position.

(Question read.)

[fol. 1935] Exam. Walsh: Do you believe you are qualified to go into the efficiency of the railroad operation?

The Witness: No, sir. I think that Mr. Fitzgerald was referring to the operation of unloading, sir, of the cars, specifically, if I understand him correctly.

Mr. Fitzgerald: May I say, Mr. Examiner, that is correct. The testimony which has just been read into the record deals specifically with the unloading operation as observed by Mr. Ward and his associates and assistants.

Exam. Ward: I haven't ruled on this yet, but I would like to know, have you ever supervised the unloading of freight?

The Witness: No, sir, but I have just recently finished the installation of the wage-incentive system which established a wage incentive plan for three warehouses in a large company in Toledo.

Exam. Walsh: How would that be connected with your knowledge of efficient or inefficient unloading of freight?

The Witness: By my familiarity with the methods usually used in unloading freight, and their possible application at the Pennsylvania, or the B. & O. Terminal.

Exam. Walsh: With that background, I will let you answer. Objection overruled.

I will let him answer.

Mr. Donadio: I would like to have an exception.

Exam. Walsh: Exception.

By Mr. Fitzgerald:

Q. Answer the question.

[fol. 1936] A. My observation was that the using of a basic six-man crew, which is the practice, or where that is the practice, the operation of unloading is quite efficient.

The second observation that I made or am making is that

looking at it from an engineering standpoint, it would seem possible to possibly replace the truck, the loading, the transportation of the fruit or vegetables from car to the place on the platform by portable conveyors, which would of course eliminate two truckers out of a six-man team but a six-man crew in itself makes good use of their time.

Q. And that is what you meant when you said that the operation now was efficient; is that correct?

A. Yes.

Q. In other words, that the men are not loafing on the job; they are hustling, as you have observed them?

A. Yes.

Q. But it is your opinion that the operation could be rendered more modern and less an operation involving pure hand work——

Mr. Donadio: I object to the leading form of the question, Mr. Examiner.

Mr. Fitzgerald: May I continue?

Exam. Walsh: Continue.

By Mr. Fitzgerald:

Q. —if the operation were improved by the installation of portable conveyors; is that correct?

Mr. Donadio: I object to leading questions, Mr. Examiner. [fol. 1937] If Mr. Fitzgerald wants to take the stand let him take the stand and I will object to his testimony.

Exam. Walsh: The question is leading. Suppose you reframe your question.

Mr. Fitzgreald: I will withdraw the question, Mr. Examiner.

By Mr. Fitzgerald:

Q. Are you familiar with comparable unloading operations in other plants where the type of portable conveyor system that you referred to has been put into effect?

A. Yes.

Bernhein Distilling Company, of Schenley, uses such a conveyor, for instance, for unloading cartons of bottles from their receiving platform and transferring them down an incline to a basement, where they are there disposed of.

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Plascon Division of Libby-Owens-Ford at Toledo unloads drums from box cars by a conveyor.

General Electric Company in Bridgeport started using those types in 1940, about ten years ago, or 11 years ago.

Exam. Walsh: When you say "those types" you mean those types of conveyors?

The Witness: Yes, sir.

By Mr. Fitzgerald:

Q. Is it your opinion that the type of lading at the Pennsylvania Produce Terminals, and I include both of them, adapts itself to this type of operation?

A. I would say the majority of it does, the citrus fruits [fol. 1938] especially.

Q. Do you care to comment on that any more fully?

A. Only to say that in fairness to the statement, a rough cost comparison would be the possibility of saving, say, $6,000 a year per crew for the expenditure of, say, a couple of thousand dollars for portable conveyors, per crew.

Q. Would it in your judgment improve the handling of these packages as respects breakage?

A. I would say it would not. It would have no bad effect on the handling. It would cause no more damage than it does now.

Exam. Walsh: What do you base that on?

The Witness: There is a certain amount of damage now which is presumably inevitable. The men move pretty quickly and sometimes quite possibly fall and possibly they are already weakened, but crates do break open. On a conveyor I would say that the chance of their breaking open in the movement would be minimized; it would be no more and probably less.

Exam. Walsh: There is a lot of "probability" and "chance" in here.

By Mr. Fitzgerald:

Q. Mr. Ward, at the present time these boxes of fruit and other commodities are piled on to a truck about four tiers high, are they not, for handling from the car to the platforms?

A. Not quite as high as that, as a rule.

Q. Well, what is the height?

[fol. 1939] A. Two tiers as a rule.

Q. How many cartons are packed on?

A. About ten, if you are talking about orange crates.

Exam. Walsh: Are they handled on a hand-truck or on an electric truck?

The Witness: They are handled on a hand truck of varying types.

Exam. Walsh: Man operated hand truck?

The Witness: Yes, sir.

Exam. Walsh: With a rack?

The Witness: Yes, and some are four-wheel trucks, four-wheel platform trucks. The Pennsylvania, for instance, uses a four-wheel platform truck.

By Mr. Fitzgerald:

Q. And the boxes are piled on to this truck and then handled off of it again and stacked; is that correct?

A. Yes, sir.

Q. Now, if they used a conveyor, the boxes would go individually, would they not, from the cars to the place——

A. The usual practice is to roll the conveyors in such a way that they are rolled into the car over the lip and plugged in; probably every other one would be operated by a motor. There would be a belt conveyor. The crates would be placed on the conveyor. They would move out to the unloading spot and be taken off there by the stacker.

[fol. 1940] Q. Now, Mr. Ward, I direct your attention to your Exhibits Nos. 170 and 171 and ask you if you will state to the Examiner and the parties how you went about preparing these exhibits?

A. Exhibits 170 and 171 were prepared from Exhibits 149 and 152 already submitted. For each railroad they show the breakdown by cost item of the difference in costs between terminal and team-track costs and then they also show —excuse me—since the same list of cost items has been used in both exhibits it gives a comparison item by item between railroads, the two railroads, of this difference in cost claimed between terminal and team-track operation.

Q. And when you refer to both exhibits you are referring

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to Exhibits 149 of Mr. Heywood and 152 of Mr. Talbott? Is that correct?

A. Yes, sir.

Q. So that upon your analysis of the figures which have gone into Mr. Heywood's Exhibit 149 and eliminating all the items which he has stated to be common to both operations, you arrive at a per car total claimed cost, as stated by Mr. Heywood, of $69.72?

A. Yes, sir.

Q. For terminal operation?

A. Yes, sir. That represents the difference as indicated in the footnote of $96.68 per car for terminal and the $24.96 for team-track, shown on page 16 of Mr. Heywood's Exhibit 149.

[fol. 1941] Q. And the rest of the data on your Exhibit No. 170 breaks down according to the accounting heads used by Mr. Heywood of the items going into that total of $69.72.

A. Yes.

Q. And of that total what is the amount that is developed by the actual unloading operation?

A. The amount that would seem to be comparable to the operations we observed was the $18.37, appearing under "Transportation," and entitled, "Wages earned at and chargeable to Pennsylvania Produce Terminal" and appearing on pay rolls at South Philadelphia Freight Station.

Q. Were you able to make any further analysis from the pay records of the data going into that item of $18.37 wages?

A. No, I was not.

Q. Now, in referring to Exhibit No. 171, this is prepared in precisely the same manner from Mr. Talbott's exhibit; is that correct?

A. Yes, sir, except that I retained the cost item names used by the Pennsylvania Railroad in order to make the two comparable.

Q. In so far as such widely differing result as reached by these two gentlemen could be compared; is that correct?

A. Yes.

Mr. Fitzgerald: I have no further questions.

Exam. Walsh: Cross examine.

[fol. 1942] Cross-examination.

By Mr. Miller:

Q. I take it, Mr. Ward, that you think that at the Pennsylvania Terminal in Philadelphia, it would be better to use a movable conveyor; is that correct?

A. Yes, sir.

Q. Have you ever installed a conveyor in a situation of this kind?

A. Not in connection with a produce terminal, no, sir. I have seen them used in many cases where you had a similar problem of moving material from a car to a fixed place, intermittently.

Q. How is this conveyor going to operate? I take it is going to be a power conveyor; is that right?

A. Yes. People like Louis Sheppard sell conveyors of that sort in ten foot lengths.

Q. This is going to be a power conveyor?

A. Yes, sir.

Exam. Walsh: We are not advertising anybody's product.

The Witness: I beg your pardon, sir.

By Mr. Miller:

Q. How far off the floor will the conveyor be, Mr. Ward?

A. They are usually about two feet above the level of the floor Mr. Miller.

Q. How far will the conveyor run out on the station platform?

A. About 60 feet.

Q. That is, to the center of the platform?

[fol. 1943] A. Leaving an aisle down the middle.

Q. Who is going to move the packages from the end of the conveyor to the place on the platform near the car door?

Mr. Fitzgerald: The question isn't clear to me.

Exam. Walsh: It is clear to me.

The Witness: Yes, I understand.

The conveyor goes right into the car, sir.

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By Mr. Miller:

Q. But when your packages come out and reach the end of the conveyor who then is going to take them from the end of the conveyor 60 feet to the car door to the place where they are put on the platform about 15 feet from the car door?

A. The conveyor would unload at the same point as the truck unloads now, sir.

Q. This is going to be a power conveyor and it is going to move the packages steadily from the car door out to the center of the platform; is that right?

A. Yes.

Q. And they are going to reach the end of the conveyor at the center of the platform?

A. Yes.

Q. Isn't it correct that some of those packages are actually placed at rest on the floor, a distance of about 15 or 20 feet from the car door?

A. Yes, I see your point.

Q. Who is it that is going to carry the package from the end of the conveyor at the middle of the platform back to [fol. 1944] the edge of the platform?

A. Well, sir, if you are unloading nearer the car door, as you do when you start in, then you would pick it off the conveyor at that point.

Q. Isn't it true that these packages come out in an entirely different order from the order in which they are stacked on the platform floor?

A. Yes, they do.

Q. So that it would not be practicable to use a conveyor in actual operation?

A. I think it would be, sir.

Q. Then you are going to have your man stand alongside the conveyor and pull his particular package off the conveyor at his location on the platform?

A. You have two men there and you would continue to have two men doing that.

Q. You are going to have two men stacking the packages on the floor; is that right?

A. Yes, two men unloading and stacking as you do now.

Q. And these packages are going to be moving right along in a continuous stream; isn't that correct?

A. Yes, they do. They would.

Q. All right. When a package—say, for example, that the marks on one package are "A" and the marks of another package are "B", the "A" package is to be placed at a [fol. 1945] point 20 feet from the car door, and the "B" package is to be placed near the center of the platform. I take it then that the man picking off the "A" packages will stand alongside the conveyor and he sees the particular marks on his package and immediately picks it off and places it on the pier floor alongside his spot, alongside the conveyor; is that the operation you have in mind?

A. That might be a little difficult, to do that, to see that as it goes by, but the portable conveyor would, I feel, the saving that you would get by eliminating the two truck men, would pay for the slight extra time it would take to move the boxes from the end of the conveyor or any point thereon to the actual place where a particular box was supposed to be piled.

Q. How would the man carry the box from the point at the center of the platform, the 40 foot distance to the place where it is to be put at rest?

A. Well, I realize these packages are, some of them, run up to 50 or 60 pounds and he would probably have to do some amount of trucking himself.

Q. In other words, then, he would take the package off the end of a conveyor and put it on a truck and carry it back toward the car?

A. In some cases he would have to do that.

[fol. 1946] Q. Now, in cases where you are unloading one car toward the west end of the building and another car between that car and the place where those packages are to be placed on the platform, how are the two conveyors going to be operated?

A. May I understand you correctly?

Q. That is, you have a line of freight moving from one car in an easterly direction, crossing over the line which the freight takes moving from an intermediate car direct across the platform so that you necessarily have your conveyors crossing.

A. There are a good many cases, especially in the B. & O. Terminal, where a car is unloaded out of place, you might

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say, and which is apparently the reason for the tractor team. Those would have to be brought down by truck.

Q. You wouldn't use a conveyor on those?

A. No, I said it would be usable in, not all cases, in the majority of them.

Exam. Walsh: But you have had no experience in unloading freight?

The Witness: Sir, you asked if I had supervised the operation of unloading freight?

Exam. Walsh: Yes.

The Witness: I said that I had not but that I had studied the methods of unloading freight and recommended methods which had been used.

Exam. Walsh: In freight stations, on railroads?

[fol. 1947] The Witness: Not in railroads, no, sir, but unloading operations of sufficiently similar character to justify a comparison.

Exam. Walsh: Have you given consideration to the fact that unloading at Schenley's, cartons of bottles, cartons would be all of a uniform size?

The Witness: Yes, sir, that is true.

Exam. Walsh: Do you find railroad freight in uniform size packages?

The Witness: No. However, I think that the freight coming in the Pennsylvania and B. & O. Terminals are confined to bags and crates, which is, for instance, different from Sears-Roebuck, where you may have it coming through in any form.

Exam. Walsh: Would you have a conveyor for every car?

The Witness: You would have to do that, sir. They have as a rule about four cars unloading at once, as I recall, or maybe five in some cases.

Exam. Walsh: What is the length of the unloading fruit and vegetable platform at Philadelphia? How many cars can it accommodate?

Mr. Miller: About fifteen, my recollection.

The Witness: Yes, that is true.

Exam. Walsh: And they may be unloading all of those cars at one time in order to facilitate the movement; they would have to.

The Witness: Yes, sir. The most cars that I have seen

[fol. 1948] unloaded at Pennsylvania has been around five at once, I would say.

Exam. Walsh: How often have you been in the Pennsylvania Terminal?

The Witness: I have been in several times myself.

Exam. Walsh: Several——

The Witness: Two; and the man that made the studies was in, I would say—I would have to count the dates here—eight times, I would say.

Exam. Walsh: Did you say some man made the studies?

The Witness: Under my supervision.

Mr. Fitzgerald: In his prepared testimony it is made entirely clear that these surveys were made by engineers under his supervision and answering to his direction.

Exam. Walsh: Any further cross examination of the witness?

By Mr. Miller:

Q. On these Exhibits 161 to 165, Mr. Ward, I don't understand why it is that one study one night started at 10, one started at 12 and one started at 8; can you explain that?

A. The unloading does not always start at the same time. However we made no attempt to start our studies at the start of unloading, or for that matter, finish at the end of unloading; so that this is not representative of the total cars unloaded that night.

Q. Well, what you did, then, was simply go down to the platform and compute a few hours work during the middle [fol. 1949] of a particular evening; is that correct?

A. Not necessarily the middle. In one case, for instance, 161 ends at 6:45 which is——

Q. 161 ends at 6:45.

Exam. Walsh: Ends at 7 o'clock, 7 in the morning, from 10:15 in the evening.

By Mr. Miller:

Q. Which is 161?

A. Exhibit 2.

Exam. Walsh: That shows that the unloading was performed on Sunday, April 29, 1951, starting at 10:15 in the *afternoon?*

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The Witness: Yes.

Exam. Walsh: And ending at 7 o'clock the following morning.

The Witness: Yes. I was looking at the finish of the last car which was 6:45.

By Mr. Miller:

Q. Is there any idle time in those Exhibits 160 to 164?

A. Only in the event that there was idle time during the actual unloading of the car, which did not occur.

Q. Are these exhibits intended to have some bearing upon the cost—total cost of performing unloading at these terminals?

A. It is supposed to indicate—it indicates the actual time taken by a six-man crew to unload a representative sample of cars at the two Terminals.

[fol. 1950] Q. Isn't it true that I could go down to the platform and make a study of this kind that would be just as competent as this?

A. The times—yes.

Q. Is there any special knowledge necessary to make a study of this kind? What you really did was just simply compute times men were working; isn't that so?

A. Yes, sir. That would be—if we are taking a time study which would require special knowledge, we would study each——

Q. But you didn't do that here?

A. No, sir. We took the over-all time.

Q. Why would a man of your ability so limit himself to doing something which I could do in attempting to make a cost study?

A. We did what we were requested to do, which was thought to be the fairest way of showing actual cost.

Q. If you were going to make a study to determine what it costs the Pennsylvania Railroad to perform this unloading, would it be a study of this kind?

A. Will you repeat that, sir?

Q. If you were employed by the Pennsylvania Railroad Company to determine for it what it costs to perform unloading at this produce terminal, would it be a study of this kind?

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A. We did what we were requested to do, which was thought to be the fairest way of showing actual cost.

Q. If you were going to make a study to determine what it costs the Pennsylvania Railroad to perform this unloading, would it be a study of this kind?

A. Will you repeat that, sir?

Q. If you were employed by the Pennsylvania Railroad Company to determine for it what it costs to perform unloading at this produce terminal, would it be a study of this kind?

A. Specifically, yes, but may I add this, that I think that you are saying, if the Pennsylvania Railroad asked us to study the operation and analyze the cost with a view, I think, toward making recommendations, would we study it in this way?

[fol. 1951] Q. No, indeed, that is not my question. My question is if you were asked to, on behalf of the Pennsylvania Railroad Company, to determine what the actual cost of its present unloading operation at the produce terminal in Philadelphia is, would you present this kind of a report? Would you make this kind of study?

A. For the direct labor, yes.

Q. No, I didn't say that.

A. Not for the total cost, no.

Q. Would you think that this kind of study had any reasonable bearing on the total cost?

A. I would say it did, yes.

Q. Would there be any way of determining total cost on the basis of this study?

A. There is in addition to this cost the factor of overhead, which we have made some comments on in the testimony.

Q. Do you believe that this represents a total labor cost per car?

A. It represents total direct unloading costs per car.

Q. For these particular cars?

A. Yes, sir.

Q. Would you be satisfied with a study of this kind in determining what it would cost as a general proposition to perform this unloading, considering only the direct labor cost?

A. Will you say what you mean by "general?"

[fol 1952] Q. It would seem to me perfectly absurd to think that I could determine what it would cost to perform an unloading operation, to go down and compute the time six men worked to unload a few cars on a few evenings in a week; isn't that correct?

A. No, sir, I don't think it is, because the unloading of a car is a relatively repetitive thing, the only variable being the type of material unloaded in the car, and I feel that a significant element of the unloading cost is the actual direct labor cost of unloading the car, and that the fairer

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thing to do was to determine what the actual direct labor cost for unloading was for a representative sample of the cars unloaded during a period.

Q. And then you would assume that because it costs much the same amount to unload any particular car within any particular hour period, that therefore if you would multiply that figure by the number of cars received, you would get a figure representing total labor cost; is that correct?

A. Total direct unloading cost, yes, sir.

Q. Now suppose in an instance of this kind the number of cars unloaded varied very widely, would that affect your conclusion as to labor cost?

A. The cars do vary apparently from one day to another, Sunday being a heavy day.

Q. And how would you propose that the Pennsylvania Railroad arrange its operations so that it is prepared to unload 20 cars one day, and to have no more than an exact [fol. 1953] number of men to unload five cars another day?

A. Well, the exhibits show that the variation in costs per car from a heavy day to a light day is not a great amount.

Q. On the basis of this study?

A. Yes. I mean there is a——

Q. Why don't you assume——

Mr. Fitzgerald: Why don't you let the witness complete the answer to the question?

Mr. Miller: He says he has answered.

The Witness: Yes.

By Mr. Miller:

Q. How would you go about arranging with your labor to provide a varying number of men from night to night?

A. Well, sir, it would seem that the Pennsylvania Railroad does a pretty good job of that right now, from observations on the platform.

Q. That is, the two evenings you were there?

A. Plus the eight or ten evenings that Mr. McCoy was there.

Q. Did it come to your attention in making this study that these laborers are now a part of the labor force which works both at the produce terminal and South Philadelphia station?

A. Yes.

Q. Do you know why those two forces are combined?

A. I have only the understanding that it is done from the [fol. 1954] standpoint of efficiency of operation.

Q. In what respect?

A. I understand that the men are brought in at 7 o'clock and the crews formed and any excess men are sent to the South Philadelphia freight terminal, leaving only enough to take care of the unloading operations at the Pennsylvania. I am talking only about Pennsylvania now.

Mr. Fitzgerald: Mr. Miller is counsel for the Pennsylvania Railroad.

The Witness: Yes.

By Mr. Miller:

Q. And that is all the information you have as to the reason for putting those two groups together?

A. Yes.

Mr. Miller: That is all.

Cross examination.

By Mr. Donadio:

Q. I have a couple of questions, Mr. Ward:

What is the number of this exhibit you filed with your testimony?

Mr. Fitzgerald: Nos. 160 to 169, Mr. Donadio.

Mr. Donadio: Is each page a separate exhibit?

Mr. Fitzgerald: Yes.

By Mr. Donadio:

Q. Do you represent that this Exhibit 160 series of exhibits, from 160 to 169, to the extent that it deals with the Baltimore & Ohio situation, is the cost of unloading fruits at the B. & O. Terminal or Reading B. & O. Terminal at Philadelphia?

[fol. 1955] A. Well, sir, Exhibits 161 and 165 represent studies taken in that terminal.

Exam. Walsh: And 166.

The Witness: That was the Baltimore & Ohio, sir.

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By Donadio:

Q. Do those figures represent the cost to the B. & O. Railroad for unloading fruits at Philadelphia?

A. It represents the direct labor unloading cost, using $1.57 as the hourly labor rate.

Q. Where did you get the $1.57 as applicable to B. & O. labor?

A. It was taken as a figure which was conservative in that it was at least as much as was being paid and probably more. We had no direct information as to the labor rate being paid; we showed the calculation on our exhibit so that it would be appreciated that we used a figure of $1.57.

Q. Well, it is $1.57. You don't know whether the B. & O. pays the labor, that particular labor, $1.57 or $1.95?

A. No, sir.

Q. Isn't Exhibit 161 and 166, 165 and 161 and 165, merely a statement showing the time that you observed, or your assistant observed, that it took to unload the car, or the particular cars shown in those exhibits, converted into man-hours, and multiplied by $1.57?

A. Yes.

Q. And isn't it a fact, Mr. Ward, that that has no more relation as to the actual expense, or cost, labor expense, [fol. 1956] direct labor expense to the B. & O. Railroad for unloading those—has no relation to what the actual cost is to the railroad for the direct labor for unloading those cars?

A. Well, sir, we had no way of knowing what the actual labor was billed at. However, the basic factor in the direct labor cost for an operation is, as you pointed out, the man-hours taken and the cost of that operation would be the man-hours taken times an hourly rate, which we took conservatively at $1.57, and showed it plainly as such.

Q. Well, even based on a man-hour basis, as you have set it up in this exhibit, it would disregard any standby time?

A. It would disregard any standby time, yes.

Q. And to that extent would not represent the actual cost for unloading that group of cars that the railroad incurred?

A. No, sir. It was intended to show the raw labor cost of directly unloading the cars, as a significant figure on which any excess manpower cost would be added. I be-

lieve we said in our testimony, which was put into the record, that that was what it showed, and that a factor would have to be added to that in here or in any outside terminal for overhead, which would consist of excess labor and supervision, and that sort of thing.

Q. Do you know, Mr. Ward, precisely how the B. & O. Railroad pays the labor for unloading those cars at the produce terminal there?

[fol. 1957] A. Mr. Talbott has been kind enough to discuss that with me to some extent. I know that they are paid a piece price of so much a car.

Mr. Fitzgerald: Do you know what that is?

The Witness: It is $12.90, I understand. That is the basic piece price to which is added certain allowances.

By Mr. Donadio:

Q. Are you familiar with the union contract that is in effect covering that situation?

A. No, I didn't see your union contract.

Q. You do know that it is on a per car basis for a certain number of men for each crew?

A. You say the contract is on a—you mean the piece price is on a per car basis?

Q. Yes.

A. By contract?

Q. And requires the employment of certain men, a certain number of men for each crew, unloading crew?

A. I gathered that from discussion with Mr. Talbott. It was my recollection that they did not always work with the standard number of men and sometimes more and sometimes less.

Q. But none of your figures reflect the true situation with respect to this unloading cost of the railroads?

Mr. Fitzgerald: I object to that question. What does counsel mean by "reflect the true situation?"

Mr. Donadio: I think he knows what I am talking about, [fol. 1958] the actual situation. I don't use it disparagingly.

The Witness: No.

Our figures do not attempt to indicate the actual wages

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paid platform labor, in accordance with your Exhibit No. 171, for instance.

By Mr. Donadio:

Q. On 161 you used a six man crew in getting your man hours?

A. I beg your pardon for hesitating. I want to be sure and check myself.

Yes.

Q. Isn't it a fact that as to a number of those cars, there were eight-men crews that actually did the work?

A. I do not know. I did not observe and Mr. McCoy did not observe during the time he was there any instances where there was more than six men. There were some times when there were less than six men, and those cars were omitted from our figures since we were talking about a standard unloading process.

Q. Now take this 161 here: Do I understand you to say that on all of the cars that you show on that exhibit that there were—that you observed no more than six men on those crews?

A. Yes, sir.

Q. You say that is true of all of them. Do you say that is true of car 47708?

My understanding is that as to that car there was an eight-man crew. On some of the others the same thing is true. [fol. 1959] You observed the loading of all of those cars shown on this exhibit?

A. Yes. We did not observe—may I add to that—we did not observe the whole operation of each car because we were observing in some cases three or four at once, but we did check in at some time during the unloading in order to look at the operation, and also get the starting and finishing time.

Q. Well, then, there could have been eight men crews that unloaded several of those cars without your noticing it?

A. We attempted to exclude any cars that did not have six men, sir, and to the best of our knowledge we did succeed in doing so.

Q. In other words, you disregarded all cars as to which there were more than six men?

A. We attempted to do so, yes.

Mr. Donadio: That is all.
Mr. Miller: May I ask one question?
Exam. Walsh: Yes.

Further cross examination.

By Mr. Miller:

Q. As I understand it, you feel I am perfectly competent to make a study of this kind?

A. Yes, I would say so, sir.

Q. Now, if I made a study of this kind and I had on the other hand someone of your special knowledge to compute the actual total cost, and this other fellow put men on the piers for an entire week and determined what the actual [fol. 1960] wages paid for all the men engaged in the unloading during that week were and further computed all the additional costs incurred by the railroad in connection with the unloading, and he came up with a different figure, would you think my figure or his was the more reliable?

A. I don't think I can answer that question by a yes or no answer. I would like to answer it by saying that you are not comparing the two equal things. One is an actual car-unloading time of representative cars, and the other is an over-all study of all cars, including all labor, plus additional cost, in addition to direct labor.

Mr. Miller: That is all.
Exam. Walsh: Redirect?

Redirect examination.

By Mr. Fitzgerald:

Q. Mr. Ward, I believe you stated in the prepared testimony that in your judgment this was a representative period of the year during which your examinations were made at these terminals; is that correct?

A. Yes.

Q. Now, you have stated here that Sunday night is a heavy night. On what nights of the week did you make your observations?

A. Observations were made on Wednesday, Thursday and Sunday.

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Q. In your judgment, are those representative nights to indicate the difference in volume on different nights of the week?

[fol. 1961] A. Yes.

Q. Was there any difference in your observation as to the amount of standby time or idle time on any of those nights, as compared to other nights?

A. I would say that the foreman attempted to control his standby time by the means which he has in his possession, so that he has attempted to confine the standby time to a minimum, whether it is Thursday or Sunday.

Q. Well, how effective did his attempt prove to be, according to your observation?

A. I think he did a pretty good job, from my observation, sir, based upon seeing no one but crew members unloading cars, and based upon the observation that six-man crews seemed to be pretty much the rule.

Q. Now, based on your statement that the period of your observation was a representative period, and that you have made observations on representative nights, do you care to comment any more fully on the point raised by the Examiner as to the possibility of cars being unloaded simultaneously all along both sides of the platform, or perhaps 15 cars?

I believe that was the remark?

A. Yes.

The studies taken on six occasions there indicated that there were not more than five cars unloaded at one time during those periods.

[fol. 1962] Q. What can you say as to the planning made by the foreman for the unloading operations and for the spotting of cars and that sort of thing, with particular reference to the possibility of cars being unloaded simultaneously all along the platform?

A. Supplementing the testimony in the written record here, or repeating it, I would say that the Pennsylvania foreman whose contract apparently permits it, and whose facilities for utilizing labor also permitted, does a good job of arranging cars so that they have about the same number of cars to unload all night.

Q. Is there anything in those factors which would change

your judgment as to the feasibility of the use of portable conveyors?

A. No.

Q. Now, I direct your attention, Mr. Ward, to page 6 of your testimony, in which you have stated that the hourly rate of $1.57, which was used by you in these exhibits was given to you by the Pennsylvania Railroad as their hourly rate. You were not present yesterday during the testimony of Mr. Heywood, I believe, is that correct?

A. No, that is correct.

Q. I may say that Mr. Heywood testified that the actual rate paid at the Pennsylvania Terminal varied from $1.40 and a fraction to $1.42 and a fraction. What effect in general would that fact have on your exhibits?

A. If those figures were substituted for the $1.57 in the [fol. 1963] exhibits, the consequent direct labor cost per car would therefore be lower.

Q. Merely for clarification, this study of yours does not purport to be an actual cost study of the Pennsylvania in any sense, since the Pennsylvania did not make available to you, as I understand it, any of its actual costs?

A. That is correct.

Q. Now, Mr. Ward, I don't expect you to understand the legal aspects of this case but I will preface my next question with the statement that there has been a distinction made in this entire proceeding between delivery as such and sorting and stacking.

Mr. Miller has asked you about the distribution of packages at the end of the assembly line. Would that in your judgment constitute unloading from the car, or some other or further operation, such as sorting or stacking?

A. Our study was based on the assumption that the unloading operation consisted of from the time the door was opened and the boxes started or the crates started moving out, to the time that they were finally stacked and sorted.

Q. Now, as a matter of fact, is it not true that there are employees specially detailed for the sorting and stacking, as distinguished from the unloading of the citrus fruit at "A" platform of the Pennsylvania Railroad?

A. Two men of each six man crew sort and stack, yes.

[fol. 1964] Mr. Fitzgerald: No further questions.

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Exam. Walsh: Any recross?
Mr. Wells: May I ask one question, Mr. Examiner?
Exam. Walsh: Mr. Wells.

Recross examination.

By Mr. Wells:

Q. Mr. Ward, if the process of unloading was terminated simply by placing the packages on the floor of the warehouse, or building, where it would be made available to the consignee, and without any service rendered in sorting and stacking but just putting them there as they came from the car, would that operate to reduce the amount of time consumed in each car, unloading and other operations, as you observed it?

A. When you say "the time," you mean the total time, the cost of unloading the car?

Q. Well, I am speaking now just of the time involved in the actual operation. In other words, if the same crew or members of the same crew did not consume any of the time in sorting and stacking the packages, according to lines, or letters, "A" and "B," etc., as Mr. Miller suggested, if none of that was done by the crew but the crew concentrated only on taking the packages physically from inside the car and putting them physically on to the platform, where they could be obtained, would that be a reduction in the amount of time required in the operation?

[fol. 1965] A. If six men confined themselves, assuming that it was physically possible for them to do it, to unloading from the car, and placing on the floor, without any sorting and stacking, they could unload a car faster than they do now. I am not sure it is physically possible for them to work in that way.

Q. Well, do I understand from your answer that a four-man crew could efficiently take the packages themselves from inside the car, and put them on the platform, if they didn't have regard to the order in which they were placed?

A. I would say so, sir.

Mr. Wells: That is all.

Recross examination.

By Mr. Donadio:

Q. Mr. Ward, this conveyor belt situation that you recommend, the saving that you suggest would come from the cutting down on the number of men; is that it?

A. Yes, sir.

Q. And if in the case of the B. & O. Railroad, that has an arrangement or contract with its employees covering this unloading on a per car basis, it is unable to change that method because of the union situation, then there would not be any saving?

A. No, sir.

Mr. Donadio: That is all.

Exam. Walsh: Now, I understood you in answer to Mr. Wells' question to say that the freight could be unloaded by four men if they eliminated the stacking and packing and [fol. 1966] sorting after it came out on to the platform. Am I correct?

The Witness: Yes, sir.

I would like to add one statement to that, if I may, that four men now—the four men, eliminating the sorting and stacking men, the four men now accomplish the job of bringing the boxes out of the car over to the place where they are sorted and stacked and there would be the additional—there is the additional job of pulling them off the truck and putting them on the ground, so to speak.

In saying that four men could do it, they would also, of course, have to unload the truck at the place where the crates were to be placed, or deposited.

That is the statement I would like to add.

Exam. Walsh: And would the place where the crates would be placed or deposited be the loaction where delivery would be made to the consignee?

The Witness: I don't know, sir. I mean it was a hypothetical question.

Exam. Walsh: I mean the end of the unloading, it was placed somewhere on the platform and the consignee comes in and takes the freight?

The Witness: Yes, sir.

Exam. Walsh: You are eliminating the sorting?

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The Witness: Yes.

Exam. Walsh: You unload all the traffic from five, ten [fol. 1967] or fifteen cars, out in that pile?

The Witness: Yes.

Exam. Walsh: And Consignee A, B, C, D and E come in for that freight?

The Witness: Yes.

Exam. Walsh: How are they going to get their freight out of that heap? Would you consider that good railroading? Dump it out there in a heap and let consignee A come in, and say, "Look for your freight. It is in that heap somewhere?"

The Witness: I assumed you were talking about a car loading or unloading operation with one consignee.

Exam. Walsh: Don't you have several consignees?

The Witness: I think you do, yes, sir, as a rule.

Exam. Walsh: At an ordinary freight station?

The Witness: I think you do, as a rule.

Exam. Walsh: Do you know of any freight station that is a one-man operation?

The Witness: No, sir, I was speaking about one car, sir, one consignee per car.

Exam. Walsh: All right.

Any further questions?

Mr. Wells: Mr. Examiner, in order to clarify the question that I asked, it seems to me there may be some confusion about the intent that I had. I was thinking about the Allowance and Stacking case, which was referred to in the brief.

[fol. 1968] Mr. Miller: Allowance for Stacking.

Mr. Wells: I would like to ask Mr. Ward this additional question.

Recross examination.

By Mr. Wells:

Q. From what you observed in the actual operations, would the four-man crew be able to unload and to place the packages from a particular car in a separate place on the platform, without the sorting and stacking by grades and sizes and so forth, so that the pile, if you want to call it that,

or the packages from each car, would be still separate and distinct on the platform from the location of the packages from a different car?

A. Yes, I would say it would be possible.

I would like to add that it might take slightly longer for four men to do that than it would for six men to do what they are doing now.

Mr. LaRoe: You could do it with one man, couldn't you, if you took time enough?

The Witness: If you took time enough, yes, sir.

Exam. Walsh: Any further questions of this witness?

(No response.)

Exam. Walsh: You are excused, Mr. Ward. Thank you.

(Witness excused.)

Exam. Walsh: The next witness, please.

Mr. Mattson: Mr. Examiner, I would like to call Mr. Pease.

[fol. 1969] Exam. Walsh: Has Mr. Pease testified in this proceeding?

Mr. Mattson: Yes.

Y. L. Pease previously sworn, further testified as follows:

Direct examination.

By Mr. Mattson:

Q. You are the same Mr. Pease who testified at the previous hearings in this proceeding?

A. That is right.

Q. What is your present title, Mr. Pease? I understand you have had a change since the previous hearing.

A. Assistant Chief, Traffic Management Division, Transportation and Warehousing Branch, Production and Marketing Administration, United States Department of Agriculture, Washington 25, D. C., South Building.

Q. Mr. Pease, yesterday Witness Clark, Train Master for the Pennsylvania Railroad, at Philadelphia, testified as to ownership of refrigerator cars, and he stated that

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several railroads which he named have placed their refrigerator cars upon a mileage basis.

He names the Atchison, Topeka & Santa Fe, Bangor & Aroostook, Boston & Maine, Delaware, Lackawanna and Western, Denver & Rio Grande Western, Illinois Central, Louisiana & Arkansas, Northern Pacific—those are all American railroads, are they not?

A. Yes, sir.

[fol. 1970] Q. In addition he names the Canadian National, Canadian Pacific, and the Grand Trunk Western.

Are those American railroads?

A. Those are commonly known as Canadian railroads.

Q. Then he states that practically all of the railroads-controlled refrigerator cars in the United States are owned by the railroads shown in the foregoing list.

In that connection, do you have, or do you know the relative numbers of refrigerator cars owned by those railroads?

A. I have a tabulation for three of them as taken from the Official Equipment Register.

The Illinois Central owns 1,017; the Atchison, Topeka & Santa Fe owns 14,833 refrigerators commonly referred to as S. F. R. D.'s; Northern Pacific owns 2,277 refrigerators.

Q. And as to the other railroads referred to by Witness Clark, do they own substantial numbers of refrigerator cars?

A. I don't think they could be called substantial numbers. The Bangor & Aroostook, I believe, is in the process of building up a fleet of refrigerator cars. I don't think their ownership is much over 300.

The Boston & Maine I was not aware owned any.

Delaware, Lackawanna & Western I believe is negligible.

Denver & Rio Grande Western cars are part operated—I believe operated as a part of the American Refrigerator Transit Company fleet.

[fol. 1971] Louisiana & Arkansas Railroad, I didn't know they owned any.

Q. Now, reference was also made by Witness Clark to cars owned by the so-called car lines. Do you have information in that connection which you can give to the Commission?

Mr. Miller: What kind of information? Let's make it a question?

Mr. Mattson: All right.

By Mr. Mattson:

Q. Do you know the numbers of cars owned by these car lines at the present time, or in 1950?

A. As reported in their annual reports to the Commission for 1950, the American Refrigerator Transit Company owned 9,928 cars at the end of the year;

Burlington Refrigerator Express, 1730; Fruit Growers Express Co., 12,674; Merchants Dispatch Transportation Corporation, 9,979; Pacific Fruit Express Co., 37,557; Estern Fruit Express Co., 5,582; or a total fleet of those six so-called private car lines of 77,518 cars.

Q. As compared to roughly 18,000 cars directly owned by the railroads which you have named?

A. By those three railroads I named. They own 18,127.

Q. Now, as to these private car lines, are they in turn owned by the railroads of the United States?

[fols. 1972-1976] A. Yes, sir.

Mr. Mattson: That is all. Thank you.

Exam. Walsh: Cross examine.

Mr. Wells: May I ask a question for clarification?

Exam. Walsh: All right.

Mr. Wells: Mr. Pease, in the numbers that you give of cars, both of direct railroad ownership and indirect railroad ownership through the refrigerated car lines, did you include only the freight refrigerated cars or do those also include express refrigerated cars?

The Witness: Freight refrigerated cars only.

Mr. Wells: Thank you.

Mr. Mattson: That is all on direct.

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[fol. 1977] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31106

FLORIDA CITRUS COMMISSION, ET ALS., COMPLAINANTS

vs.

THE BALTIMORE & OHIO R. R. CO., ET ALS., DEFENDANTS

MOTION TO DISMISS COMPLAINT—Filed October 22, 1952

Defendants hereby move to dismiss the complaint herein on the following grounds:

1. All of the complainants herein were parties to, and active participants in, I. & S. Docket No. 5500.

2. The complaint herein attacks the lawfulness of unloading charges on fresh fruits and vegetables at certain Philadelphia, Pa. stations on the sole ground that (paragraph 11) "said unloading charges are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act."

3. In I. & S. Docket No. 5500, the entire Commission on October 4, 1948 made a report and order containing this finding (272 I. C. C. 648, 663):

> "We find that the schedules under investigation are just and reasonable."

The schedules so found to be just and reasonable named the unloading charges on fresh fruits and vegetables at Philadelphia which were originally filed by the carriers to become [fol. 1978] effective June 1, 1947. The unloading charges which became effective originally were substantially higher than the unloading charges now in effect.

4. After rehearing and further hearing in I. & S. Docket No. 5500, the entire Commission on May 7, 1952 (286 I.C.C. 119) made a report and order directing tne cancellation of the unloading charges which originally became effective without prejudice to the establishment of lower unloading charges specified by the Commission. These lower unloading charges, now alleged by the complaint herein to be unjust and unreasonable, became effective on July 3, 1952 and are now in effect.

5. The Commission's report dated May 7, 1952, contains

this sentence (286 I.C.C. 119, 142): "The ultimate finding in the prior report is modified accordingly." Said ultimate finding in the prior report was (272 I. C. C. 648, 663): "We find that the schedules under investigation are just and reasonable." In other words, the entire Commission on May 7, 1952, made a specific finding that the lower unloading charges, now alleged by the complaint herein to be unjust and unreasonable, are "just and reasonable."

6. The complaint herein does not allege any new facts, or changed conditions since May 7, 1952, to support its allegation that the existing unloading charges are unjust and unreasonable. Such allegation is in derogation of the entire Commission's finding of May 7, 1952.

7. The contention in the complaint herein was fully considered by the entire Commission, and disposed of, in I. & S. Docket No. 5500. Nothing new, in the way of fact, law or argument, is stated in the complaint. Complainants' allegation that the unloading charges should be cancelled be- [fol. 1979] cause the unloading service is in the line-haul rates was disposed of by the entire Commission under "General Discussion and Conclusions" at pages 139-141 of the decision dated May 7, 1952 in I. & S. Docket No. 5500.

8. Since the issue raised by the complaint herein was in all respects specifically ruled upon by the entire Commission in I. & S. Docket No. 5500, and since all the complainants in the complaint herein were parties to I. & S. Docket No. 5500, and since the complaint herein alleges nothing that was not fully considered and disposed of by the entire Commission in I. & S. Docket No. 5500, it would be contrary to the public interest for the Commission to waste its resources in hearing the complaint herein, and it would be vexatious and burdensome to subject defendants herein to further hearing and argument.

9. In I. & S. Docket No. 5500, there were three separate and lengthy hearings and three oral arguments with proposed reports, exceptions and numerous briefs. All of the complainants herein had their full day before the Commission.

10. If complainants felt unduly aggrieved by the decision dated May 7, 1952 of the entire Commission in I. & S. Docket No. 5500, they could have, within sixty days thereafter, petitioned the Commission for reconsideration under

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Rule 101 of the Commission's General Rules of Practice. Complainants herein should not be permitted to violate Rule 101(e) by the simple expedient of calling their filed document a "Complaint."

11. The dispute raised by the complaint herein has already been heard and disposed of in I. & S. Docket No. 5500. No useful purpose would be served by burdening the Commission and defendants with further hearings and argument.

[fol. 1980] 12. Precedent in all respects supports the granting of this Motion. For example, in Docket No. 30782 (*Indianapolis Machinery and Supply Company, Inc. et al.* v. *Atchison, Topeka & Santa Fe Railway Company, et al*), the Commission granted defendants' Motion to Dismiss the complaint therein, saying:

> "Upon consideration of the complaint in the above-entitled proceeding, defendants' motion to dismiss it without hearing, and complainants' reply thereto; and it appearing that the complaint is made by the same complainants with respect to the same commodities and origin and destination points and presents substantially the same issues that were considered and disposed of by the Commission in No. 29973, *Indianapolis Mach. & Supply Co., Inc.* v. *A. T. & S. F. Ry. Co.*, 276 I.C.C. 252, and that the Commission, on January 9, 1950, denied complainants' petition therein for rehearing and further consideration; and it further appearing from the complaint that the circumstances and conditions under which the rates apply and the shipments are made, have not materially changed since substantially the same issues were presented and decided in the prior proceeding and that no reasonable ground appears for investigation of this further complaint.
>
> "*It is ordered*, That said motion of defendants be, and it is hereby, sustained.
>
> "*It is further ordered*, That the complaint in this proceeding be, and it is hereby, dismissed."

13. Defendants respectfully request that the time for filing answers to the complaint herein be indefinitely postponed pending consideration and disposition of this Motion.

Wherefore, defendants hereby respectfully move that the complaint herein be dismissed.

[fols. 1981-1982] *Duly sworn to by E. A. Hodkinson jurat omitted in printing.*

[fol. 1983] BEFORE THE INTERSTATE COMMERCE COMMISSION

[Title omitted]

PETITION BY THE SECRETARY OF AGRICULTURE FOR LEAVE TO INTERVENE—Filed November 7, 1952

Comes now your petitioner, the Secretary of Agriculture of the United States, and respectfully represents that he has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become a party to the said proceeding, and for grounds of the proposed intervention says:

I

That this petition is filed pursuant to section 201 of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1291) and section 203(j) of the Agricultural Marketing Act of 1946 (7 U.S.C. 1622).

II

That the complaint in this proceeding attacks as unlawful certain charges relating to the transportation of farm products and affecting the public interest.

[fol. 1984]

III

That the charges attacked by the complaint are unjust and unreasonable in violation of section 1(5) of the Interstate Commerce Act.

IV

That your petitioner hereby adopts and affirmatively supports the allegations of the complaint, and states further that this petition does not unduly broaden the issues in this proceeding.

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Wherefore, the Secretary of Agriculture of the United States prays leave to intervene in and be treated as a party to this proceeding with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Respectfully submitted, by direction of the Secretary of Agriculture of the United States.

Chas. B. Bowling, Chief, J. L. Pease, Assistant Chief, Traffic Management Division, Transportation and Warehousing Branch Production and Marketing Administration. (S.) Charles W. Bucy, Associate Solicitor. (S.) Walter D. Matson, Attorney. United States Department of Agriculture, Washington 25, D. C.

Dated November 7, 1952.

[fols. 1985-1986] BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 31106

FLORIDA CITRUS COMMISSION, et al.

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.

ORDER PERMITTING SECRETARY OF AGRICULTURE TO INTERVENE—November 12, 1952

In the Matter of Petition for Leave to Intervene.

Present: Charles D. Mahaffie, Commissioner, to whom the above-entitled matter has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding and petition filed on behalf of the Secretary of Agriculture of the United States.

It is ordered, That the said the Secretary of Agriculture of the United States be, and he is hereby, permitted to inter-

vene and be treated as a party to this proceeding, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard on brief and on oral argument, if oral argument is heard; provided, however, that the permission to intervene herein granted shall not be construed to allow intervener to introduce evidence which will unduly broaden the issues raised in the complaint.

It is further ordered, That a copy of the intervening petition be served upon complainants and defendants; and that a copy of this order be served upon each of the parties to this proceeding.

Dated at Washington, D. C., this 12th day of November, A. D., 1952.

By the Commission, Commissioner Mahaffie, George W. Laird, George W. Laird, Acting Secretary. (Seal.)

[fol. 1987] BEFORE THE INTERSTATE COMMERCE COMMISSION

Docket No. 31105

FLORIDA CITRUS COMMISSION, et als., Complainants

vs.

THE BALTIMORE & OHIO R. R. Co., et als., Defendants

MOTION TO DISMISS COMPLAINT—Filed October 22, 1952

Defendants hereby move to dismiss the complaint herein on the following grounds:

1. All of the complainants herein were parties to, and active participants in, I. & S. Docket No. 5500.

2. The complaint herein attacks the lawfulness of unloading charges on fresh fruits and vegetables at certain New York pier stations on the sole ground that (paragraph 10) "said unloading charges are unjust and unreasonable in violation of Section 1 of the Act."

3. In I. & S. Docket No. 5500, the entire Commission on October 4, 1948 made a report and order containing this finding (272 I. C. C. 648, 663):

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"We find that the schedules under investigation are just and reasonable."

The schedules so found to be just and reasonable named the unloading charges on fresh fruits and vegetables at [fol. 1988] New York which were originally filed by the carriers to become effective June 1, 1947. The unloading charges which became effective originally were substantially higher than the unloading charges now in effect.

4. After rehearing and further hearing in I. & S. Docket No. 5500, the entire Commission on May 7, 1952 (286 I.C.C. 119) made a report and order directing the cancellation of the unloading charges which originally became effective without prejudice to the establishment of lower unloading charges specified by the Commission. These lower unloading charges, now alleged by the complaint herein to be unjust and unreasonable, became effective on July 3, 1952 and are now in effect.

5. The Commission's report dated May 7, 1952, contains this sentence (286 I.C.C. 119, 142): "The ultimate finding in the prior report is modified accordingly." Said ultimate finding in the prior report was (272 I.C.C. 648, 663): "We find that the schedules under investigation are just and reasonable." In other words, the entire Commission on May 7, 1952, made a specific finding that the lower unloading charges, now alleged by the complaint herein to be unjust and unreasonable, are "just and reasonable."

6. The complaint herein does not allege any new facts, or changed conditions since May 7, 1952, to support its allegation that the existing unloading charges are unjust and unreasonable. Such allegation is in derogation of the entire Commission's finding of May 7, 1952.

7. The contention in the complaint herein was fully considered by the entire Commission, and disposed of, in I. & S. Docket No. 5500. Nothing new, in the way of fact, law or argument, is stated in the complaint. Complainants' allegation that the unloading charges should be cancelled [fol. 1989] because the unloading service is in the line-haul rates was disposed of by the entire Commission under "General Discussion and Conclusions" at pages 139-141 of the decision dated May 7, 1952 in I. & S. Docket No. 5500.

8. Since the issue raised by the complaint herein was in

all respects specifically ruled upon by the entire Commission in I. & S. Docket No. 5500, and since all the complainants in the complaint herein were parties to I. & S. Docket No. 5500, and since the complaint herein alleges nothing that was not fully considered and disposed of by the entire Commission in I. & S. Docket No. 5500, it would be contrary to the public interest for the Commission to waste its resources in hearing the complaint herein, and it would be vexatious and burdensome to subject defendants herein to further hearing and argument.

9. In I. & S. Docket No. 5500, there were three separate and lengthy hearings and three oral arguments with proposed reports, exceptions and numerous briefs. All of the complainants herein had their full day before the Commission.

10. If complainants felt unduly aggrieved by the decision dated May 7, 1952 of the entire Commission in I. & S. Docket No. 5500, they could have, within sixty days thereafter, petitioned the Commission for reconsideration under Rule 101 of the Commission's General Rules of Practice. Complainants herein should not be permitted to violate Rule 101(e) by the simple expedient of calling their filed document a "Complaint."

11. The dispute raised by the complaint herein has already been heard and disposed of in I. & S. Docket No. 5500. No useful purpose would be served by burdening the Commission and defendants with further hearings and argument.

[fol. 1990] 12. Precedent in all respects, supports the granting of this Motion. For example, in Docket No. 30782 (*Indianapolis Machinery and Supply Company, Inc. et al* v. *Atchison, Topeka & Santa Fe Railway Company, et al.*), the Commission granted defendants' Motion to Dismiss the complaint therein, saying:

> "Upon consideration of the complaint in the above-entitled proceeding, defendants' motion to dismiss it without hearing, and complainants' reply thereto; and it appearing that the complaint is made by the same complainants with respect to the same commodities and origin and destination points and presents substantially the same issues that were considered and disposed of by the Commission in No. 29973, *Indianapolis Mach.*

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& Supply Co., Inc. v. *A. T. & S. F. Ry. Co.*, 276 I.C.C. 252, and that the Commission, on January 9, 1950, denied complainants' petition therein for rehearing and further consideration; and it further appearing from the complaint that the circumstances and conditions under which the rates apply and the shipments are made, have not materially changed since substantially the same issues were presented and decided in the prior proceeding and that no reasonable ground appears for investigation of this further complaint.

"*It is ordered,* That said motion of defendants be, and it is hereby, sustained.

"*It is further ordered,* That the complaint in this proceeding be, and it is hereby, dismissed."

13. Defendants respectfully request that the time for filing answers to the complaint herein be indefinitely postponed pending consideration and disposition of this Motion.

Wherefore, defendants hereby respectfully move that the complaint herein be dismissed.

[fols. 1991-1992] *Duly sworn to by E. A. Hodkinson jurat omitted in printing.*

[fol. 1993] BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 31105

FLORIDA CITRUS COMMISSION, et al.

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al.

PETITION BY THE SECRETARY OF AGRICULTURE FOR LEAVE TO INTERVENE—Filed November 7, 1952

Comes now your petitioner, the Secretary of Agriculture of the United States, and respectfully represents that he has an interest in the matters in controversy in the above-entitled proceeding and desires to intervene in and become

a party to the said proceeding, and for grounds of the proposed intervention says:

I

That this petition is filed pursuant to section 201 of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1291) and section 203(j) of the Agriculture Marketing Act of 1946 (7 U.S.C. 1622).

II

That the complaint in this proceeding attacks as unlawful certain charges relating to the transportation of farm products and affecting the public interest.

[fol. 1994] III

That the charges attacked by the complaint are unjust and unreasonable in violation of section 1(5) of the Interstate Commerce Act.

IV

That your petitioner hereby adopts and affirmatively supports the allegations of the complaint, and states further that this petition does not unduly broaden the issues in this proceeding.

Wherefore, the Secretary of Agriculture of the United States prays leave to intervene in and be treated as a party to this proceeding with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses, and be heard in person or by counsel upon brief and at the oral argument, if oral argument is granted.

Respectfully submitted, by direction of the Secretary of Agriculture of the United States.

Chas. B. Bowling, Chief, J. L. Pease, Assistant Chief Traffic Management Division, Transportation and Warehousing Branch Production and Marketing Administration. (S.) Charles W. Bucy, Associate Solicitor. (S.) Walter D. Matson, Attorney, United States Department of Agriculture, Washington 25, D. C.

Dated November 7, 1952.

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[fols. 1995-2011] BEFORE THE INTERSTATE COMMERCE COMMISSION

No. 31105

[Title omitted]

ORDER PERMITTING THE SECRETARY OF AGRICULTURE AND THE CITY OF NEW YORK TO INTERVENE—November 12, 1952

In the Matter of the Petitions for Leave to Intervene.

Present: Charles D. Mahaffie, Commissioner, to whom the above entitled matter has been assigned for action thereon.

Upon consideration of the record in the above-entitled proceeding and petitions filed on behalf of the Secretary of Agriculture of the United States and The City of New York.

It is ordered, That the said the Secretary of Agriculture of the United States and The City of New York be, and they are hereby, permitted to intervene and be treated as parties to this proceeding, with the right to have notice of and appear at the taking of testimony, produce and cross-examine witnesses and be heard on brief and on oral argument, if oral argument is heard; provided, however, that the permission to intervene herein granted shall not be construed to allow interveners to introduce evidence which will unduly broaden the issues raised in the complaint.

It is further ordered, That a copy of the intervening petitions be served upon complainants and defendants; and that a copy of this order be served upon each of the parties to this proceeding.

Dated at Washington, D. C., this 12th day of November A. D., 1952.

By the Commission, Commissioner Mahaffie, George W. Laird, Acting Secretary. (Seal.)

[fol. 2012] IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1953

[Title omitted]

STIPULATION—Filed February 25, 1954

In lieu of the Designation of Parts of Record to be Printed heretofore filed by counsel for the Secretary of Agriculture of the United States in No. 480 and the Appellants in No. 481, the Statement Designating Additional Parts of Record to be Printed filed by counsel for the Interstate [fol. 2013] Commerce Commission, and the stipulation of the parties as to the record and the parts thereof to be printed dated December 18, 1953, for the purpose of reducing the cost of printing the record herein it is stipulated and agreed that the entire record in these cases shall be printed with the following parts thereof to be omitted, it being understood and agreed that the entire record including the parts thereof listed below for omission from the printed record shall stand as part of the record and any party and the Court may refer to the unprinted parts of the record with the same force and effect as if they had been printed in full in the transcript of record:

1. Certified copies of the exhibits received in evidence before the Interstate Commerce Commission in Docket No. I&S 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia.*

2. The oral arguments before the Commission running from pages 720-912 and pages 1482-1612 of the stenographers' minutes of proceedings before the Interstate Commerce Commission in Docket No. I&S 5500.

3. Praecipes.

4. All Certificates of Service.

5. All Certificates of the Secretary of the Interstate Commerce Commission certifying to the authenticity of the record.

6. Complaints before the Interstate Commerce Commission in Docket Nos. 31105 and 31106.

Replies to motions to dismiss complaints in Docket Nos. 31105 and 31106.

Order of Interstate Commerce Commission in Docket Nos. 31105 and 31106.

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7. Petition for Reconsideration on behalf of California Citrus League dated December 6, 1948.

[fol. 2014] Petition for Reopening and Reconsideration by International Apple Association, National League of Wholesale Fresh Fruit and Vegetable Distributors and United Fresh Fruit and Vegetable Association, dated December 6, 1948.

Petition for Reconsideration on behalf of California Grape and Tree Fruit Association and California Growers and Shippers Protective League, dated December 13, 1948.

Petition for Reopening and Reconsideration on behalf of New York Carload Receivers Committee, dated December 6, 1948.

8. City of New York Reply to Exceptions of Respondents, dated June 15, 1950.

Reply of Southeastern Association of Railroad Utilities Commissioners to Exceptions, dated June 30, 1950.

Industry Committee for Improvement of Washington Market Reply to Exceptions, dated June 30, 1950.

California Grape and Tree Fruit League Reply to Exceptions, dated June 30, 1950.

Philadelphia Terminals Marketing Association Reply to Exceptions, dated June 30, 1950.

Auction Receivers of Philadelphia, Reply to Exceptions, dated June 27, 1950.

9. All of Appendix F (pps. 99, et seq.) to Exceptions of Respondents to the Proposed Report of Examiner M. J. Walsh, dated September 11, 1951. This is a copy of Commission decision, 272 I. C. C., pps. 648 through 664, which is being printed as Appendix A of complaint in the District Court.

Reply of City of New York to Exceptions of Respondents, dated October 15, 1951.

Reply to Exceptions of National League of Wholesale Fresh Fruit and Vegetable Distributors, dated October 15, 1951.

[fol. 2015] Reply to Respondents' Exceptions on behalf of Philadelphia Terminals Marketing Association and Auction Receivers of Philadelphia, dated October 18, 1951.

Reply of California Citrus League to Respondents' Exceptions, dated October 18, 1951.

Reply to Respondents' Exceptions on behalf of Industry Committee for the Improvement of Washington Market, dated October 18, 1951.

10. Parts of transcript of stenographer's minutes before the Interstate Commerce Commission, Docket No. I&S No. 5500, as follows (all figures are inclusive):

Pp. 1-4. P. 5, line 5, p. 10, line 17. P. 165, last six lines. Pp. 166-167a. P. 369, last six lines. Pp. 370-371-A. P. 523, last 14 lines. Pp. 524-530-B. P. 577, line 1—p. 579, line 10. P. 713, last 16 lines—p. 718, first 16 lines. Pp. 720-912. P. 976, last 11 lines. Pp. 977-891, first 3 lines. P. 981, from line 4, beginning "(Protestant's Exhibits * * *)"—p. 982, line 5. Pp. 1070-1076, first 11 lines. P. 1076, last 15 lines—p. 1098. [fol. 2016] Pp. 1099-1112. Pp. 1113-1114. P. 1115, under heading "Proceedings," lines 1-16. Pp. 1181-1186. Pp. 1187-1197. Pp. 1198-1208. Pp. 1225-1234. P. 1314, last 7 lines, beginning "(Respondents' Exhibits * * *)". Pp. 1315-1316. Pp. 1476-1481. Pp. 1482-1612. P. 1613—lines 1-8. P. 1615—lines 2-18. P. 1741—lines 2-8. P. 1742, lines 1-2. P. 1875, lines 2-11. Pp. 1876-1887. P. 1888, under heading "Proceedings"—lines 1-8. P. 1972, last 13 lines. Pp. 1973-2117.

11. Report of Commission dated October 4, 1948.

12. Petition of The Port of New York Authority for extension of time within which to submit petition for reconsideration.

13. Report on Rehearing Proposed by Russell M. Brown M. J. Walsh, Examiners.

[fols. 2017-2018] 14. Stenographer's Minutes of PreHearing Conference, dated November 8, 1950 (pp. 1-65).

15. Second Report on Further Hearing Proposed by M. J. Walsh, Examiner.

16. Note—Fifty Copies of complaint of Florida Citrus Commission, et al., in the United States District Court will be furnished by the appellants except for Exhibits A and B to the complaint. Therefore, it will be necessary to print only Exhibits A and B of this complaint.

The Secretary of Agriculture of the United States, appellant in No. 480, and Florida Citrus Commission, et al.,

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appellants in No. 481, have heretofore adopted, and hereby adopt, for their statements of points upon which they intend to rely in their appeals to this Court the points contained in their respective assignments of errors filed herein.

Neil Brooks, Associate Solicitor, U. S. Department of Agriculture, Attorney for the Secretary of Agriculture, Appellant; Arthur L. Winn, Jr. Attorney for Florida Citrus Commission, et al., Appellants; Edward M. Reidy, Chief Counsel, Interstate Commerce Commission, Appellee; Hugh B. Cox, Counsel for Intervening Railroads, Appellees.

February 25, 1954.

[fol. 2019] [File endorsement omitted]

[fol. 2020] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

Nos. 480 & 481

SECRETARY OF AGRICULTURE OF THE UNITED STATES, Appellant,

vs.

UNITED STATES OF AMERICA et al.; and

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA et al., Appellants,

vs.

UNITED STATES OF AMERICA et al.

ORDER NOTING PROBABLE JURISDICTION—Filed February 1, 1954

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted and the cases are consolidated for argument.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY, DR. P. PHILLIPS COOPERATIVE, PLAINTIFFS,

THE CITY OF NEW YORK, THE PORT OF NEW YORK AUTHORITY, CALIFORNIA CITRUS LEAGUE, CALIFORNIA GRAPE AND TREE FRUIT LEAGUE, PHILADELPHIA TERMINALS MARKETING ASSOCIATION, THE AUCTION RECEIVERS OF PHILADELPHIA, DAN STOREY JR., MAX FELDBAUM AND SONS, A. CANCELMO COMPANY, B. M. YOUNG, NEW YORK FRUIT AUCTION CORPORATION, UNITED FRUIT BUYERS' ASSOCIATION, INC., UNITED FRESH FRUIT AND VEGETABLE ASSOCIATION, IDAHO SHIPPERS ASSOCIATION, INC., NATIONAL ONION ASSOCIATION, WESTERN GROWERS ASSOCIATION, AND THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFFS,

v.

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS,

THE BALTIMORE & OHIO RAILROAD COMPANY, ERIE RAILROAD, THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, AND READING COMPANY, INTERVENING DEFENDANTS

STATEMENT OF THE SECRETARY OF AGRICULTURE AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the appellant Secretary of Agriculture (an inter-

vening plaintiff in the case) submits herewith his statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order and judgment of the District Court of three judges entered in this cause.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Florida, Orlando Division, has not yet been reported. A copy of the opinion and final judgment are attached hereto as Appendix A.

JURISDICTION

This proceeding was instituted to enjoin and set aside certain orders of the Interstate Commerce Commission, and in accordance with the requirement in 28 U.S.C. Supp. V § 2325 the cause was heard by a District Court of three judges. The Court below entered its order on August 31, 1953, denying the application to set aside, and to enjoin the enforcement of, the Commissioner's orders. A petition for appeal is presented to the District Court herewith, to wit, on October , 1953. The jurisdiction of the Supreme Court to review this order and judgment by direct appeal is invoked under 28 U.S.C. Supp. V §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *American Trucking Assns.* v. *United States,* 326 U.S. 77; *Alabama G.S.R. Co.* v. *United States,* 340 U.S. 216; *American Trucking Assns.* v. *United States,* 344 U.S. 298.

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The right of the Secretary of Agriculture to appeal from the judgment of the District Court is conferred by § 201(b) of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U.S.C. § 1291(b)); § 203(j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088-1089, 7 U.S.C. § 1622(j)); and 28 U.S.C. Supp. V § 2323. It is provided, *inter alia*, in § 201(b) of the Agricultural Adjustment Act of 1938 that in cases with respect to rates, charges, tariffs, and practices relating to the transportation of farm products where the Secretary is a party before the Interstate Commerce Commission he shall have "the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (7 U.S.C. § 1291(b)).

QUESTIONS PRESENTED

The line-haul freight rate established by railroad carriers in the United States (*i.e.*, the published freight rate between cities) includes delivery of the freight to the consignee. Delivery is generally effected by placing the freight in the car on a team-track at a location accessible to the consignee. However, the team-track facilities at New York are adequate to handle only a small part of the great bulk of fruits and vegetables received at New York, and because of the topography the carriers move the cars by means of car floats across the Hudson River from Jersey City, New Jersey, to the piers at New York, and the unloading of the cars is performed by the carriers. The shippers

are not permitted access to the cars. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. This method of making delivery of freight at New York is the method most economical to the carriers, and no charge for such delivery, other than the line-haul rate, has been made for over fifty years prior to the action challenged in this case. The unloading of fruits and vegetables has also been performed by the carriers at certain locations in Philadelphia, Pennsylvania, and the shipper is not permitted access to the cars at these tracks. Delivery to the consignee is not effected until after the cars are unloaded. No charge for such delivery at Philadelphia, other than the line-haul rate, has been made for over fifty years prior to the action challenged in this case. At the hearing before the Interstate Commerce Commission to determine the validity of proposed unloading charges at New York and Philadelphia, no evidence was introduced to show that the carriers are not adequately compensated for the delivery of fruits and vegetables at New York and Philadelphia by their line-haul rates. The Commission did not determine whether the proposed aggregate charges, consisting of the line-haul rates plus the proposed unloading charges, are just and reasonable for the transportation of the fruits and vegetables. In these circumstances, the questions are:

(1) Whether the Commission has authority to approve charges by the appellee railroad carriers,

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for unloading fruits and vegetables at New York and Philadelphia, without determining whether the line-haul rates plus the unloading charges, *i.e.*, the entire charges for the transportation, including delivery, are just and reasonable.

(2) Whether an unloading charge on fruits and vegetables at New York is an unjust discrimination or an undue or unreasonable prejudice or disadvantage in violation of sections 2 and 3(1) of the Interstate Commerce Act inasmuch as no similar charge is imposed on any other freight unloaded by the carriers at New York, including other similar perishable products, *e.g.*, butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk.

(3) Whether the orders of the Commission, establishing identical unloading charges at New York and Philadelphia even though it is conceded that unloading costs at Philadelphia are substantially lower than at New York, are supported by substantial evidence and adequate findings.

(4) All other questions raised in the Assignment of Errors are also presented.

STATUTES INVOLVED

Sections 202 and 203(j) of the Agricultural Marketing Act of 1946 (7 U.S.C. §§ 1621, 1622 (j)); Section 201(a) and (b) of the Agricultural Adjustment Act of 1938 (7 U.S.C. § 1291(a) and (b)); and Sections 1(3)(a), 1(5), 2, 3(1), 6(7), 15(6), 15(7), and 15 a(2) of the Interstate Commerce Act, as amended (49 U.S.C. §§ 1(3)(a), 2, 3(1), 6(7),

15(6), 15(7), 15a(2), and 49 U.S.C. Supp. V § 1(5)), and the National Transportation Policy preceding Section 1 of the Interstate Commerce Act, as amended, are set forth in Appendix B hereto.

STATEMENT

This action was instituted in the United States District Court for the Southern District of Florida, Orlando Division, by various shippers of fruits and vegetables against the Interstate Commerce Commission and the United States to enjoin and set aside certain orders of the Interstate Commerce Commission approving charges established by railroad carriers for unloading fruits and vegetables at New York and Philadelphia. The United States was made a defendant in accordance with the requirement in 28 U.S.C. Supp. V § 2322, but the United States remained neutral in the litigation.

The Port of New York Authority, the Secretary of Agriculture of the United States, and others intervened as plaintiffs and the railroad carriers involved intervened as defendants. The Secretary of Agriculture of the United States intervened in accordance with Section 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U.S.C. § 1291), which authorizes the Secretary to participate as a party in proceedings before the Interstate Commerce Commission with respect to "rates, charges, tariffs, and practices relating to the transportation of farm products * * * " (7 U.S.C. § 1291(a)), and in such cases "the Secretary shall have the rights of a party before the Commis-

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sion and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (7 U.S.C. § 1291(b)).

The unloading charges challenged in this proceeding were filed with the Commission to become effective on June 1, 1947, but the charges were suspended by the Commission's order of May 28, 1947, pending an investigation of the lawfulness of the charges. In its report dated October 4, 1948, the Commission, with Chairman Lee and Commissioners Aitchison, Splawn, and Alldredge dissenting, and Commissioner Patterson not participating, found the proposed unloading charges "just and reasonable". Thereafter the unloading charges, ranging from $1.95 to $2.60 per net ton became effective on November 1, 1948. These charges were 30% higher than the charges originally proposed as a result of a general increase in all railroad rates and charges authorized by the Commission. In December 1948 various petitions were filed with the Commission seeking to have the proceeding reopened and on June 9, 1949, the Commission reopened the proceeding for rehearing. After receiving additional evidence the two Hearing Examiners for the Commission issued their report recommending that the Commission "should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed" (Report on Rehearing Proposed by Russell M. Brown

and M. J. Walsh, Examiners, p. 21). Subsequently, the Commission issued a notice that the record "is deficient in respect of certain evidence which seems to be important, and the proceedings will be assigned for further hearing." Further evidence was received and the "Second Report on Further Hearing Proposed By M. J. Walsh, Examiner" was issued recommending that upon further hearing "the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of Section 3(1) of the act" (Report, p. 25).

The report of the Commission dated May 7, 1952, reversed the findings and conclusions by the Examiners and approved the unloading charges at New York and Philadelphia at reduced rates varying from $1.05 to $1.65 per net ton. On September 16, 1952, and on September 23, 1952, certain of the plaintiffs filed complaints with the Commission attacking the unloading charges at New York and Philadelphia, respectively, and on December 15, 1952, the Commission dismissed these complaints.

The District Court, with Judge DeVane dissenting, sustained the validity of the Commission's orders and the Court denied the relief prayed for in the complaints.

It is the position of the Secretary of Agriculture that the Commission's order of October 4, 1948, originally approving the unloading charges, the Commission's order of May 7, 1952, approving the

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unloading charges at a reduced rate, and the Commission's order of December 15, 1952, dismissing the complaints attacking the reduced unloading charges are invalid and should be set aside and enjoined.

The Secretary of Agriculture of the United States is interested in this proceeding as the representative of the agricultural community in the United States. The unloading charges will aggregate several million dollars each year, and will be borne to a large extent by the American farmers (R. 588-589, 593, 614, 636-637, 666, 675, 677, 685, 716, 1182-1184).[1] Even if the unloading charges can be partially shifted to the consumers (R. 614, 1065, 1067, 1181-1182, 1251-1253, 1310), the unloading charges will, nonetheless, widen the spread between the price received by the producer and the price paid by the consumer (R. 86, 1183-1184), which is contrary to the expressed purpose of Congress to provide for "an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and *the price spread between the producer and consumer may be narrowed* * * * " (7 U.S.C. § 1621; emphasis supplied).

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[1] The record references are to the pages of the transcript of testimony in the administrative proceeding (Investigation and Suspension Docket No. 5500), which is a part of the record in the District Court.

The New York area has received annually in recent years over 100,000 carloads of fruits and vegetables by rail (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 125). The team-track facilities at New York are adequate to handle only a small portion of this vast bulk of freight traffic, and "it would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York (*Id.* at 130). Instead of delivering the fruits and vegetables at team tracks, the carriers place the freight cars on car floats or lighters at Jersey City, New Jersey, and move the cars across the Hudson River by tugboats to the piers at New York.[2] The carriers then unload the cars, and the cars are immediaely returned empty to the New Jersey side and other car floats are placed at the piers for unloading. This method of unloading permits the carriers to use the same space for unloading two or three times during the same night (*Id.* at 124-125). "In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available" (*Id.* at 124). This method of making delivery of freight at New York is the method most

[2] The New York Central has the only all-rail line into Manhattan for the delivery of freight. This line has "limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 124).

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economical to the carriers,[3] and no charge for such delivery, other than the line-haul rate, has been made for over 50 years prior to the action challenged in this case. The shippers are not permitted access to the cars on the car floats and their trucks can come on to the pier floors only at specified times. "Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 272 I.C.C. 648, 654-655; 286 I.C.C. 119, 125). "When cars are unloaded at the pier terminals the owners of the produce must truck the contents of the cars from the pier floor to their destination in New York * * * " (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 272 I.C.C. 648, 655).

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[3] By delivering cars at the pier, the carriers avoid the expense of additional switching and detention of the cars and the great expense which would be incurred if the railroads were required to expand their team track facilities at New York (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 123, 126, 133). There is no switching charge in the event of delivery at team tracks, and there is no basis for the statement in the District Court's opinion that the Commission found that a switching charge is paid "by the consignee". The cars delivered at team tracks are moved across the Hudson River by car floats or lighters, but when the cars for team-track delivery reach Manhattan Island they are accorded additional switching and, after placement on the team track, the consignee has two days free time to unload the car. In these circumstances, unloading at the New York piers was "inaugurated by the carriers [during the latter part of the nineteenth century] for their own convenience and benefit", and this method of making delivery "is now and always has been the most economical way the carriers may make deliveries of freight at New York" (DeVane, District Judge, Dissenting).

The railroads have also historically unloaded fruits and vegetables at Philadelphia without any charge other than the line-haul rate. From 1927 until November 1, 1948, when the challenged unloading charges went into effect, approximately 95% of the fruits and vegetables consigned to Philadelphia, other than for chain stores, was handled at the Pennsylvania Produce Terminal at which the cars were unloaded without a separate charge by the railroad carriers. The shippers are not permitted access to the cars prior to the unloading at the Pennsylvania Produce Terminal and delivery is not made until the cars have been unloaded by the carrier. This method of making delivery releases the cars quickly and about 95% of the cars are, therefore, released almost immediately after arrival. This method of making delivery also affords the carriers an opportunity to repair damaged packages thereby reducing claims for damage (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 133-135).

The development of the wholesale marketing facilities for fruits and vegetables at New York and Philadelphia has been centered around the railroad facilities at these cities, and the marketing enterprise is dependent to a large degree on the continued maintenance of reasonable and adequate transportation by the rail carriers. The unloading charges attacked in this proceeding, if allowed to remain in effect, will substantially disrupt the marketing of agricultural products at New York and

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Philadelphia. For example, when the unloading charges became effective, consignees attempted to avoid the charges by taking delivery at outlying team-track stations and paying the cost of trucking the commodities into market or by shifting from rail to motor trucks for the entire transportation. In February, 1949, deliveries of fresh fruits and vegetables to the New York piers were about 50% less than in February 1948 (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 126.) Similar traffic to New York by truck and vessel increased substantially in February 1949 compared with February 1948. The Commission found that the "diversion of rail shipments from pier stations to other points intensified the problems of the New York produce market, resulting in greater congestion in terminal handling, and in dissatisfaction among buyers, labor, and other elements at that facility" (*Id.* at 126).

In addition, the City of New York was "planning to rehabilitate its piers at a cost of $78,000,000, but it is intimated that it may not proceed with that program" if the unloading charges remain in effect (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 129). The Port of New York Authority has also temporarily abandoned plans for the construction of a union water front terminal at a cost of $27,000,000, in substantially the same location as the pier terminals, because of the disruptive effects of the unloading charges involved in this case (*Id.* at 130).

"The New York water front contributes from 25 to 40 percent of the basic economy of that city" and the city officials are seriously concerned about the adverse effects which will result from a continuance of the challenged unloading charges (*Id.* at 129-130).

With respect to Philadelphia, there has been a trend since 1930 toward diversion from the railroads to the trucks of the fruit and vegetable traffic consigned to Philadelphia, and the unloading charges attacked in this case "will further divert the fruit and vegetable traffic from the [railroads] produce terminals" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 136). The unloading charges at Philadelphia are also causing some dealers to buy their produce at other cities and, as a result, the entire produce business at Philadelphia will suffer irreparable damage if the unloading charges remain in effect (*Id.* at 135-137).

THE QUESTIONS ARE SUBSTANTIAL

The issues in this case relate primarily to the authority of the Interstate Commerce Commission to impose charges on shippers for unloading fruits and vegetables at New York and Philadelphia without determining whether the total payment received by the railroads for such unloading is just and reasonable. In addition, the issue is presented as to whether the Commission can approve a charge for unloading fruits and vegetables when no similar charge is imposed for unloading other similar per-

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ishable agricultural commodities. These issues are of far-reaching importance to the agricultural economy of the United States, and the decision as to these issues will substantially influence the marketing of agricultural commodities shipped from all sections of the country to New York and Philadelphia.

The Commission concedes that for over 50 years the railroads have been compensated, either in whole or in part, for the unloading of fruits and vegetables at New York and Philadelphia by their line-haul rates. In its Report of May 7, 1952, the Commission states that (emphasis supplied) "[p]rior to November 1, 1948, when the charges under consideration became effective there were no *separate* charges *in addition to the through rates*, for unloading fruits, vegetables, or other descriptions of traffic at the stations specified" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, 121). "At the [Philadelphia] piers unloading, similar to the present operations at New York piers, was performed by the carriers without charge therefor *other than the line-haul rate*. In fact, delivery could not be accomplished without first unloading the freight. In 1927, the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce terminals, either of which was then capable of accommodating the fruit trade at that point, and at both of which unloading *under the line-haul rate*, as previously performed at the piers, was continued" (*Id.* at 133-134). "This method of unloading had

been performed by the carriers prior to November 1, 1948, without charge therefor *other than the line-haul rate*" (*Id.* at 135). "The respondents have been willing to perform the unloading without a *separate* charge until, in recent years, the cost thereof substantially increased" (*Id.* at 139-140). These findings by the Commission inexpugnably prove that the railroads, prior to November 1, 1948, were compensated for unloading fruits and vegetables at New York and Philadelphia by their line-haul rates.

It is also significant that in prior proceedings involving the line-haul rates on fruits and vegetables to points in the United States, including New York and Philadelphia, the destination carriers "emphasized the magnitude of their terminal services and costs, including unloading by them of the traffic as an essential part of delivery * * * " (See Second Report on Further Hearing Proposed by M. J. Walsh, (Examiner, p. 25). The Commission found that "[v]arious rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates" (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia*, 272 I.C.C. 648, 662).[4]

[4] There is no basis in the evidence or in the Commission's findings for any contention that the unloading was performed free by the carriers. An analogous situation is involved in the "Bank Night" motion picture cases where the theatres allegedly give "free" chances for a prize with the purchase of a movie ticket. It has been consistently held that the chance is not

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The Commission also recognized that the unloading performed at New York and Philadelphia is an integral part of the transportation involved and that such unloading merely effects delivery to the consignee. The Commission expressly found that "[d]elivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (272 I.C.C. 648, 654-655; see also 286 I.C.C. 119, 125, 129, 133-139). It is a fundamental principle in the transportation law of the United States that delivery is included under the line-haul rates. This principle has been consistently recognized by the Commission and the Courts. In *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I.C.C. 310, 314-315, the Commission held:

> "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery. * * * The railroads recognize their duty to

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"free", as a matter of law, and that the admission price includes payment for the chance. See *Affiliated Enterprises* v. *Gantz*, 86 F. 2d 597, 599 (C.A. 10); *City of Wink* v. *Griffith Amusement Co.*, 129 Tex. 40, 100 S.W. 2d 695, 699. In a similar case, *Taylor* v. *Smetten*, 11 L.R.S.C.J. 207, the English Court held that "[a]lthough it was admitted by the respondent that the tea was good and worth all the money, it is impossible to suppose that the aggregate prices charged and obtained for the packages did not include the aggregate prices of the tea and the prizes". *Cf. Federal Trade Comm'n* v. *Education Society*, 302 U.S. 112; *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103 (C.A. 7).

make delivery under the flat rate stated in their tariffs, * * *."[5]

Similarly, in *United States v. Am. Tin Plate Co.*, 301 U. S. 402, 409, the Court stated:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver from in its freight depot or at team tracks or on siding or spur-tracks owned by an industry."

In *Atchison Ry. v. United States*, 295 U. S. 193, 200, involving the delivery of livestock at Chicago, this Court held that "[l]ong continued practice and special conditions made unloading at these yards a transportation service to be performed by the carrier" under the line-haul rates. See also, *Adams v. Mills*, 286 U. S. 397, 409-416; *United States v. U. S. Smelting Co.*, 339 U. S. 186, 189-190.

The principle that delivery is included under the line-haul rate was also recognized by the Commission in *Unloading Lumber at New York Harbor*, 256 I.C.C. 463, 468, in which it was held:

> "The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor . . . The nature and incidents of the unloading service

[5] This decision and order by the Commission was upheld in *Interstate Commerce Commission v. A., T. & S. F. Ry. Co.*, 234 U. S. 294.

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here considered establish beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61. As such a showing was not made respondents have not met the requirements of the statute in that respect and accordingly have not sustained their burden as to the reasonableness of the proposed charge."

The same issue was also presented in *Fruits and Vegetables to Duane St., N. Y.*, 66 I.C.C. 135, 139. In that proceeding the Erie Railroad had two proposals, the second of which was "to establish terminal charges on fruits and vegetables at its Duane Street station." Those terminal charges were intended to cover the two services of unloading and sorting and were to take the place of lower charges, previously in effect, which covered only the sorting service. In finding the proposed unloading and sorting charges not justified, the Commission held:

"The terminal charges present a somewhat different problem. It is proposed that they shall apply on all fruit and vegetable traffic delivered at Duane street station. As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane street under the line-haul rates. * * * The services for which the proposed terminal

charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic, merely pointing out that the rates on California fruit are blanketed to all territory east of the Colorado common points and that 15 years ago, when the traffic began to be handled in the manner above described, no corresponding increase was made in the through rates. This blanket has been voluntarily maintained by the carriers for many years and appears to have been satisfactory to all concerned. We find that the establishment of terminal charges higher than the present assorting charges has not been justified."

Commissioner Knudson, dissenting, in the Commission's report dated May 7, 1952, challenged in this proceeding, explains that (*Unloading Charges on Fruits and Vegetables at New York and Philadelphia,* 286 I.C.C. 119, 144):

"In several reports the Commission found that charges for unloading freight at New York piers incident to delivery to the consignee were included in the line-haul rates; that "delivery to the consignee is not effected until the cars are unloaded and the lading placed at a convenient location on the pier floor"; and

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that where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation theretofore received for such through service. *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47; *Bills of Lading*, 52 I.C.C. 671; *Erie R. Co.* v. *Alabama & V. Ry. Co.*, 98 I.C.C. 268; *Fruits and Vegetables to Duane St., N. Y.*, 66 I.C.C. 135; *Allowances for Stacking*, 179 I.C.C. 780; *Unloading Lumber at New York Harbor*, 256 I.C.C. 463. These reports, supporting protestants' contention herein and specifically referred to in the examiners' proposed reports, are omitted from the report of the majority."

Although the Commission has suggested that, because of an increase in the cost of unloading, the carriers are no longer *adequately* compensated for the unloading in their line-haul rates,[6] the decisive

[6] The Commission stated in its report of October 4, 1948 (272 I.C.C. 648, 662), that "[*f*]*or the purposes of this proceeding* we are not convinced that *adequate* compensation for these unloading services is or should be included in the line-haul rates" (emphasis supplied). This statement is not supported by any evidence. No evidence was introduced as to the adequacy of the line-haul rates to compensate the carriers for the entire transportation of the agricultural commodities, including delivery. Also, there are no subsidiary findings by the Commission as to whether the line-haul rates adequately compensate the carriers for the transportation involved. See *Colorado-Wyoming Co.* v. *Comm'n*, 324 U. S. 626, 634; *Florida* v. *United States*, 282 U. S. 194, 215.

fact is that the line-haul rates prior to November 1, 1948, included payment for the unloading performed at New York and Philadelphia. It is, therefore, impossible to determine whether the proposed unloading charges are just and reasonable without determining the extent to which payment is being made for the unloading in the line-haul rates. No evidence was introduced to show that the railroads are not being adequately compensated in their line-haul rates for the entire transportation rendered, including delivery. Various rate increases have been granted in the line-haul rates from time to time and effective October 6, 1947, a 30% increase in all freight rates was approved by the Commission (286 I.C.C. 119, 120). But assuming, *arguendo,* that even with these increases the railroads are not being adequately compensated for the transportation rendered, the entire line-haul rate must be considered and the Commission must find that the entire charge proposed for the transportation, including delivery, consisting of the line-haul rate plus the proposed unloading charge, is just and reasonable. Otherwise the railroads will be receiving double payment for the service rendered. The extent, if any, to which the railroads are not at present being adequately compensated for the unloading under their line-haul rates—and, therefore, the extent to which an additional charge can now be imposed for the unloading—cannot be determined without considering the reasonableness of the entire line-haul rates.

The District Court, in sustaining the Commis-

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sion's orders, erroneously attributed to the Commission findings antithetical to the findings made by the Commission. The District Court stated that the Commission is really deciding "where the carrier's line-haul service ends, and whether unloading is a justifiable additional service * * *." The Court then stated that the Commission "found that unloading is an additional service, wholly distinct from delivery * * *." But, as shown above, this is directly contrary to the Commission's findings. The Commission found that "[d]elivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (272 I.C.C. 648, 654-655), and that the proposed charge, in addition to the line-haul rate, was "for making delivery at New York piers" (286 I.C.C. 119, 129).

Based upon this basic error, the District Court erroneously concluded that "the Commission found that the line-haul service terminated when the cars reached the pier station * * *." No such finding was made by the Commission. As shown above, the Commission recognized that for over 50 years the line-haul rate included the unloading at New York and Philadelphia. The District Court failed to recognize that the Commission found only that *for the future* the line-haul rate would not include delivery. The Commission stated:

> "Under their proposal [*i.e.*, the carriers' proposal in 1947 to impose an additional charge for unloading] the line-haul rate will apply only to the New York piers, with an additional

> charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery" (286 I.C.C. 119, 123).
>
> * * * * *
>
> "Respondents' proposal would * * * tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, for making delivery at New York piers" (286 I.C.C. 119, 129).

Assuming, *arguendo,* that *for the future* the carriers can establish a line-haul rate which does not include delivery, and that the carriers can establish in their tariffs an additional charge "for making delivery" (286 I.C.C. 119, 129), the vital fact is that they have not done so in the past. The prior line-haul rates included delivery, *i.e.,* unloading at New York and Philadelphia, and, therefore, it is impossible to determine whether an additional charge for delivery is reasonable without considering the entire line-haul rates.

The appellants are confident that the evidence will show that the carriers are being adequately compensated under their line-haul rates to New York and Philadelphia for the entire transportation service rendered, including delivery. The carriers have not produced any evidence with respect to a consideration of their entire line-haul rates. "At any hearing involving a change in a

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rate, fare, charge, or classification, or in a rule, regulation, or practice, * * * the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *" (49 U.S.C. § 15(7)).

The District Court also erred in failing to set aside the Commission's orders under sections 2 and 3(1) of the Act (49 U.S.C. §§ 2, 3(1)). Under these sections, it is unlawful for a carrier to subject any traffic to an undue or unreasonable prejudice or disadvantage or to unjustly discriminate against any kind of traffic by charging a greater rate for any service rendered than it charges for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. The carriers unload all freight at the New York piers, other than fruits and vegetables, without any charge other than the line-haul rate. Perishable agricultural commodities, *e.g.*, butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk are included in the products unloaded under the line-haul rates. This is manifestly an unjust discrimination and an undue and unreasonable prejudice or disadvantage in violation of sections 2 and 3(1) of the Act.

CONCLUSION

The unloading charges challenged in this proceeding, if permitted to remain in effect, will seriously disrupt the marketing of fruits and vegetables at New York and Philadelphia and will

cause irreparable damage to the marketing enterprise at these cities. The unloading charges are invalid, and we believe that the questions presented by this appeal are substantial and are of public importance.

Respectfully submitted.

KARL D. LOOS,
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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY AND DR. P. PHILLIPS COOPERATIVE, PLAINTIFFS,

versus

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

FINAL JUDGMENT

The above styled cause having been submitted as on final hearing, and the Court having heard the parties, after due notice, it is upon consideration of the record and arguments:

ORDERED AND ADJUDGED:

1. The relief sought by plaintiffs is denied, and the complaint is dismissed at the cost of plaintiffs.

DONE AND ORDERED, August 31, 1953.

LOUIE W. STRUM,
U. S. Circuit Judge.
WILLIAM J. BARKER,
U. S. District Judge.
DOZIER A. DEVANE,
U. S. District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY, AND DR. P. PHILLIPS COOPERATIVE, PLAINTIFFS,

versus

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

Suit to enjoin and set aside orders of Interstate Commerce Commission.

(August 31, 1953)

Before STRUM, Circuit Judge, and BARKER and DEVANE, District Judges.

STRUM, Circuit Judge:

[1] The purpose of this suit is to set aside orders of the Interstate Commerce Commission relating to unloading charges on fresh fruits and vetgetables at New York and Philadelphia, entered pursuant to the Commission's report on re-hearing, dated May 7, 1952, 286 I.C.C. 119. See also 272 I.C.C. 648.

Plaintiffs are shippers of said commodities, and others interested in the marketing thereof. The

Note 1. Order dated May 7, 1952, in Investigation & Suspension Docket No. 5500; and orders dated December 15, 1952, in Florida Citrus Commission v. B. & O. R.R. Co., Docket Nos. 31105 and 31106.

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Secretary of Agriculture of the United States intervened, as did also many marketing, transportation and terminal organizations, and public Commissions. The cause is submitted as on final hearing.

Substantially all carload shipment of fresh fruits and vegetables destined to New York City from the South and West are brought to the Jersey side of the Hudson River, and the freight cars, with their cargoes intact, are then ferried across the river on car floats. There are two methods of delivery on the New York side. One is to switch the railroad cars from the car floats to team tracks located on land in lower Manhattan, where the consignees unload the railroad cars and place the cargo directly onto trucks. There is no separate charge for these deliveries.

By the other method, with which we are here concerned, the railroad cars are not switched to land tracks, but remain on the car floats which are placed alongside unloading piers where the carriers unload the cars, placing the contents on the floor of the pier station, where they are picked up by the consignees. The consignees are not allowed to unload the freight cars themselves, as they do on the team tracks, as it is physically impossible to place the consignee's trucks alongside the car floats. The carriers therefore unload the cars, the consignees having access to shipments only after they have been unloaded and placed on the floor of the pier stations. Approximately 75% of the total traffic is handled in this manner, as the team tracks can accommodate only about 25% of the traffic, and it is not feasible to expand them.

For this unloading service the railroads, since November 1, 1948, have been authorized to make additional charges, over and above the line haul rates at designated pier stations in Manhattan, first those proposed by the railroads and approved by the Commission, October 4, 1948, effective November 1, 1948, 272 I.C.C. 648, and later the lower rates approved by the Commission, May 7, 1952, 286 I.C.C. 119, here under attack. No delivery charges are imposed for other types of commodities unloaded at the pier station in like manner as fresh fruits and vegetables. Prior to November 1, 1948, the carriers also unloaded fresh fruits and vegetables at pier stations without additional charges.

In Philadelphia, unloading operations are generally similar to those at New York, except that no car floatage is now performed, and the team tracks are more adequate, but there are designated stations at which the carrier performs the unloading before the consignee has access to the goods.

When certain carriers proposed to establish separate unloading charges at pier stations, effective June 1, 1947, many shippers, including most of the plaintiffs here, protested. The Commission thereupon suspended operation of the schedules to December 31, 1947, and ordered an investigation to determine the lawfulness of the proposed charges. This proceeding is known as Investigation & Suspension Docket No. 5500, the final order in which, dated May 7, 1952, is one of the orders here under attack. See 286 I.C.C. 119.

Following a hearing before a Commission examiner, at which much evidence was presented by the carriers and opposing parties, and after oral

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argument and re-arguments, the Commission on October 4, 1948, issued its report in which it found that the proposed unloading charges were just and reasonable. 272 I.C.C. 648. The Commission thereupon vacated the Suspension order and authorized unloading charges of $1.95, $2.28 and $2.60 per net ton, effective November 1, 1948, on designated groups of said commodities at designated pier stations, in addition to the through line haul rates.

The Commission concluded that these additional charges for unloading service are in substantially the same category as those for switching, transit, refrigeration, and other specific services for which charges are authorized, and that the then expense of unloading was such that the carriers should no longer be required to furnish the service without compensation.

Upon the petitions of many protestants, the Commission thereafter reopened the proceedings for a rehearing. Extensive further evidence was taken by two Commission examiners, who recommended that the charges be held unlawful, but the Commission overruled these recommendations, and entered its final report on May 7, 1952, in which it held that unloading costs should be borne in part by shippers and in part by the carriers, and that not exceeding $1.05, $1.35 and $1.65 per ton would be reasonable charges to be paid by shippers. The Commission thereupon cancelled the existing higher charges, "without prejudice to the establishment of charges in conformity with the views ex-

pressed" in the report on May 7, 1952. The charges thus approved represented only a portion of the actual unloading costs.

On September 22, 1952, certain shippers again attacked the unloading charges approved on May 7, 1952, Docket No. 31105 referring to New York and Docket No. 31106 referring to Philadelphia, asserting that the charges were unjust and unreasonable, enabling the carriers to make two charges for a single service. The Commission dismissed these proceedings by its order of December 15, 1952, which is also here under attack, holding that these petitions assailed the order on substantially the same grounds previously considered and overruled on May 7, 1952 in I. & S. Docket No. 5500.

In this action, brought pursuant to 28 U.S.C.A. 1336, 1337, 1398, 2284 and 2321-25, plaintiffs seek to enjoin and set aside the orders above mentioned. They contend that the line haul rate includes delivery to the consignee at destination, that no additional charge for unloading is justified when no additional service is rendered, and that none is rendered here. Plaintiffs further contend that in authorizing these charges, the Commission acted arbitrarily, unreasonably, unlawfully and contrary to the evidence; that the Commission could not consistently approve the additional unloading charges without first examining the line haul rates as to their adequacy to cover the unloading charges; that plaintiffs were denied an opportunity to be heard as to the justification for and reasonableness of the unloading charges of $1.05, $1.35 and $1.65,

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which were finally allowed; and that the Commission failed to give effect to sec. 15(7) of the Interstate Commerce Act, which places the burden of proof in these matters upon the carriers.

The fact finding and policy making authority in these matters is the Interstate Commerce Commission, in whom Congress has reposed the duty and authority to determine whether charges of this character are appropriate, reasonable, and just. *Arizona Grocery Co.* v. *A.T. & S.F.R. Co.*, 284 U.S. 370 76 L. Ed. 348; *Penn. R. Co.* v. *International Coal Mining Co.*, 230 U.S 184, 196, 57 L. Ed. 1446, 1451; *Mississippi Valley Barge Co.* v. *United States*, 292 U.S. 282, 78 L. Ed. 1260. It is not our function to review the Commission for mere error, nor are we authorized to reverse its findings even though, as original finders of fact, we might have reached a different conclusion on the evidence. It is for us to consider and decide only whether the Commission has acted within its statutory authority, has proceeded in accordance with the essential requirements of due process, has acted upon adequate findings, and whether in the record considered as a whole there is substantial evidence to support those findings. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 139, 83 L. Ed. 1147, 1157; *I.C.C.* v. *Inland Waterways* Corp. 319 U.S. 671, 691, 87 L. Ed. 1655, 1668; *I.C.C.* v. *Illinois Cent. R. Co.*, 215 U.S. 452, 470, 54 L. Ed. 280, 288.

The point at which a carrier's line haul service begins or ends is a question of fact to be deter-

mined by the Commission, not by the courts. The commission's findings on that question will not be disturbed by the courts if supported by evidence. *United States* v. *Wabash R. Co.,* 321 U.S. 403, 408, 88 L. Ed. 827, 831; *I.C.C.* v. *Hoboken R. Co.,* 320 U.S. 368, 88 L Ed 107; *United States* v *American Tin Plate Co,* 301 U.S. 402, 81 L. Ed. 1186; *United States* v. *Pan Amer. Pet. Co.,* 304 U.S. 156, 82 L. Ed. 1262; *B.&O. R. Co.* v. *United States,* 305 U.S. 507, 525, 83 L. Ed. 318, 329; *Swift & Co* v. *United States,* 316 U.S. 216, 86 L. Ed. 1391; *A.T. & S.F.R. Co.* v. *United States,* 295 U.S. 193, 79 L. Ed. 1382; *Armour & Co.* v. *Alton R. Co,* 312 U.S. 195, 85 L. Ed. 771.

Whether a terminal service, such as this unloading operation, shall in the circumstances involved be treated as in addition to, or as a part of, the service covered by the line haul rate, is a question upon which the findings of the Commission are conclusive, if supported by substantial evidence. *Adams* v. *Mills,* 286 U.S., 397, 410, 76 L. Ed. 1184, 1193. In the last cited case, the additional charge was disapproved. Although the historical aspects of that case bear a noticeable resemblance to this, and the additional charges were there disallowed, those are circumstances to be resolved by the Commission. A prior existing custom of performing the additional service without charge is not controlling. *United States* v. *Smelting Co.,* 339 U.S. 186, 94 L. Ed. 750.

It is not essential that the Commission first review in detail the line haul rates before allowing

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the unloading charges under consideration. What the Commission is really deciding here is, not the adequacy or inadequacy of line haul rates to cover the unloading service, but where the carrier's line haul service ends, and whether unloading is a justifiable additional service, of value to the consignee, for which he should pay at least a part of the cost. As we have seen, determination of these matters is confided by Congress to the Commission, whose decision, if supported by substantial evidence, is conclusive on the courts, as these are discretionary administrative matters in a specialized field, recognized as such by Congress. While the Commission is not precluded from considering the through rate, it is not *required* to consider it in determining the reasonableness of a separately stated accessorial charge. *Barringer* v. *United States,* 319 U.S. 1, 87 L. Ed. 1171, where the Supreme Court said: "But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism."

The Commission has found that the level of line haul rates to New York and Philadelphia is no higher than the rates to other consumer points where shippers unload or where charges are assessed for unloading. It has also found that unloading is an additional service, wholly distinct

from delivery; that pier station unloading by the carrier in New York is essential, as the team tracks are inadequate, can not be enlarged, and there are no physical means by which the consignee's trucks may reach the car floats; that this method of unloading saves the payment of switching charges by the consignee, avoids traffic congestion, and facilitates deliveries; and that it is beneficial to consignees, for the additional reason that in taking delivery on the pier station floor, the consignee has the advantage of displaying the entire contents of a car to prospective buyers, and of using the pier station facilities as a sales place. Comparable benefits accrue at Philadelphia.

Based upon these findings, which are amply supported by evidence, the Commission found that the line haul service terminated when the cars reached the pier station, just as they found it terminated at the interchange yards in the Tin Plate and Pan American Petroleum cases, supra, in which the Supreme Court accepted the Commission's findings as conclusive. The evidence also supports the Commission in finding that unloading by the carrier is a desirable and justifiable accessorial service, of value to the consignee, and that he should pay a part of the costs, and that conditions have materially changed since the time when the carrier performed that service without charge.

Plaintiffs assert that they were not given an opportunity to be specifically heard upon the reasonableness of the reduced rates of $1.05, $1.35, and $1.65 per ton, and claim that they were thereby denied due process. But the Commission had just concluded, not one but two, exhaustive and compre-

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hensive investigations of the entire subject of unloading charges at these points, based upon the higher rates then in effect, during which plaintiffs, and others, were afforded a full opportunity to be heard upon all phases of the subject. As a result of these hearings, the Commission found the existing rates too high, but that the reduced rates above mentioned would be reasonable, and that the charge was justified as for an additional service.

Instead of merely setting aside the old rates, thus leaving the matter undetermined, the Commission brought the controversy to a close by setting the old rates aside "without prejudice to the establishment of charges in conformity with the views expressed herein," that is, in the Commission's report. The carriers then put the reduced rates into effect.

Having just completed a thorough investigation of the entire subject, during which plaintiffs were fully heard, it would have been a work of supererogation to conduct a further hearing upon these lower rates, the reasonableness of and justification for which was already shown by the evidence. It was clearly within the Commission's power not only to condemn the then existing rates as unreasonable, but at the same time and upon the evidence already taken to fix rates that would be just and reasonable. In this, there was no denial of due process to plaintiffs. Plaintiffs were fully heard upon the entire matter. The situation is the same in principle as where a plaintiff demands $1,000 of a defendant, the court finding that he is not entitled to $1,000 but that on the evidence he is entitled to $500, and awards that sum. In these circumstances the de-

fendant could not complain of a denial of due process because he was not again heard on his liability for $500. *Akron C. & Y. Ry. Co.* v. *United States,* 22 Fed. (2) 199, 203.

Nor does it appear to us that the Commission erroneously relieved the carriers of the burden of proof cast upon them in these matters by sec. 15(7) of the Interstate Commerce Act. The Commission's "notice" of October 10, 1950, that the "record is deficient" as to certain evidence, and assigning the case for further hearing as to the comparative cost of team track and platform delivery, merely extended the evidence into an additional field of inquiry. Nothing appears in this procedure which tends to shift the burden of proof to others than the carriers.

In disposing of this matter, the Commission has clearly acted within its statutory authority; its proceedings have been conducted consistently with due process; its findings are adequate and supported by substantial evidence. In these circumstances, the relief sought by plaintiffs must be denied, and the complaint dismissed at the cost of plaintiffs.

Dismissed.

LOUIE W. STRUM,
U. S. Circuit Judge.
WILLIAM J. BARKER,
U. S. District Judge.
DOZIER A. DEVANE,
U. S. District Judge.

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UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF FLORIDA,
ORLANDO DIVISION

No. 597 Orl. Civ.

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, NEVINS FRUIT COMPANY, AND DR. P. PHILLIPS COOPERATIVE, PLAINTIFFS,

versus

UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

DEVANE, DISTRICT JUDGE, Dissenting:

The record in this case discloses it is the desire of the carriers affected to have the same unloading practices in effect at Philadelphia that are in effect at New York, and I will, therefore, confine this dissent to the situation at New York.

In my opinion the majority enlarges the authority of the Interstate Commerce Commission over specific freight rates to unprecedented and unauthorized limits. The Court in effect holds our review of the order of the Commission in this case is limited to the mere matter of due process; i.e., notice and hearing. In reaching this conclusion the court brushes aside the following undisputed factual questions which, in my opinion, are controlling of the case:

1. Unloading at New York was originally inaugurated by the carriers concerned for their own convenience and benefit.

2. It is now and always has been the most economical way the carriers may make deliveries of freight at New York.

3. The line-haul rates were originally established to include and have always included compensation for unloading costs at New York. The Interstate Commerce Commission has so held in numerous cases.

4. When the unloading charges were made effective by the Interstate Commerce Commission the line-haul rates were then, and are now, in excess of just and reasonable rates based upon the cost of transporting and unloading fruits and vegetables at New York.

The first three points stated above are so thoroughly covered and completely presented by the report on rehearing proposed by Russell M. Brown and J. M. Walsh, Interstate Commerce Commission Examiners, and in the second report on further rehearing proposed by J. M. Walsh, Examiner, (Exhibits H and I to the complaint) that the Court considers it quite unnecessary to enlarge upon what the Examiners say on these points in the two reports. They concluded in each report that the carriers failed to meet the burden of proof that the assailed charges were just and reasonable, and therefore failed to meet the requirements of Section 15(7) of the Interstate Commerce Commission Act. Having reached this decision, they concluded in the first report that it was unnecessary to consider whether there was also a violation of Sections 2 and 3 of the Act. In the second report Examiner Walsh also found and held that the

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proposed unloading charges were in violation of Section 3(1) of the Act.

In my opinion, the carriers not only failed to meet the requirements of Section 15(7) of the Act, but the evidence in the case also clearly establishes a violation of Section 2 and 3(1) of the Act. Unloading is performed by the carriers of almost all perishable freight consigned to New York. The unloading charges are made applicable only to fruits and vegetables, while other similar perishable products such as butter, butter solids, cheese, eggs, dressed poultry, fresh meat, fish, oysters and raw milk, are unloaded by the carrier without the imposition of any unloading charges. This, in my opinion, constitutes a clear violation of Sections 2 and 3(1) of the Act.

The fourth point enumerated above was not considered by the examiners or the Interstate Commerce Commission when this case was before the Commission. The examiners merely held that under Section 15(7) of the Act, the obligation rested upon the carriers to show the reasonableness of the line-haul rates and it was because of the carriers' failure to meet this burden that they recommended the proposed unloading charges be cancelled. The Interstate Commerce Commission simply brushed aside the question of the reasonableness of the line-haul rates and decided the case solely on the reasonableness of the unloading charges.

At the time the Commission had this case under consideration it also had under consideration a general application for an increase in freight rates (interstate and intrastate) throughout the United States to meet rising costs and diminishing passen-

ger revenue. As a result of the application for this general increase the Commission allowed a thirty percent (30%) increase in freight rates, chiefly to make up for passenger operating deficits. 264 I.C.C. 695; 266 I.C.C. 537; 269 I.C.C. 33; 270 I.C.C. 81, 93, 403. The legality of this action on the part of the Commission was challenged in *King, et al.* v. *United States of America, et al.*, 344 U.S. 254. On the record in that case the carriers frankly conceded that the railroads of this country by and large are making a substantial profit out of their overall freight service, and that considered alone, increases in freight rates could not have been justified in that case on the ground that the railroads needed the additional revenue to pay the cost of rendering freight services and a fair return on the property devoted to such services. The difference between that case and this case is of grave importance as to the power of the Interstate Commerce Commission over freight rates. In the former case there was a general increase made in freight rates to cover the heavy losses resulting from passenger operations. Congress having authorized such action and the Interstate Commerce Commission having taken such action, the Court did not have the authority to override the same. In this case, however, the carriers have limited their efforts to secure increases in rates to a small segment of freight transportation and the Commission by its order has cast a burden upon this small segment of transportation that is not placed upon any other commodities. To hold that the Interstate Commerce Commission has the authority under the Interstate Commerce Act to so discriminate

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against fruits and vegetables or any other classes of commodities is to vest in the Commission authority not to be found in the Interstate Commerce Act. The decision in *King* v. *United States*, supra, is so far reaching in its effect upon freight rates that a grave duty rests upon the Courts to restrict the carriers and the Commission to the principles announced in that case and where, as in this case, it appears that the line-haul rates are in excess of just and reasonable rates additional accessural charges limited to particular classes of freight should not be countenanced.

Assuming the carriers are entitled to additional compensation for the cost of unloading freight at New York and Philadelphia, their remedy, under the Interstate Commerce Act, is to secure it by agreement with connecting carriers affected or make application to the Commission for a greater division of the line-haul rates to cover the needed additional costs instead of loading such costs on the farmers of this country.

In my opinion, the order of the Commission of May 7, 1952, 286 ICC 119, clearly violates Sections 2, 3(1) and 15(7) of the Interstate Commerce Act and, for this reason, is illegal and should be set aside.

——— ———,
District Judge.

APPENDIX B

The following are the relevant provisions of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088-1089):

"SEC. 202. The Congress hereby declares that a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation. It is further declared to be the policy of Congress to promote through research, study, experimentation, and through cooperation among Federal and State agencies, farm organizations and private industry a scientific approach to the problems of marketing, transportation, and distribution of agricultural products similar to the scientific methods which have been utilized so successfully during the past eighty-four years in connection with the production of agricultural products so that such products capable of being produced in abundance may be marketed in an orderly manner and efficiently distributed. In order to attain these objectives, it is the intent of Congress to provide for (1) continuous research to improve the marketing, handling, storage, processing, transportation, and distribution of agricultural products; (2) cooperation among Federal and State agencies, producers, industry organizations, and others in the development and effectuation of research and market-

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ing programs to improve the distribution processes; (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed, that dietary and nutritional standards may be improved, that new and wider markets for American agricultural products may be developed, both in the United States and in other countries, with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner. In effectuating the purposes of this title, maximum use shall be made of existing research facilities owned or controlled by the Federal Government or by State agricultural experiment stations and of the facilities of the Federal and State extension services. To the maximum extent practical marketing research work done hereunder in cooperation with the States shall be done in cooperation with the State agricultural experiment stations; marketing educational and demonstrational work done hereunder in cooperation with the States shall be done in cooperation with the State Agricultural extension service; market information, inspection, regulatory work and other marketing service done hereunder in cooperation with the State

agencies shall be done in cooperation with the State departments of agriculture, and State bureaus and departments of markets" (7 U.S.C. § 1621).

"SEC. 203. The Secretary of Agriculture is directed and authorized:

* * * * *

(j) To assist in improving transportation services and facilities and in obtaining equitable and reasonable transportation rates and services and adequate transportation facilities for agricultural products and farm supplies by making complaint or petition to the Interstate Commerce Commission, the Maritime Commission, the Civil Aeronautics Board, or other Federal or State transportation regulatory body with respect to rates, charges, tariffs, practices, and services, or by working directly with individual carriers or groups of carriers" (7 U.S.C. § 1622(j)).

The following are the relevant provisions of the Agricultural Adjustment Act of 1938 (52 Stat. 31, 36):

"SEC. 201. (a) The Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges,

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tariffs, and practices relating to the transportation of farm products, the Commission shall cause the Secretary to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard" (7 U.S.C. § 1291 (a)).

"(b) If such rate, charge, tariff, or practice complained of is one affecting the public interest, upon application by the Secretary, the Commission shall make the Secretary a party to the proceeding. In such case the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. The liability of the Secretary in any such case shall extend only to liability for court costs" (7 U.S.C. § 1291 (b)).

The following are the relevant provisions of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U.S.C. § 1 *et seq.*):

NATIONAL TRANSPORTATION POLICY

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establish-

ment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy" (49 U.S.C. preceding § 1).

* * * * *

SEC. 1(3) (a). "* * * The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *" (49 U.S.C. § 1(3) (a)).

SEC. 1(5) "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and rea-

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sonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful" (49 U.S.C. Supp. V § 1(5)).

"SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful" (49 U.S.C. § 2).

"SEC. 3 (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any

respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description" (49 U.S.C. § 3 (1)).

SEC. 6 (7) "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs (49 U.S.C. § 6 (7)).

SEC. 15 (6) "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between

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the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than an-

other carrier of the joint rate, fare or charge" (49 U.S.C. § 15 (6)).

SEC. 15 (7) "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension,

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the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible" (49 U.S.C. § 15 (7)).

SEC. 15a(2) "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in

the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service" (49 U.S.C. § 15a(2)).

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE SECRETARY OF AGRICULTURE OPPOSING MOTIONS TO AFFIRM

INTRODUCTORY STATEMENT

In compliance with Rules 7 (3) and 12 (3) of the Revised Rules of the Supreme Court of the United States the appellant Secretary of Agriculture (an intervening plaintiff in the Court below) submits this brief in opposition to the motions to affirm filed by the Interstate Commerce Commission and the intervening defendants.

This brief is supplemental to the Statement of the Secretary of Agriculture as to Jurisdiction

filed in this proceeding which sets forth in detail the position of the Secretary of Agriculture with respect to most of the contentions raised in the motions to affirm. The arguments advanced in the Secretary's jurisdictional statement are not repeated in this brief.

ARGUMENT

I

The Commission and the intervening defendants contend that the Secretary of Agriculture's assignment of error number 2—involving the issue as to whether unloading charges on fruits and vegetables at New York are an unjust discrimination or an undue or unreasonable prejudice or disadvantage in violation of sections 2 and 3 (1) of the Interstate Commerce Act inasmuch as no similar charges are imposed on any other similar freight unloaded by the carriers at New York—was not litigated in the District Court and is not properly before this Court on appeal (Commission's motion, fn. 9; Intervening Defendants' motion, fn. 2). The appellees present no argument on the merits of this issue in support of their motions to affirm.

However this issue was litigated in the District Court and is properly before this Court on appeal. The Hearing Examiner for the Commission found that:

> "* * * respondents have continued to perform such unloading without charge in

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> respect of other commodities at the identical New York pier stations at which charges are collected for unloading fruits and vegetables. For instance, canned fruit juices originating at points in Florida are unloaded without additional charge, other than the line-haul rate, at the same New York piers at which charges are collected for unloading fruits and vegetables. As there is keen competition between fresh fruits and fruit juices in household consumption, the assailed unloading charges are unduly prejudicial to fresh fruits and unduly preferential of fruit juices in violation of section 3 (1) of the act."[1]

The Examiner concluded:

> "Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of section 3 (1) of the act."[2]

The complaint filed in the District Court by the Secretary of Agriculture, in addition to the general allegations that "the Commission erred in approving the continued imposition of unloading charges although reduced in measure"[3] and that "the Commission erred in summarily dismissing

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[1] Second Report on Further Hearing Proposed by M. J. Walsh, Examiner, p. 24.

[2] *Id.* at p. 25.

[3] Complaint, paragraph X (3).

the complaints in Nos. 31105 and 31106,"[4] quotes the conclusion by the Commission's Examiner that the unloading charges "are also in violation of section 3 (1) of the act."[5] The Commission expressly ruled on this issue in the administrative proceeding,[6] and these allegations in the complaint in the District Court, challenging the entire administrative action in this case, were sufficient to put the Commission and the intervening railroads on notice that the issue was in controversy in the District Court. All of the evidence received in the administrative proceeding in this case was certified to the District Court, and, therefore, all of the evidence with respect to this issue was before the District Court. The issue under sections 2 and 3 (1) of the Act was actually litigated in the District Court and is one of the bases for the dissenting opinion. Judge De Vane, dissenting, concluded that:

> "In my opinion the carriers not only failed to meet the requirements of Section 15 (7) of the Act, but the evidence in the case also clearly establishes a violation of Sections 2 and 3 (1) of the Act. Unloading is performed by the carriers of almost

[4] Complaint, paragraph X (4).

[5] Complaint, paragraph VIII.

[6] The Commission held that the "record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 or 3 of the act" (286 I. C. C. 119, 142).

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> all perishable freight consigned to New York. The unloading charges are made applicable only to fruits and vegetables, while other similar perishable products, such as butter, butter solids, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk, are unloaded by the carrier without the imposition of any unloading charges. This, in my opinion, constitutes a clear violation of Sections 2 and 3 (1) of the Act" (114 F. Supp. 420, 426).

There can be no doubt that this issue was before the District Court and was considered and resolved on the merits by the District Court. But assuming, *arguendo,* that the allegations in the complaint were not entirely explicit, in this respect, the "whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalism of the common law. It is now generally accepted that there may be no subsequent challenge of issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise. If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings." *Kuhn* v. *Civil Aeronautics Board,* 183 F. 2d 839, 841–842 (C. A. D. C.). Accord: *Labor Board* v. *Mackay Co.,* 304 U. S. 333, 349–350; *Pasquel* v. *Owen,* 186 F. 2d 263, 271 (C. A. 8); *Hutchins* v. *Akron,*

Canton & Youngstown R. Co., 162 F. 2d 189, 192 (C. A. 6).

Hence the issue under sections 2 and 3 (1) of the Act is properly before this Court on appeal. The Commission and the intervening railroads have failed to meet this argument set forth in the jurisdictional statement of the Secretary of Agriculture.

II

The other errors assigned by the Secretary of Agriculture are discussed in detail in the Secretary's jurisdictional statement, and the motions to affirm advance no relevant argument to the contrary. The Commission's main argument, in its motion to affirm, is that the "Commission's determination of the point in time and place at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts." But the Commission, in its motion to affirm, ignores the fact—discussed at length in the Secretary's jurisdictional statement—that the Commission did *not* make a finding that the carriers' transportation service ended prior to the unloading involved in this case or that the delivery of freight at New York and Philadelphia was not previously included in the line-haul rates.

To the contrary, the Commission found that "[d]elivery to the consignee is not effected until after the cars are unloaded and the lading placed

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at a convenient location on the pier floor" (272 I. C. C. 648, 654–655; see also 286 I. C. C. 119, 125, 129, 133–139), and that the challenged charges are "for making delivery at New York piers" (286 I. C. C. 119, 129). The Commission concedes that for over 50 years the railroads have been compensated, either in whole or in part, for the transportation of fruits and vegetables to New York and Philadelphia, including delivery, by their line-haul rates.[7] Nonetheless in considering the reasonableness of the proposed charges *for making delivery* the Commission concedes that it did not consider the extent to which the line-haul rates adequately compensate the carriers for making delivery (286 I. C. C. 119, 140). Hence the Commission's action in approving the additional charges for making delivery is manifestly erroneous.

The intervening railroads state that "Plaintiff-Appellants assert that these unloading charges are improper because the unloading service precedes delivery." But that is not a correct statement of our position. The jurisdictional statement of the Secretary of Agriculture makes it plain that the "issues in this case relate primarily to the authority of the Interstate Commerce Commission to impose charges on shippers for

[7] See quotations from the Commission's report set forth in the Secretary of Agriculture's jurisdictional statement in the second paragraph under the heading "The Questions Are Substantial."

unloading fruits and vegetables at New York and Philadelphia without determining whether the total payment received by the railroads for such unloading is just and reasonable."

The Commission, in a case decided on June 29, 1953 (*Whitney-Apollo Corp. Terminal Services,* 289 I. C. C. 267, 274), reiterates the position of the appellants in this case that "transportation includes delivery; that whatever is essential to complete delivery the carrier must do; [and] that if it fails to make delivery and the consignee completes the work an allowance is due." But assuming, *arguendo,* that *for the future* the carriers can establish line-haul rates which do not include delivery, the decisive fact is that they did not do so in the past. For over 50 years, the line-haul rates involved have included delivery. Until the Commission determines *the extent,* if any, to which the carriers are not being adequately compensated under their line-haul rates "for making delivery" (286 I. C. C. 119, 129), the Commission cannot determine the extent to which an additional charge is warranted.

The intervening railroads suggest in their motion to affirm that "the Commission properly took the view that the line-haul rates could be presumed to be just and reasonable in the absence of a showing otherwise by the protestants." But this argument overlooks the fact that the line-haul rates, for over 50 years, included delivery at New York and Philadelphia, and, therefore, if any

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presumption is proper, it must be presumed that the line-haul rates are still just and reasonable for the transportation involved, including delivery. The statute places the burden of proof on the carriers to show that the proposed charges are just and reasonable (49 U. S. C. § 15 (7)). The carriers could not fulfill this requirement without showing the extent, if any, to which they are not adequately compensated under their line-haul rates for making delivery.

The intervening railroads also contend that if "Plaintiff-Appellants were serious in their belief that the publication of separate charges for unloading made the line-haul rates unreasonable, they could have filed a complaint attacking the line-haul rates under Section 13 (1)." But our position is that the unloading charges are illegal, and this proceeding presents that sharply chiseled issue. Judicial review may undoubtedly be had at this time with respect to the Commission's orders approving the unloading charges.

III

The Secretary of Agriculture assigned as error number 5 that the orders of the Commission, establishing identical unloading charges at New York and Philadelphia even though it is conceded by the Commission that unloading costs at Philadelphia are substantially lower than at New York, are not supported by substantial evidence and adequate findings. In its motion to affirm,

the Commission states that a separate charge for special sorting is made by the carriers at New York, but not at Philadelphia, and furthermore that "the record indicates the desirability of a parity of charges for unloading" at the two cities. However there is no evidence or finding that the cost of unloading and sorting at Philadelphia is as great as the cost of unloading at New York, and, moreover, there is no evidence or subsidiary findings to justify the Commission's assertion that "the record indicates the desirability of a parity of charges for unloading" at New York and Philadelphia. The Commission's finding, in this respect, is based solely upon an unsupported statement in a brief filed with the Commission by the railroads.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Statement of the Secretary of Agriculture as to Jurisdiction, it is respectfully submitted that the Court should deny the motions to affirm, and the appellant Secretary of Agriculture prays that the Court note probable jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE SECRETARY OF AGRICULTURE

PRIOR OPINIONS

The report of the Commission in 1952 on rehearing and further hearing (I R. 23–23gg) [1] is in 286 I. C. C. 119. The prior report of the Commission in 1948 (I R. 24–24s) is in 272 I. C. C. 648. The opinion of the District Court (I R. 204–215) is in 114 F. Supp. 420.

[1] The printed record consists of three volumes, and volume I of the record is referred to in this brief as "I R," and the subsequent volumes are referred to herein as "II R" and "III R," respectively.

JURISDICTION

This action was instituted to enjoin and set aside certain orders (I R. 25–27, 224) of the Interstate Commerce Commission, and in accordance with the requirement in 28 U. S. C. 1952 ed. § 2325 the cause was heard by a District Court of three judges. The District Court entered its judgment on August 31, 1953, denying the applications to set aside, and to enjoin the enforcement of, the Commission's orders (I R. 203–204). The petition by the Secretary of Agriculture of the United States for an appeal was presented to the District Court on October 28, 1953 (I R. 215); the appeal was allowed by the District Court on October 28, 1953 (I R. 220); and probable jurisdiction was noted by the Supreme Court on February 1, 1954 (III R. 1555). This Court is authorized to review the case on direct appeal pursuant to 28 U. S. C. 1952 ed. §§ 1253 and 2101 (b).

The Secretary of Agriculture intervened, as a matter of right, under Rule 24 (a) of the Federal Rules of Civil Procedure, in the action in the District Court (I R. 201–202). The right of the Secretary of Agriculture to intervene in the proceeding before the Commission, and in the review in the District Court, and to appeal from the judgment of the District Court is conferred by § 201 of the Agricultural Adjustment Act of 1938, as amended (52 Stat. 31, 36, 7 U. S. C. 1952 ed.

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§ 1291), in which it is provided, *inter alia,* that the Secretary may, as a matter of right, intervene in a proceeding before the Interstate Commerce Commission relative to the regulation of the transportation of agricultural commodities and products and in "such case the Secretary shall have the rights of a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination" (7 U. S. C. 1952 ed. § 1291 (b)). The Secretary's participation in this case is also authorized by § 203 (j) of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089, 7 U. S. C. 1952 ed. § 1622 (j)), by § 17 (9) of the Interstate Commerce Act (54 Stat. 916, 49 U. S. C. § 17 (9)), by 28 U. S. C. 1952 ed. §§ 1253 and 2323, and by § 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1952 ed. § 1009).

QUESTIONS PRESENTED

The line-haul freight rate established by railroad carriers in the United States, i. e., the published freight rate between cities, includes delivery of the freight to the consignee. Delivery is generally effected by placing the loaded freight car on a team track at a location accessible to the consignee. However, the team-track facilities at New York are adequate to handle only a small part of the great volume of fruits and vegetables received at New York, and the carriers move the

freight cars, by means of car floats, across the Hudson River from Jersey City, New Jersey, and vicinity to the piers at New York, and the unloading of the cars is performed by the carriers. The shippers are not permitted access to the cars on the car floats. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. That method of making delivery of freight at New York is the most economical method whereby the carriers may deliver the vast volume of freight shipped to New York, and no charge for such delivery, other than the line-haul rate, has been made for over fifty years prior to the imposition of the charges in this case. The unloading of fresh fruits and vegetables is also performed by the carriers at certain terminals in Philadelphia, Pennsylvania, and the shipper is not permitted access to the cars at those terminals. Delivery to the consignee is not effected until after the cars are unloaded. No charge for such delivery at Philadelphia, other than the line-haul rate, has been made for over fifty years prior to the imposition of the charges challenged in this case. At the hearing before the Interstate Commerce Commission to determine the validity of proposed charges for making delivery of fresh fruits and vegetables at New York and Philadelphia, no evidence was introduced to show that the carriers are not adequately compensated, for such delivery, by their line-haul rates. The Com-

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mission did not determine whether the proposed aggregate charges, consisting of the line-haul rates plus the proposed delivery charges, are just and reasonable for the transportation of the fresh fruits and vegetables, including delivery. In these circumstances, the questions are:

(1) Whether the Commission has authority to approve separate charges by the appellee railroad carriers, for making delivery of fresh fruits and vegetables at New York and Philadelphia, and if so whether the Commission may approve the separate charges without determining whether the line-haul rates plus the delivery charges, i. e., the entire charges for the transportation, including delivery, are just and reasonable.

(2) Whether the delivery charges on fresh fruits and vegetables at New York are unjust discriminations and undue or unreasonable prejudices or disadvantages in violation of sections 2 and 3 (1) of the Interstate Commerce Act inasmuch as no similar charges are imposed on any other freight delivered by the carriers at New York, including other similar perishable agricultural commodities, e. g., butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk.

(3) Whether the orders of the Commission, establishing identical charges for making delivery at New York and Philadelphia even though it is conceded that the costs for making delivery at Philadelphia are substantially lower than at New

York, are supported by substantial evidence and adequate findings.

(4) Whether substantial evidence on the record as a whole and adequate findings support the Commission's orders.

STATUTES INVOLVED

The statute primarily involved is Part I of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U. S. C. § 1 *et seq.*). The pertinent provisions of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U. S. C. § 1 *et seq.*), the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089; 7 U. S. C. 1952 ed. § 1621), and the Agricultural Adjustment Act of 1938 (52 Stat. 31, 36; 7 U. S. C. 1952 ed. § 1291) are set forth in the Appendix, *infra,* pp. 91–101.

STATEMENT

This case involves the validity of the approval (I R. 25–27, 224) by the Interstate Commerce Commission of separate charges, in addition to the line-haul freight rates, proposed by the appellee railroad carriers for making delivery of fresh fruits and vegetables at New York and Philadelphia.

1. THE ADMINISTRATIVE PROCEEDINGS

The delivery charges challenged in this proceeding were filed with the Commission to become effective on June 1, 1947, but the tariffs were suspended by the Commission's order of May 28,

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1947, pending an investigation of the lawfulness of the charges (I R. 224). In its report dated October 4, 1948, the Commission, with Chairman Lee and Commissioners Aitchison, Splawn, and Alldredge dissenting, and Commissioner Patterson not participating, found the proposed charges "just and reasonable" (I R. 24r; 272 I. C. C. 648, 663).[2] Thereafter the charges, ranging from $1.95 to $2.60 per net ton, i. e., approximately $35 to $47 per car, became effective on November 1, 1948. These charges were 30% higher than the charges originally proposed because of a general increase in all railroad rates and charges authorized by the Commission (I R. 23b). In December 1948, various petitions were filed with the Commission seeking to have the proceeding reopened and on June 9, 1949, the Commission reopened the proceeding for rehearing. After receiving additional evidence the two Hearing Examiners for the Commission issued their report recommending that the Commission "should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed" (I R. 80).

[2] The report of the Commission in 1948 is entitled *Unloading Charges on Fruits and Vegetables at New York and Philadelphia* and is cited throughout this brief as "(I R. —; 272 I. C. C. 648, —)" indicating the relevant pages in the printed record in this case and in 272 I. C. C.

Subsequently, the Commission issued a notice that the record "is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing" (I R. 293). Further evidence was received and the Hearing Examiner issued a report recommending that upon further hearing "the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of section 3 (1) of the act" (I R. 115–116).

The report of the Commission dated May 7, 1952, reversed the findings and conclusions by the Examiners and approved the proposed delivery charges at New York and Philadelphia at reduced rates varying from $1.05 to $1.65 per net ton (I R. 23–23cc; 286 I. C. C. 119, 119–142).[3] On September 16, 1952, and on September 23, 1952, certain of the plaintiffs filed complaints with the Commission attacking the delivery charges at New York and Philadelphia, respectively (I R. 28–41; III R. 1544–1545, 1549–1550), and on December 15, 1952, the Commission, on motion and without further hearing, dismissed these complaints (I R. 26–27).

[3] The report of the Commission in 1952 is entitled *Unloading Charges on Fruits and Vegetables at New York and Philadelphia* and is cited throughout this brief as "(I R. —; 286 I. C. C. 119, —)" indicating the relevant pages in the printed record in this case and in 286 I. C. C.

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2. THE PARTIES IN THE DISTRICT COURT

This action was instituted in the United States District Court for the Southern District of Florida, Orlando Division, by the Florida Citrus Commission, Growers and Shippers League of Florida, Chase and Company, Nevins Fruit Company, and Dr. P. Phillips Cooperative to enjoin and set aside the orders of the Interstate Commerce Commission approving the proposed delivery charges (I R. 1–22). The Secretary of Agriculture of the United States intervened in the District Court proceeding (I R. 201–202), and also numerous other parties intervened in the proceeding in the District Court to enjoin and set aside the Commission's orders, viz., The City of New York, The Port of New York Authority, California Citrus League, California Grape and Tree Fruit League, Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, B. M. Young, New York Fruit Auction Corporation, United Fruit Buyers Association, Inc., United Fresh Fruit and Vegetable Association, Idaho Shippers Association, Inc., National Onion Association, and Western Growers Association (I R. 201–202).

The United States was made a defendant in accordance with the requirement in 28 U. S. C. 1952 ed. § 2322, but the United States remained neutral in the litigation (I R. 199–201).

The Baltimore & Ohio Railroad Company, Erie Railroad, New York Central Railroad Company, Pennsylvania Railroad Company, and Reading Company intervened to defend the action of the Commission approving their proposed delivery charges (I R. 202–203).

3. DECISION OF THE DISTRICT COURT

The District Court held, with one Judge dissenting, that the orders of the Commission approving the delivery charges were valid (I R. 208; 114 F. Supp. 420).[4] The majority opinion reiterated the Commission's finding "that pier station unloading by the carrier in New York is essential, as the team tracks are inadequate, cannot be enlarged, and there are no physical means by which the consignee's trucks may reach the car floats" (I R. 213; 114 F. Supp. at 424). But the majority of the Court concluded that the Commission could approve separate charges for making delivery of fruits and vegetables at New York and Philadelphia without considering the reasonableness of the line-haul rates inasmuch as the majority of the Court believed that "the Commission found that the line haul service terminated when the cars reached the pier station * * *" (I R. 214; 114 F. Supp. at 424).

Judge Dozier A. DeVane, dissenting, stated

[4] The opinion of the District Court is in the case of *Florida Citrus Commission* v. *United States*, 114 F. Supp. 420 (S. D. Fla.).

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that the "majority enlarges the authority of the Interstate Commerce Commission over specific freight rates to unprecedented and unauthorized limits" (I R. 204; 114 F. Supp. at 425), and in concluding that the Commission's orders are illegal Judge DeVane set forth the "following undisputed factual questions" which, in his opinion, are controlling in the case:

> 1. Unloading at New York was originally inaugurated by the carriers concerned for their own convenience and benefit.
>
> 2. It is now and always has been the most economical way the carriers may make deliveries of freight at New York.
>
> 3. The line-haul rates were originally established to include and have always included compensation for unloading costs at New York. The Interstate Commerce Commission has so held in numerous cases.
>
> 4. When the unloading charges were made effective by the Interstate Commerce Commission the line-haul rates were then, and are now, in excess of just and reasonable rates based upon the cost of transporting and unloading fruits and vegetables at New York (I R. 205; 114 F. Supp. at 425–426).

In these circumstances, Judge DeVane concluded that the Commission could not approve the proposed charges without determining the reasonableness of the line-haul rates (I. R. 205–

207; 114 F. Supp. at 426). Judge DeVane also concluded that the evidence in this case "clearly establishes a violation of Sections 2 and 3 (1) of the Act" inasmuch as "unloading charges are made applicable only to fruits and vegetables, while other similar perishable products, such as butter, butter solids, cheese, eggs, dressed poultry, fresh meat, fish, oysters and raw milk, are unloaded by the carrier without the imposition of any unloading charges" (I R. 205–206; 114 F. Supp. at 426).

4. INTEREST OF THE SECRETARY OF AGRICULTURE OF THE UNITED STATES

The Secretary of Agriculture of the United States is interested in this proceeding as the representative of the agricultural community in the United States. The additional charges for the transportation of fresh fruits and vegetables approved by the Commission will aggregate several million dollars each year, and will be borne to a large extent by the American farmers (II R. 909–910, 943, 961–962, 968, 969, 975). Even if the unloading or delivery charges can be partially shifted to the consumers, the charges will, nonetheless, widen the spread between the price received by the producer and the price paid by the consumer (I R. 552; II R. 582, 591), which is contrary to the expressed purpose of Congress (7 U. S. C. 1952 ed. § 1621) to provide for "an integrated administration of all laws enacted by

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Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and *the price spread between the producer and consumer may be narrowed* * * *." [Emphasis supplied.]

The level and structure of freight rates have been of great concern to the agricultural industry for a long time. *The Transportation Problem of Agriculture,* 1940 Year Book of Agriculture, p. 723; Aitchison, *The Evolution of the Interstate Commerce Act:* 1887–1937, 5 George Washington L. Rev. 296 (1937). The Secretary of Agriculture "is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission" (7 U. S. C. 1952 ed. § 1291 (a)). Also, the Secretary of Agriculture "is authorized to cooperate with and assist cooperative associations of farmers making complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products" (7 U. S. C. 1952 ed. § 1291 (d)).

It is the position of the Secretary of Agriculture that the Commission's orders approving the delivery charges (I R. 25, 224), and the Commission's order of December 15, 1952, dismissing the

complaints attacking the delivery charges (I R. 26–27) are invalid and should be set aside and enjoined.

5. ECONOMIC CONSEQUENCES OF THE DELIVERY CHARGES THAT ARE CHALLENGED IN THIS CASE

The wholesale marketing facilities for fresh fruits and vegetables in New York and Philadelphia are centered around the railroad facilities in those cities, and the marketing enterprise is dependent to a large degree on the continued maintenance of reasonable and adequate transportation by the rail carriers. The delivery charges attacked in this proceeding, if allowed to remain in effect, will substantially disrupt the marketing of fresh fruits and vegetables in New York and Philadelphia. For example, the Commission found that when the delivery charges became effective the consignees attempted to avoid the charges by taking delivery at outlying team-track stations and paying the cost of trucking the commodities into market or by shifting from rail to motor trucks for the entire transportation (I R. 23h–23i; 286 I. C. C. 119, 125–126). In February 1949, deliveries of fresh fruits and vegetables to the New York piers were about 50% less than in February 1948 (I R. 23i; 286 I. C. C. 119, 126). Similar traffic to New York by truck and vessel increased substantially in February 1949 compared with February 1948 (I R. 23i; 286 I. C. C. 119, 126). Later statistics reveal a con-

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tinuation of this trend. In 1952 only 80,989 carlots of fresh fruits and vegetables were unloaded from railroad freight cars at New York City [5] as compared with 114,538 carlots similarly unloaded in 1947.[6] The truck receipts at wholesale and farm markets in New York City have increased from 61,265 carlot equivalents to 65,712 carlot equivalents during the same period.[7] The Commission found that the "diversion of rail shipments from pier stations to other points intensified the problems of the New York produce market, resulting in greater congestion in terminal handling, and in dissatisfaction among buyers, labor, and other elements at that facility" (I R. 23i; 286 I. C. C. 119, 126).

In addition, the report of the Commission states that the City of New York was "planning to rehabilitate its piers at a cost of $78,000,000, but it is intimated that it may not proceed with that program" if the charges for making delivery at the New York piers remain in effect (I R. 23m; 286 I. C. C. 119, 129). "The New York water

[5] *Unloads of Fresh Fruits and Vegetables at New York City, 1952* (U. S. Department of Agriculture, Fruit and Vegetable Branch), p. 6.

[6] *Unloads of Fresh Fruits and Vegetables at New York City, 1947* (U. S. Department of Agriculture, Fruit and Vegetable Branch), p. 4.

[7] *Unloads of Fresh Fruits and Vegetables at New York City, 1947* (U. S. Department of Agriculture, Fruit and Vegetable Branch), p. 4; *Unloads of Fresh Fruits and Vegetables at New York City, 1952* (U. S. Department of Agriculture, Fruit and Vegetable Branch), p. 6.

front contributes from 25 to 40 percent of the basic economy of that city" and the city officials are seriously concerned about the adverse effects which will result from a continuance of the challenged charges (I R. 23m; 286 I. C. C. 119, 129–130). The Port of New York Authority has also temporarily abandoned plans for the construction of a union waterfront terminal at a cost of $27,000,000, in substantially the same location as the pier terminals, because of the disruptive effects of the charges involved in this case (I R. 23m–23n; 286 I. C. C. 119, 130). The Port Authority's plan "called for a structure stretching nearly one-half mile along the North River waterfront, between Duane and Watts Streets" and would have provided a "shedded area equivalent to ten Madison Square gardens."[8] The aggregate savings in the handling of fruits and vegetables at New York as a result of the construction of a union waterfront terminal was conservatively estimated at $9,000,000 per year.[9]

The need for improving the marketing facilities for fresh fruits and vegetables at New York has

[8] *Restudy of Proposal for Development of the Municipally Owned Waterfront and Piers of New York City* (The Port of New York Authority, April 27, 1949), pp. 3–4. See also, *Proposal for Development of the Municipally Owned Waterfront and Piers of New York City* (The Port of New York Authority, February 10, 1948), pp. 28, 36–37, 69–83.

[9] *Restudy of Proposal for Development of the Municipally Owned Waterfront and Piers of New York City* (The Port of New York Authority, April 27, 1949), p. 4.

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been recognized by all persons familiar with the present marketing conditions.[10] The charges for making delivery at the New York piers imposed on November 1, 1948, have prevented the fruition of the plans proposed by the City of New York and the Port of New York Authority for the modernization of the piers and market, and these delivery charges have caused inestimable damage to the agricultural interests.

With respect to Philadelphia, there has been a trend since 1930 toward diversion from the railroads to the trucks of the fruit and vegetable traffic consigned to Philadelphia, and the Commission found that the charges attacked in this case "will further divert the fruit and vegetable traffic from the [railroads'] produce terminals" (I R. 23u; 286 I. C. C. 119, 136). The challenged charges at Philadelphia are also causing some dealers to buy their produce at other cities and, as a result, the entire produce business at Philadelphia will suffer irreparable damage if the delivery charges remain in effect (I R. 23t–23w; 286 I. C. C. 119, 135–137).

[10] See e. g., *Annual Report of the New York State Temporary Commission on Agriculture*, 1953–54 (Legislative Document (1954) No. 24, pp. 2–3, 18–24); *The Wholesale Fruit and Vegetable Markets of New York City* (U. S. Department of Agriculture, April 1940), pp. 48–53.

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding and concluding that the Commission has authority to approve separate charges by the appellee railroad carriers, in addition to their line-haul rates, for delivering fresh fruits and vegetables at New York and Philadelphia, and that such charges may be approved by the Commission without determining whether the line-haul rates plus the delivery charges, i. e., the entire charges for the transportation, including delivery, are just and reasonable.

2. In failing to hold that the delivery charges on fresh fruits and vegetables at New York are unjust discriminations and undue and unreasonable prejudices or disadvantages in violation of sections 2 and 3 (1) of the Interstate Commerce Act inasmuch as no similar charges are imposed on any other freight delivered by the carriers at the New York piers, including other similar perishable agricultural commodities, e. g., butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk.

3. In holding and concluding that adequate findings and substantial evidence, on the record as a whole, support the orders by the Commission.

4. In holding and concluding that the orders of the Commission, establishing identical delivery charges at New York and Philadelphia even though it is conceded that delivery costs at Phila-

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delphia are substantially lower than at New York, are supported by substantial evidence and adequate findings.

5. In holding and concluding that the Commission found: (a) that unloading is an additional service, wholly distinct from delivery; (b) that the method of unloading at New York saves the payment of switching charges "by the consignee"; and (c) that the line-haul service, prior to November 1, 1948, terminated when the cars reached the pier station.

6. In failing to suspend, enjoin, annul, and set aside the parts of the Commission's orders which approve the imposition of delivery charges at New York and Philadelphia in addition to the line-haul rates, and the Commission's order of December 15, 1952, dismissing the complaints attacking such delivery charges.

SUMMARY OF ARGUMENT

I

The issues in this case relate to the action of the Interstate Commerce Commission in approving separate charges by the railroads for delivering fresh fruits and vegetables at the New York piers and at the produce terminal platforms in Philadelphia.

The railroads have been compensated for over 50 years by their line-haul rates for unloading, i. e. delivering, fresh fruits and vegetables at the New York piers and at the produce terminal

platforms in Philadelphia. The Commission found that no separate charges "such as those under consideration have applied to this traffic in the past," and prior to November 1, 1948, when the unloading or delivery charges became effective, "there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic * * *" (I R. 23b; 286 I. C. C. 119, 120–121). Also the answer of the Commission, in this case in the District Court, admits that "separate charges for unloading said commodities at New York and Philadelphia were not assessed by the said railroads prior to November 1, 1948" (I R. 179).

The Commission found that in New York the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken" by the consignees, and at the produce terminal platforms in Philadelphia the consignees are not permitted access to the cars prior to the unloading by the railroads (I R. 23g, 23r–23t; 286 I. C. C. 119, 125, 134–135). The special and distinctive circumstances at the New York piers are such that delivery cannot be made by the railroads without first unloading the freight. The Commission found that "it would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York" (I R. 23n; 286 I. C. C. 119, 130). Instead of delivering the

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fruits and vegetables at team tracks, the carriers place the freight cars on car floats at Jersey City, New Jersey, and vicinity and then by means of tug boats move the cars across the Hudson River to the New York piers. The Commission found that there "are no physical means by which consignees' trucks can reach the car floats," and the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken" (I R. 23g; 286 I. C. C. 119, 125). Unloading by the carriers is essential to delivery, and the method of delivery used by the railroads at the New York piers is the most economical method whereby the railroads may deliver the vast volume of freight at the piers.

The line-haul rates, for shipments to the New York piers and to the produce terminal platforms in Philadelphia, include compensation to the railroads for unloading, i. e., delivering, the fresh fruits and vegetables. In prior proceedings, involving the line haul rates, the railroads have "emphasized the magnitude of their terminal costs, including unloading by them of the traffic as an essential part of delivery * * *" (I R. 114). The line-haul rates include compensation for unloading the freight, i. e., delivery, and the line-haul rates have been divided between carriers on the basis of evidence relative to the expenses incurred by the railroads in unloading the freight. See, e. g., *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, 139; *Erie R. R.*

Co. v. *Alabama & V. Ry. Co.*, 98 I. C. C. 268, 281. The carriers have recognized, in proceedings before the Commission, that the line-haul rates include compensation to the carriers for unloading the freight. Also it cannot be assumed that the railroads gratuitously performed, for more than 50 years, the unloading or delivery service in New York and Philadelphia. *Interstate Commerce Commission* v. *Chicago &c R'd. Co.*, 186 U. S. 320, 336; *American Express Co.* v. *United States*, 212 U. S. 522, 526–527, 532; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406; *Ex parte No. 104*, 209 I. C. C. 11, 20.

The reasonableness of the line-haul rates, including compensation for unloading the freight, is presumed to continue in the absence of a showing to the contrary. *Swift & Co.* v. *United States*, 343 U. S. 373, 382–383; *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, 379. But in this proceeding the Commission approved the separate charges, for unloading, i. e., delivering, the freight, without making any finding or receiving any evidence as to whether the line-haul rates plus the unloading or delivery charges—i. e., the entire charges for the transportation, including delivery—are just and reasonable.

The railroads are obligated to make delivery, and the principle is established that a separate charge for making delivery is illegal. In circumstances where unloading is an accessorial service

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distinct from delivery, its "cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge." *Railroad Board* v. *Duquesne Co.*, 326 U. S. 446, 453. But there is no statutable requirement that an unloading charge be separately stated, and where unloading is an essential part of delivery a separate charge for making delivery is not permissible.

Assuming, however, that a separate charge may, under some circumstances, be imposed by a carrier for making delivery, nonetheless the approval by the Commission of separate charges in this case is illegal because the Commission did not find that the entire charges for the transportation—consisting of the line-haul rates plus the delivery charges—are just and reasonable. The line-haul rates included, prior to this proceeding, compensation to the carriers for unloading, i. e., delivery, and it is impossible to determine whether an additional charge for delivery is just and reasonable without reconsidering the entire line-haul rates. A carrier should not be permitted to multiply its revenue by merely dividing its rates. The Commission cannot, under the circumstances of this case, approve as just and reasonable separate charges for a service for which compensation is included under the line-haul rates unless the Commission finds that the line-haul rates and the separate charges are, in their entirety, just and reasonable for the entire transportation services. The record contains no finding and no evi-

dence to support a finding that the line-haul rates and the separate charges for delivery are just and reasonable. Hence, the orders of approval by the Commission are invalid, and should be set aside and enjoined.

II

The Commission's orders of approval are also invalid because they are not based on substantial evidence, on the record as a whole, or on adequate findings.

The Commission found that the "[u]nloading operations are less expensive at Philadelphia than at New York" (I R. 23d; 286 I. C. C. 119, 122). But the Commission's orders gave approval to identical charges for making delivery in New York and in Philadelphia (I R. 24r; 272 I. C. C. 648, 663; I R. 23bb; 286 I. C. C. 119, 141). Nothing is revealed in the findings by the Commission as to why the charges should be the same in both cities even though the delivery costs are substantially higher at the New York piers. The findings merely assert the desirability of a parity of charges. The findings fall far short of the criteria of clarity and completeness which were held to be necessary in *Automatic Canteen Co.* v. *Federal Trade Comm.*, 346 U. S. 61, 81; *New York* v. *United States*, 331 U. S. 284, 301–310; *Interstate Commerce Commission* v. *Mechling*, 330 U. S. 567, 583; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488–489.

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In addition to the inadequacy of the findings, the record contains no evidence which would warrant a finding that the charges for unloading should be the same in Philadelphia as at the New York piers.

III

The separate charges for unloading, i. e., delivering, are applicable only to fresh fruits and vegetables. No separate charge is imposed for unloading or delivering other similar freight. To make an additional charge on fresh fruits and vegetables and then make no charge for the same transportation service for "a like kind of traffic" is on its face an unjust discrimination, and violative of § 2 of the Interstate Commerce Act (49 U. S. C. § 2). Moreover, the failure to impose the separate charges on other similar traffic creates an undue or unreasonable preference in violation of § 3 (1) of the Act (49 U. S. C. § 3 (1)), and subjects the traffic in fresh fruits and vegetables to an undue or unreasonable prejudice in violation of § 3 (1) of the Act. Charging different rates for equal service is a plain case of unlawful discrimination. It is not enough for the Commission to say, as it did in this proceeding in 1948, that the railroads are giving consideration to the establishment of comparable charges on other similar traffic. The Commission's findings fail to reveal any basis for the discrimination, and the findings are inadequate.

ARGUMENT

I. THE LINE-HAUL RATES INCLUDE COMPENSATION FOR UNLOADING, I. E. DELIVERY, AND SEPARATE CHARGES FOR DELIVERY ARE INVALID; AND ALSO THE SEPARATE CHARGES FOR DELIVERY ARE INVALID BECAUSE THE COMMISSION FAILED TO FIND, OR RECEIVE EVIDENCE WHICH WOULD WARRANT THE FINDING, THAT THE ENTIRE CHARGES FOR THE TRANSPORTATION, CONSISTING OF THE LINE-HAUL RATES PLUS THE DELIVERY CHARGES, ARE JUST AND REASONABLE

The line-haul rates have, for more than 50 years, included compensation to the railroads for unloading, i. e., delivering, fresh fruits and vegetables at the New York piers and at the produce terminal platforms in Philadelphia which are referred to in this litigation (I R. 23b–23c; 286 I. C. C. 119, 120–121). "No [unloading or delivery] charges such as those under consideration have applied to this traffic in the past," and prior to November 1, 1948, when the unloading or delivery charges became effective, "there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic * * *" (I R. 23b, 23c; 286 I. C. C. 119, 120–121). The answer of the Commission in this proceeding in the District Court admits that "separate charges for unloading said commodities at New York and Philadelphia were not assessed by the said roalroads prior to November 1, 1948" (I R. 179).

In prior proceedings, involving the line-haul rates to the New York piers and the produce terminal platforms in Philadelphia, the railroads

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"emphasized the magnitude of their terminal costs, including unloading by them of the traffic as an essential part of delivery * * *" (I R. 114). The line-haul rates have included compensation for delivery, including unloading. *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, 139. The unloading services at the New York piers are essential to the delivery of fresh fruits and vegetables and are "in no sense * * * special services comparable with refrigeration, reconsignment, or switching after placement at [the] unloading point." *Ibid.* Also, the "delivery service performed at New York on all traffic is recognized by the other carriers east of Chicago by allowing to the delivering line" a certain sum "prior to prorating the revenue accruing east of Chicago." *Erie R. R. Co.* v. *Alabama & V. Ry. Co.*, 98 I. C. C. 268, 281. The carriers have recognized, in proceedings before the Commission, that the "unloading cost at New York piers * * * is a necessary part of the through rate,"[11] and under "the rate it is

[11] See, e. g., the testimony by T. C. Powell, vice president of the Erie Railroad, in the proceeding of *Erie R. R. Co.* v. *Alabama & V. Ry. Co.*, Doc. No. 14244, 98 I. C. C. 268, Vol. II, p. 84, of the transcript of the record. The attorney for the Erie Railroad stated also that "under our tariffs to New York pier stations all carload freight is unloaded by the carrier * * *." *Id.* at p. 289. The transcript of the record in that proceeding is a public record on file in the National Archives, and is available for public and official use. 44 U. S. C. § 300c; 44 CFR 1.1 *et seq.*

our obligation to unload the freight on to the pier * * *."[12] The line-haul rates, as approved by the Commission, to the New York piers and to the produce terminal platforms in Philadelphia include compensation to the carriers for unloading the freight, i. e., making delivery, and the line-haul rates have been divided between carriers on the basis of evidence with respect to the expense of unloading at the New York piers and at the produce terminal platforms in Philadelphia, *infra,* pp. 36–53. The reasonablness of the line-haul rates, including compensation to the carriers for unloading the freight at the New York piers and at the produce terminal platforms in Philadelphia, is presumed to continue in the absence of a showing to the contrary. *Swift & Co.* v. *United States,* 343 U. S. 373, 382–383; *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U. S. 368, 379.

A carrier cannot impose or receive a separate charge "in excess of the tariff rate for having performed a service covered by the tariff" (*Chesapeake & O. Ry. Co.* v. *Westinghouse Co.,* 270 U. S. 260, 266), and in this proceeding the line-haul rates include compensation for unloading, i. e., delivering, at the New York piers and

[12] Exceptions, p. 23, filed on behalf of the Erie Railroad *et al.* in *Erie R. R. Co.* v. *Alabama & V. Ry. Co.*, Doc. No. 14244, 98 I. C. C. 268. The Exceptions are a part of the transcript of the record in that proceeding, see footnote 11, *supra*, p. 27.

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at the produce terminal platforms in Philadelphia. But in this proceeding the Commission approved the unloading, i. e., delivery, charges at the New York piers and at the platforms in Philadelphia without making any finding or receiving any evidence as to whether the line-haul rates plus the unloading or delivery charges—i. e., the entire charges for the transportation, including delivery—are just and reasonable.

The special and distinctive circumstances at the New York piers are such that delivery cannot be made by the railroads without first unloading the freight (I R. 23d–23h; 286 I. C. C. 119, 122–125). The line-haul rates have, for more than 50 years, included compensation for the unloading or delivery of the freight, and the Commission found, in this proceeding, that the separate charges which the Commission approved are "for making delivery" and that the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken" (I R. 23g, 23m; 286 I. C. C. 119, 125, 129). Also the unloading charges are applicable at platforms in Philadelphia where the consignees are not permitted to obtain the freight until after it is unloaded by the carriers (I R. 23r–23t; 286 I. C. C. 119, 133–135).

The line-haul rates include compensation for delivery, and separate charges for delivery cannot be approved, and in any event the Commission cannot approve separate charges for unload-

ing, i. e., delivery, under the uncontroverted circumstances of this case, because the Commission failed to reconsider the reasonableness of the line-haul rates and made no finding and received no evidence that the line-haul rates plus the unloading charges are just and reasonable.

A. THE RAILROADS HAVE BEEN COMPENSATED FOR OVER 50 YEARS BY THEIR LINE-HAUL RATES FOR UNLOADING FRESH FRUITS AND VEGETABLES AT THE NEW YORK PIERS AND AT THE PLATFORMS IN PHILADELPHIA, AND THE UNLOADING IS AN ESSENTIAL PART OF DELIVERY

1. *The Commission Found That the Unloading Is Essential to Delivery*

The New York area has received annually, in recent years, over 100,000 carloads of fresh fruits and vegetables by rail (I R. 23h; 286 I. C. C. 119, 125). The Commission found that the team-track facilities at New York are adequate to handle only a small portion of this great volume of freight traffic (I R. 230; 286 I. C. C. 119, 131), and that "it would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York" (I R. 23n; 286 I. C. C. 119, 130). Instead of delivering the fruits and vegetables at team tracks, the carriers place the freight cars on car floats at Jersey City, New Jersey, and vicinity and move the cars across the Hudson River by tugboats to the piers at New York (I R.

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23d–23h; 286 I. C. C. 119, 122–125).[13] The carriers then unload the cars, and the cars are immediately returned empty to the New Jersey side and other car floats are placed at the piers for unloading. The Commission found that there "are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purposes of inspection, but they are not permitted to take delivery of their freight from that facility. The pier floor is the first place where, after the freight has been unloaded, delivery can be taken" (I R. 23g; 286 I. C. C. 119, 125). That finding by the Commission in 1952 is consonant with the Commission's findings in 1948 that a "reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (I R. 24h–24i; 272 I. C. C. 648, 654–655). At the

[13] The New York Central has the only all-rail line into Manhattan for the delivery of freight. The Commission found that this line has "limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers" (I R. 23f; 286 I. C. C. 119, 124).

original hearing in this matter, the railroads asserted that they were willing to permit the consignees to unload their freight from the car floats. Following the Commission's decision in this proceeding in 1948, the California Fruit Growers Exchange requested the railroads to permit the consignees, as a whole, to perform the unloading at the piers, but the request was refused by the railroads (I R. 23h; 286 I. C. C. 119, 125).

The railroads have also historically unloaded fresh fruits and vegetables at certain terminals in Philadelphia without any charge other than the line-haul rates (I R. 23c; 286 I. C. C. 119, 121). From 1927 until November 1, 1948, when the challenged delivery charges went into effect, approximately 95% of the fresh fruits and vegetables consigned to Philadelphia, other than for chain stores, was handled at the Pennsylvania Produce Terminal at which the cars were unloaded under the line-haul rates by the railroad carriers (I R. 23c, 23r; 286 I. C. C. 119, 121, 134). The shippers are not permitted access to the cars prior to the unloading at the Pennsylvania Produce Terminal and delivery is not made until the cars have been unloaded by the carrier (I R. 23r–23u; 286 I. C. C. 119, 133–135).

Team-track delivery is not available to the consignees at the New York piers or at the produce terminal platforms in Philadelphia at which the unloading charges, as approved by the Commission, are applicable. In short, the Commission

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found that in New York the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken," and at the platforms in Philadelphia the consignees are not permitted access to the cars prior to the unloading by the railroads (I R. 23g, 23r–23t; 286 I. C. C. 119, 125, 134–135). This is consonant with the Commission's decision, with respect to delivery at the New York piers, in *Allowances for Stacking,* 179 I. C. C. 780, 782, in which the Commission held that the carriers "make delivery in spaces assigned to the consignees on the piers, and * * * [their] stevedores stack the packages in those spaces. It appears from this record that at that point respondent has fulfilled its legal obligation as to delivery."

2. *The Commission Found That Pier-Station Delivery at New York, Including Unloading, Is the Most Economical Method for Railroads To Deliver the Vast Volume of Freight*

The team-track facilities of New York are adequate to handle only a small portion of the vast volume of fresh fruits and vegetables shipped to New York (I R. 23o; 286 I. C. C. 119, 131), and, since the latter part of the nineteenth century, the carriers have provided pier-station delivery in lieu of team-track delivery. The piers have no team-track facilities on which cars can be unloaded, and all parties to the proceeding before the Commission agreed that "it is not feasible to

expand the present team-track facilities on Manhattan Island" (I R. 23f; 286 I. C. C. 119, 123). The area covered by the piers is approximately 40 acres, and consists of the piers and the slips between the piers which accommodate the car floats (I R. 23f; 286 I. C. C. 119, 123). The real estate in that vicinity has a value of about $800,000 an acre, and the area covered by the piers has a value of approximately $32,000,000 (I R. 23f; 286 I. C. C. 119, 123). It was estimated that it would cost approximately $24,000,000 to expand the team-track facilities of the Pennsylvania and Erie Railroads (I R. 23q; 286 I. C. C. 119, 133).[14] It would be "impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York" (I R. 23n; 286 I. C. C. 119, 130). The Commission found that "it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track deliveries * * *" (I R. 23r; 286 I. C. C. 119, 133).

[14] The street on which this area is situated is "one of the deep and narrow canyons on this densely populated island," and the section of the street thus used "is in the very shadow of the giant skyscrapers of the financial district." *The Wholesale Fruit and Vegetable Markets of New York City* (U. S. Department of Agriculture, April 1940), p. 6.

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In addition to the high cost of land for the expansion of rail facilities so as to make available team-track delivery, the time required for handling cars across float bridges during periods of peak volume of traffic would render team-track delivery impracticable (I R. 23n; 286 I. C. C. 119, 130). The pier deliveries permit the expeditious handling of cars without switching operations or expense on Manhattan Island (I R. 23i, 23aa; 286 I. C. C. 119, 126, 141),[15] and the carriers are able to return the cars immediately for re-use whereas the consignees have two days free time to unload cars delivered at team tracks (I R. 23i; 286 I. C. C. 119, 126). A witness on behalf of the Erie Railroad stated that pier-station delivery on Manhattan Island is the most efficient method which the railroad has been able to adopt, and this method is so efficient that the carrier has been able to handle in one day, at piers 20 and 21, as many as 367 cars of fruits and vegetables, and it never handles less than 50 cars a day for pier-station delivery (I R. 23i; 286 I. C. C. 119, 126). All unloading by the carriers for pier-station delivery is performed with dispatch, and the cars after unloading are immediately returned empty to the New Jersey side, and

[15] The carriers incur the switching expense involved in team-track delivery, and there is no basis for the statement in the majority opinion that the Commission found that a switching charge is paid "by the consignee" (I R. 213; 114 F. Supp. 420, 424).

other car floats are placed at the piers for unloading (I R. 23g; 286 I. C. C. 119, 124). This method of making pier-station delivery is so expeditious that the same platform space may be used two or three times each night for unloading and stacking freight (I R. 23g; 286 I. C. C. 119, 124–125).

The Commission found in this case that the "most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee" (I R. 23n; 286 I. C. C. 119, 130). Pier-station delivery at New York, including unloading, was "inaugurated by the carriers concerned [during the latter part of the nineteenth century] for their own convenience and benefit," and this substitute for team-track delivery "is now and always has been the most economical way the carriers may make deliveries of freight at New York" (I R. 205; 114 F. Supp. 420, 425, Judge DeVane, Dissenting).

3. *The Commission Found That the Line-Haul Rates Included, Prior to This Proceeding, Compensation for Unloading, i. e., Delivering, the Freight*

The Commission found that for over 50 years prior to November 1, 1948, the railroads have been compensated for the unloading of fresh fruits and vegetables at New York and Philadel-

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phia by their line-haul rates. In its Report of May 7, 1952, the Commission stated that (emphasis supplied) "[p]rior to November 1, 1948, when the charges under consideration became effective, there were no *separate* charges *in addition to the through rates,* for unloading fruits, vegetables, or other descriptions of traffic at the stations specified" (I R. 23c; 286 I. C. C. 119, 121). "At the [Philadelphia] piers unloading, similar to the present operations at New York piers, was performed by the carriers without charge therefor *other than the line-haul rate.* In fact, delivery could not be accomplished without first unloading the freight. In 1927, the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce terminals, either of which was then capable of accommodating the needs of the fruit trade at that point, and at both of which unloading *under the line-haul rate,* as previously performed at the piers, was continued" (I R. 23r; 286 I. C. C. 119, 133–134; emphasis supplied). "This method of unloading had been performed by the carriers prior to November 1, 1948, without charge therefor *other than the line-haul rate"* (I R. 23t; 286 I. C. C. 119, 135; emphasis supplied). "The respondents have been willing to perform the unloading without a *separate* charge until, in recent years, the cost thereof substantially increased" (I R. 23z; 286 I. C. C. 119, 139–140; emphasis supplied). These unequivocal findings by the

Commission in 1952 cogently establish that, prior to the imposition of the delivery charges challenged in this case, the line-haul rates included compensation to the carriers for making delivery at New York and Philadelphia, including unloading.[16] The findings by the Commission in 1952, in this respect, are in conformity with prior decisions by the Commission in which the Commission found that the line-haul rates to the New York piers included compensation to the carriers for unloading. *Fruits and Vegetables to Duane Street, N. Y.,* 66 I. C. C. 135, 139; *Erie R. R. Co.* v. *A. & V. Ry. Co.,* 98 I. C. C. 268, 272, 280.

In *Fruits and Vegetables to Duane St., N. Y.,* 66 I. C. C. 135, the Erie Railroad attempted to impose a separate charge, in addition to the line-haul rates, for unloading and assorting fruits and vegetables at its New York piers. The railroad had previously unloaded the freight under its line-haul rates and had a separate charge covering assortment, but not unloading. A witness, Charles E. Bell, explained the proposal as follows: "Testimony has been given as to the cost

[16] The findings by the Commission, that compensation for delivery, including unloading, was included in the line-haul rates to the New York piers and the produce platforms in Philadelphia prior to November 1, 1948, are supported by substantial evidence on the record as a whole. See I R. 559; II R. 873, 883, 885, 889–891, 928–931, 951–953, 987–990, 995–996; III R. 997, 1001–1002, 1011–1013, 1064–1065, 1472–1473, 1496–1498.

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of unloading freight at Duane Street piers and at other terminals and an effort is made by the Erie Railroad to assess additional charges for this unloading service."[17] The issue was squarely presented as to whether the line-haul rates included compensation for the unloading service. The railroad contended that inasmuch as the line-haul rates on fresh fruits and vegetables had been blanketed east of the Missouri River, the line-haul rates did not include compensation for the unloading service.[18] The protestants, however, introduced weighty evidence proving that the line-haul rates included compensation for unloading.[19] For example, Mr. Charles E. Bell, a witness with 25 years of railroad traffic experience, including positions as assistant director of traffic of the Food Administration and assistant to the Director of Traffic, United States Railroad Administration, made a thorough analysis of the tariffs published or concurred in by the Erie

[17] *Investigation and Suspension Doc. No. 1420*, p. 342. This transcript of the record is on file in the National Archives. See, footnote 11, *supra*, p. 27.

[18] See Respondent's Brief in *Investigation and Suspension Doc. No. 1420*, pp. 15–20. In oral argument before the Commission, the attorney for the Erie Railroad asserted that "the line-haul rate as disclosed by the record in this case does not include compensation for the service for which we now seek compensation." *Investigation and Suspension Docket No. 1420*, p. 465.

[19] See, e. g., *Investigation and Suspension Doc. No. 1420*, pp. 65–69, 84, 182–193, 251–256, 331–372. See also, Exs. No. 8–25.

Railroad, and in connection with his exhibits numbered 8 to 25 in the proceeding, testified as follows: "These exhibits disclose that * * * [the] tariffs apply to fruits and vegetables to New York City, including Duane Street; that the Erie Railroad is a participating carrier in those tariffs without restriction; that Duane Street is a regular delivering station in New York for California fruit, and so advertised, as well as a delivering station for other kinds of freight. These exhibits are intended to disclose also that the line-haul rates include delivery service at the New York stations. Therefore, the addition of these proposed terminal charges have the effect of increasing the total charge for transportation on California fruit to New York City."[20] Based upon the evidence introduced at the hearing, the Commission found that the line-haul rates to the New York piers include compensation for delivery, including unloading. *Fruits and Vegetables to Duane Street,* N. Y., 66 I. C. C. 135, 139.

It is also significant that in other proceedings involving the line-haul rates on fruits and vegetables to points in the United States, including New York and Philadelphia, the destination carriers "emphasized the magnitude of their terminal services and costs, including unloading by them of the traffic as an essential part of delivery * * *" (Second Report on Further Hear-

[20] *Investigation and Suspension Doc. No. 1420*, p. 338. See also, exhibits 8–25, and pp. 331–372.

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ing Proposed by M. J. Walsh, Examiner, I R. 114). For example, in *Investigation and Suspension Doc. No. 5478,* relating to proposed increases in the line-haul rates on vegetables and avocados from the South to Official Territory, the carriers stressed the magnitude of the terminal operations at the New York piers, including unloading of the freight as a necessary part of delivery.[21] Based upon the evidence adduced by the railroads as to the great expense involved in delivering freight at the New York piers, including unloading, the Commission approved line-haul rates to New York which were 3¢ per 100 pounds higher than the rates to other cities in Official Territory. The Commission expressly stated that the "reason for the greater increase to New York is because of the more expensive terminal operations performed by the respondents there than at other cities in official territory." *Vegetables and Avocados from the South to Official Territory,* 269 I. C. C. 409, 410.

Also in the proceedings relative to the divisions of rates between Official and Southern territories, evidence was introduced on behalf of the Northern lines to prove that the "service performed and facilities provided by Northern lines for the

[21] The evidence with respect to the magnitude of the terminal operations at the New York piers, including unloading, is in *Investigation and Suspension Doc. No. 5478,* Vol. 2, pp. 88–91, 94–95, and 117. This is a public record on file in the Interstate Commerce Commission.

purpose of effecting prompt delivery and orderly distribution of fruits and vegetables inevitably requires the conclusion that the delivery service generally performed by the Northern lines on the fruit and vegetable traffic is a more valuable and costly service than the origin service performed by Southern carriers."[22] Included in the evidence was testimony as to the expensive terminal operations at the New York piers, including unloading, and exhibits itemizing the expenses of handling perishable freight at Philadelphia and at the New York piers, including unloading.[23] In summarizing the "principal factors reflective of the service contribution of the Northern lines in their road haul service north of the gateways,"[24] the Northern carriers, in their brief in the proceeding, included the expensive terminal operations, including delivery, at the New York piers stating that "[s]pecial equipment and facilities, with a complete marine organization are necessary for the floating service. The loading and unloading of car floats is difficult, hazardous,

[22] Brief in Behalf of Respondents Within Official Territory, p. 201 (in Vol. 50), Docket No. 24160, *Division of Rates, Official and Southern Territories.* This is a public record on file in the Interstate Commerce Commission.

[23] *Atlantic Coast Line R. Co.*, v. *Arcade & A. R. Corp.*, Docket No. 24069, Exs. 229, 230 (in Vol. 9); pp. 777–790, 833–834, 845–863 (in Vol. 7); pp. 1189–1201, 1205–1217 (in Vol. 9).

[24] Brief in Behalf of Respondents Within Official Territory, p. 194 (in Vol. 50), Docket No. 24160, *Division of Rates, Official and Southern Territories.*

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and expensive."[25] The Commission's report discussed the relevant transportation services rendered by the carriers, including the unloading by the carriers at the New York piers and the Philadelphia produce terminals. *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I. C. C. 729, 745–746.[26]

[25] *Id.* at p. 200.

[26] In *Erie R. R.* v. *Alabama & V. Ry. Company*, 98 I. C. C. 268, a vice president of the Erie Railroad, testified that the Erie desired to obtain a greater allotment or share of the total rates, and the witness stated that: "The services performed by the Erie Railroad include among other things * * * the special delivery to Duane Street, piers 20 and 21 * * * [and] the service of unloading the cars properly in the piers * * *." Vol. II, pp. 9–10, of the transcript of the record in Doc. No. 14244, see footnote 11, *supra*, p. 27. The vice president of the Erie also testified that: "There is an unloading cost at New York piers which has been passed upon by the Commission, and which they have decided is a necessary part of the through rate. They recognize that in this limited area, any freight in delivery must be moved promptly. They have decided also on general merchandise that it is not discriminatory for the carriers to unload the freight so as to clear the piers, but it is all the more necessary for the carriers to perform this service on perishable traffic, because there would not be room on the piers for the labor of the consignees." *Id.* at 84. It was stated in this proceeding by the attorney for the Erie Railroad that "under our tariffs to New York pier stations all carload freight is unloaded by the carrier * * *." *Id.* at 289. The exceptions by the railroads to the proposed report of the Examiner stated, on page 23 of the exceptions, that: "Under the rate it is our obligation to unload the freight on to the pier but for this service of sorting and piling we assess and collect from the consignees a separate and additional charge."

Similarly in *Florida R. R. Commissioners* v. *A. & R. R. R. Co.*, 144 I. C. C. 603, involving the line-haul rates on Florida citrus fruit, the carriers introduced evidence of the extraordinary expenses incurred in their terminal operations, including unloading at New York and Philadelphia.[27] The railroads also explained in detail the expensive terminal operations incident to delivery at the New York piers, including unloading by the carriers, in *Investigation and Suspension Docket No. 3705,* which was the proceeding to determine the line-haul rates on vegetables in the *Southeastern Vegetable case,* 200 I. C. C. 273.[28]

The Commission found, in the case at bar, that "[v]arious rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates" (I R. 24q; 272 I. C. C. 648, 662). Moreover, it cannot be assumed that the railroads gratuitously performed, for more than 50 years, the unloading or delivery service in New York and Philadelphia. *Interstate Commerce Commission* v. *Chicago &c. R'd Co.*, 186 U. S. 320, 336; *American Express Co.*

[27] III R. 1496–1498. See also exhibit No. 38, pp. 13–21, in the unprinted portion of the record in the case at bar.

[28] The evidence as to the unloading operation by the carriers at the New York piers is in *Investigation and Suspension Doc. No. 3705*, Vol. 6, pp. 1011–1018. This is a public record on file in the National Archives, see footnote 11, *supra*, p. 27.

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v. *United States*, 212 U. S. 522, 526–527, 532; *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406; *Ex parte No. 104*, 209 I. C. C. 11, 20.

The findings by the Commission in its final report in 1952 clearly show that the unloading involved in this case is an essential part of the delivery of the freight, and that for over 50 years prior to the imposition of the challenged charges the carriers have been compensated for such delivery in their line-haul rates. The District Court, in sustaining the Commission's orders, erroneously attributed to the Commission findings antithetical to the findings made by the Commission. The District Court stated that the Commission is really deciding "where the carrier's line-haul service ends, and whether unloading is a justifiable additional service * * *" (I R. 213; 114 F. Supp. 420, 424). The Court then stated that the Commission "found that unloading is an additional service, wholly distinct from delivery * * *" (I R. 213; 114 F. Supp. 420, 424). But that is directly contrary to the Commission's findings. The Commission found that the consignees "are not permitted to take delivery of their freight" from the car floats (I. R. 23g; 286 I. C. C. 119, 125), that the "pier floor is the first place where, after the freight has been unloaded, delivery can be taken" (*Ibid.*), and that the proposed charges, in addition to the line-haul rates, were "for making delivery at New York piers" (I R. 23m; 286 I. C. C. 119, 129).

Hence it is irrelevant as to whether "adequate" compensation for these unloading services "is or should be" included in the line-haul rates. The issue is whether compensation *has been* included for these unloading or delivery services in the line-haul rates. There is no finding in the Commission's report in 1948 contrary to the Commission's findings in 1952 that for the past 50 years, prior to November 1, 1948, the line-haul rates have included compensation for unloading at New York and Philadelphia.

In addition, the foregoing ultimate conclusion by the Commission in 1948 is not supported by any evidence or adequate subsidiary findings. Indeed *no* evidence was introduced to show whether or not the carriers' line-haul rates adequately compensated the carriers for making delivery, including unloading, at New York and Philadelphia. As stated by the Examiner in his report on further hearing, "[i]n the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant" (I R. 100).[29] Hence there could be no evidentiary basis for the Commission's statement (I R. 24q; 272 I. C. C. 648, 662) in 1948 that "[*f*]*or the purposes of*

[29] See also II R. 896, 957, 966 for repeated assertions and insistence by the railroads that this proceeding does not involve an issue as to the reasonableness of the line-haul rates, and that no evidence on that issue is relevant. The railroads failed to submit any evidence as to the reasonableness of the line-haul rates.

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this proceeding we are not convinced that *adequate* compensation for these unloading services is or should be included in the line-haul rates" (emphasis supplied). Moreover, there are no prefatory or subsidiary findings which give any support to the ultimate finding, and in the absence of any evidence as to whether the carriers are receiving adequate compensation in their line-haul rates for the delivery service involved in this case, the Commission could not validly make any prefatory or subsidiary findings necessary to explain and support its ultimate finding. This Court has repeatedly emphasized the need for clarity and completeness in the basic or essential findings in administrative orders, *infra,* pp. 79–81.

Significantly, the Commission's final report in 1952 contains no finding that the line-haul rates are inadequate to compensate the carriers for the delivery involved in this case. The Commission's findings in 1952 conclusively prove that the line-haul rates in effect prior to November 1, 1948, included unloading which, under the circumstances of this case, is an essential part of making delivery, and the Commission did not in 1952 make any finding that the line-haul rates do not adequately compensate the carriers for making such delivery. The Commission's report in 1952 contains approximately 11,000 words, and undoubtedly the Commission would have added at least a sentence asserting that the line-haul rates are inadequate to compensate the carriers for

unloading or making delivery if the Commission believed that the evidence, after two further hearings, warranted such a finding. The Commission's report in 1948 contains approximately 7,000 words as compared with 11,000 words in the 1952 report. The Commission's report in 1952 sets forth the entire basis for the Commission's action, and there is no basis for any assertion that the Commission's report in 1952 is merely an abbreviature of the Commission's report in 1948. The Commission must have recognized in 1952 that it could make no such finding in the absence of *any* evidence as to the inadequacy of the line-haul rates to compensate the carriers for making delivery of fruits and vegetables at New York and Philadelphia. Hence the ultimate finding by the Commission in 1948, that "[f]or the purposes of this proceeding we are not convinced that *adequate* compensation for these unloading services is or should be included in the line-haul rates" (emphasis supplied), is without any weight in this proceeding and certainly does not support the District Court's statement that "the Commission found that the line-haul service terminated when the cars reached the pier station * * *" (I R. 214; 114 F. Supp. 420, 424).

The Commission also stated in its 1948 report that the charges for unloading at New York and Philadelphia "are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which

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separate charges are published" (I R. 24q; 272 I. C. C. 648, 662).[30] But this is not the equivalent of a finding that the *prior* line-haul rates did not include compensation for making delivery, including unloading. As stated in *Railroad Board* v. *Duquesne Co.,* 326 U. S. 446, 453, the "duty of unloading carload freight ordinarily rests with the shipper or consignee. * * * But it is a transportation service within the meaning of the Interstate Commerce Act. * * * Its cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge." Hence even in areas where unloading is not an integral part of making delivery, and is in fact an accessorial service, its cost "may be included in the line-haul tariffs" (326 U. S. at 453). See also, *Atchison Railway Co.* v. *United States,* 232 U. S. 199, 221. The Commission, in its 1948 report, did not find that the unloading costs were separately fixed or allowed as an additional charge

[30] That statement of the Commission's ultimate conclusion in 1948 is not supported by any evidence or subsidiary findings, and is contrary to the Commission's findings in 1952 that the unloading involved is an essential part of the delivery of the fruits and vegetables, *supra*, pp. 30–33. That statement in 1948 is also squarely contrary to the Commission's findings and conclusions in *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, 139, that the terminal services at the New York piers, including unloading, "are all incidental to the efficient delivery of fruits and vegetables at Duane street. They are performed on all of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point."

prior to November 1, 1948, and therefore there is no finding by the Commission in 1948 inconsistent with the Commission's findings in 1952 that for over 50 years prior to November 1, 1948, compensation for delivery of fruits and vegetables at New York and Philadelphia, including unloading, had been included in the line-haul rates, *supra,* pp. 36–38.

The Court's conclusion that "the Commission found that the line-haul service terminated when the cars reached the pier station * * *" (I R. 214; 114 F. Supp. 420, 424) is manifestly erroneous and is responsible for the Court's erroneous decision in this case. As stated by Judge DeVane, dissenting, the "following undisputed factual questions" are controlling of the case:

> 1. Unloading at New York was originally inaugurated by the carriers concerned for their own convenience and benefit.
>
> 2. It is now and always has been the most economical way the carriers may make deliveries of freight at New York.
>
> 3. The line-haul rates were originally established to include and have always included compensation for unloading costs at New York. The Interstate Commerce Commission has so held in numerous cases.
>
> 4. When the unloading charges were made effective by the Interstate Commerce Commission the line-haul rates were then, and are now, in excess of just and reason-

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able rates based upon the cost of transporting and unloading fruits and vegetables at New York (I R. 205; 114 F. Supp. 420, 425–426).

B. THE COMMISSION'S APPROVAL OF SEPARATE CHARGES FOR MAKING DELIVERY OF FRESH FRUITS AND VEGETABLES IS INVALID

The Commission found that the unloading involved in this case is an essential part of making delivery of the fresh fruits and vegetables consigned to New York and Philadelphia, and that the proposed charges, in addition to the line-haul rates, are "for making delivery" at the designated terminals, *supra,* pp. 30–36. The Commission further found that such delivery was included under the line-haul rates prior to the imposition of the charges challenged in this proceeding, *supra,* pp. 36–53. Nonetheless the Commission approved separate charges for making delivery, and the approval was without any finding that the proposed aggregate charges, consisting of the line-haul rates plus the delivery charges, are just and reasonable for the transportation involved, including delivery. This action by the Commission is manifestly erroneous.

1. The Railroads Are Obligated To Make Delivery

It is manifest that the undertaking of a common carrier to transport goods necessarily includes the duty of delivering the goods to the consignee. *North Penn. Railroad* v. *Commercial*

Bank, 123 U. S. 727, 733–734; *Covington Stock-Yards Company* v. *Keith,* 139 U. S. 128, 135; *Rainier Co.* v. *Great Northern Co.,* 259 U. S. 150, 155; *Norfolk Railway* v. *Public Service Comm.,* 265 U. S. 70, 74. The term "transportation" as used in the Interstate Commerce Act has a special definition which enlarges its ordinary meaning so as to include more than the actual movement from origin to destination. 49 U. S. C. § 1 (3). The definement of the term includes "* * * all instrumentalities and facilities of shipment or carriage * * * and all services in connection with the receipt, delivery * * * and handling of property transported." 49 U. S. C. § 1 (3).

Delivery is a part of transportation under the Interstate Commerce Act. *Southern Ry.* v. *Prescott,* 240 U. S. 632, 637. See, also, *Erie R. R. Co.* v. *Shuart,* 250 U. S. 465, 468; *Danciger* v. *Cooley,* 248 U. S. 319, 327; *New York Central & H. R. R. Co.* v. *General El. Co.,* 219 N. Y. 227, 234, 114 N. E. 115, 117, certiorari denied, 243 U. S. 636; *Ex parte No. 104,* 209 I. C. C. 11, 20–33. "A carrier does not fulfill this obligation to deliver by merely providing a place where goods may be taken out of a car, but it must also provide a convenient and adequate way for the consignee to come and get his goods and take them safely from the carrier's property." *Allied Packers* v. *Atchison, T. & S. F. Ry. Co.,* 161 I. C. C. 641, 644.

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2. *The Imposition of Separate Charges, in Addition to the Line-Haul Rates, for Making Delivery at a Point Within the Carriers' Terminals Is Illegal*

It is an axiomatic principle, in the transportation law of the United States, that delivery is included under the line-haul rates. "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery. * * * The rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling, but the charge for the use of the terminals at both ends of the line. * * * The railroads recognize their duty to make delivery under the flat rate stated in their tariffs * * *." *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I. C. C. 310, 314–315. Based upon those fundamental principles, the Commission held in the *Associated Jobbers* case that the railroads delivering freight at private sidings or spurs at Los Angeles in lieu of team-track delivery could not impose an additional charge for such delivery. As stated by the Commission (18 I. C. C. 310, 317–318):

> If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may

> not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done.

The decision and order by the Commission in the *Associated Jobbers* case was upheld in *Interstate Commerce Commission* v. *A., T. & S. F. Ry. Co.,* 234 U. S. 294. The decision in that case is apposite in this proceeding since the pier-station delivery at New York is merely a substitute for team-track delivery and is the most economical way the carriers may make deliveries of freight at New York, *supra,* pp. 33–36. Similiarly, in *United States* v. *Am. Tin Plate Co.,* 301 U. S. 402, 409, the Court stated:

> It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a "switching district" or "switching limits." Within that area the carrier holds itself out as agreeing to deliver from in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry.

In *Atchison Ry.* v. *United States,* 295 U. S. 193, 200, involving the delivery of livestock at Chicago, it was held that "[l]ong continued practice and special conditions made unloading at

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these yards a transportation service to be performed by the carrier" under the line-haul rates. See also, *Adams* v. *Mills,* 286 U. S. 397, 409–416; *United States* v. *U. S. Smelting Co.,* 339 U. S. 186, 189–190. The Commission has held that under "general custom and practice the line-haul rate entitles a consignee to have his shipment delivered at a reasonably convenient place, whether this be within a plant, or upon a track agreed upon by him and the carriers." *Ex parte 104,* 209 I. C. C. 11, 32.

It has been familiar doctrine since *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, that a railroad is under a legal obligation to provide suitable and necessary means and facilities for receiving live stock offered for shipment and for delivering the freight after it reaches the place to which it is consigned, and that the carrier cannot impose any charge in addition to the through rate for performing such services. The "transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession." *Covington Stock-Yards Co.* v. *Keith,* 139 U. S. 128, 136. In resolving the issues presented in the *Keith* case, the Court stated the rule, applicable to live stock or other freight, that all freight must be delivered at the place of destination to the party designated

to receive it if he presents himself or can with reasonable efforts be found (139 U. S. at 135), and that "[n]o obligation of the carrier, whether the freight consists of goods or live stock, is more strictly enforced" (139 U. S. at 135). "The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported, as well as to the necessities of the respective localities in which it is received and delivered. A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars" (139 U. S. at 135).

The decision of the Commission in this case, approving separate charges for unloading, *i. e.,* delivering, fresh fruits and vegetables at the New York piers and at the platforms in Philadelphia, is manifestly contrary to the rule established in the prior decisions of this Court, *supra,* pp. 55–59,

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and in addition the decision of the Commission is contrary, in principle, to the Commission's action in *Ex parte 104*, 209 I. C. C. 11.[31] The Commission recognized in its main report in *Ex parte 104* that delivery is included in the line-haul rates in this country, and that the carriers can impose an additional charge for making the freight available to the consignee only when the carrier is prevented from making delivery "by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances * * *." *United States* v. *Wabash R. Co.*, 321 U. S. 403, 406–407. "Transportation includes delivery and what it is asked as to complete it the carrier must do." *Hanna Furnace Corporation* v. *United States*, 53 F. Supp. 341, 343 (3-judge Court, W. D. N. Y.), affirmed, 323 U. S. 667. The "main basis" for the Commission's decision in *Ex parte 104* is that interference and interruption *by the industry* may obviate the necessity of delivery under the line-haul rates (53 F. Supp. at 345). Accord: *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 189–190; *United States* v. *Am. Tin Plate Co.*, 301 U. S.

[31] In *Ex parte 104*, 209 I. C. C. 11, the Commission initiated an extensive investigation of the service rendered by carriers in spotting cars at points upon the systems of plant trackage maintained by numerous large industries to determine whether the carriers had assumed a burden not included in the transportation service compensated by the filed tariffs.

402, 405, 409; *Corn Products Refining Co.* v. *United States,* 69 F. Supp. 869, 872 (3-judge Court, N. D. Ill.), affirmed, 331 U. S. 790.

The Interstate Commerce Act, as interpreted by the Commission and by the Courts, *supra,* pp. 55–60, does not permit carriers to segregate their delivery charges from their line-haul rates. Section 6 (1) of the Interstate Commerce Act permits separate terminal charges, but not separate delivery charges (49 U. S. C. § 6 (1)). Section 6 (1) of the Act requires all carriers subject to the Act to publish with the Commission and keep open to public inspection schedules showing all the rates, fares, and charges for transportation, and such schedules "shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed, and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee" (49 U. S. C. § 6 (1)). But as we have shown, *supra,* pp. 55–60, carriers are required to make delivery under their line-haul rates. This difference between the American system of rate making and the English system, in which delivery

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charges are separately stated, was recognized by the Commission in *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.,* 18 I. C. C. 310, 314–315, as follows:

> The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery. These various services may be broken up into their component parts and a charge imposed for each, as is the case in England, where by law the Government has fixed a schedule of maximum rates for "conveyance" between stations and a separate schedule of maximum terminals, so called, which includes a fixed charge, uniform throughout the country, for a "station terminal" at each end of the haul, if the station is used, but not otherwise. So that, under the English system, in order to arrive at the total rate applicable upon a shipment, the conveyance rate must be added to the station terminal. ("Service terminals" for loading and unloading, etc., are also separately stated and charged for.) This method of stating rates has never obtained in this country, at least so far as the records of this Commission show. The rate, which it is required shall be published, is a complete rate, which includes not only the charge for hauling, but the charge for the use of the terminals at both ends of the line.

The provisions of the act to regulate commerce were enacted with respect to the American method of stating rates, and when it is provided in section 6 that the schedules, which shall be published and filed with the Commission, "shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed," it was not intended that the carriers should be required to separately state what are known in the English law as station terminals—that is to say, that they shall state separately the hauling charge between the stations and the charge for the use of the terminal at both ends of the line. The terminal charges referred to in section 6, and which *must* be expressly set forth in the carrier's tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching, and cartage. This construction of the act is borne out fully by its history and has been formally accepted by railroad counsel in advising the carriers. The railroads recognize their duty to make delivery under the flat rate stated in their tariffs, and such delivery is made upon industry tracks, which are part of the carrier's terminals, without additional charge.[32]

[32] The validity of the order in the *Associated Jobbers* case was upheld in *Interstate Commerce Commission* v. *A., T. & S. F. Ry. Co.*, 234 U. S. 294, but the Court found it unnecessary to decide whether the Commission correctly stated the

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In circumstances where unloading is an accessorial service distinct from delivery, its "cost may be included in the line-haul tariffs or separately fixed or allowed as an additional charge." *Railroad Board* v. *Duquesne Co.*, 326 U. S. 446, 453. But there is no statutable requirement that an unloading charge must be separately stated, and where unloading is an essential part of making delivery the Act does not authorize a separate charge for making delivery.

3. *The Approval by the Commission of Separate Charges for Making Delivery of Fresh Fruits and Vegetables—a Transportation Service Previously Included Under the Line-haul Rates—Is Also Invalid Because the Commission Did Not Find That the Entire Charges for the Transportation Involved, Consisting of the Line-haul Rates Plus the Delivery Charges, Are Just and Reasonable*

Railroads are obligated to make delivery of freight under their line-haul rates, and the imposition of separate charges, in addition to the line-haul rates, for making delivery of fresh fruits

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law, in this respect (234 U. S. at 310). However, the administrative interpretation of the statute is a contemporaneous and settled administrative interpretation, established over a period of 44 years, and is of great weight and should not be overturned unless the interpretation is clearly wrong or unless a different construction is plainly required. *United States* v. *Jackson*, 280 U. S. 183, 193; *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 549; *Boutell* v. *Walling*, 327 U. S. 463, 470–471; *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116.

and vegetables at New York and Philadelphia is illegal, *supra,* pp. 55–63. But assuming, *arguendo,* that for the future the carriers may establish line-haul rates which do not include delivery, and that the carriers may establish in their tariffs additional charges "for making delivery" (I R. 23m; 286 I. C. C. 119, 129), nonetheless the decisive fact is that they have not done so in the past. The prior line-haul rates included delivery, *i. e.,* unloading at New York and Philadelphia, and, therefore, it is impossible to determine whether an additional charge for delivery is just and reasonable without considering the entire line-haul rates.

A carrier should not be permitted to multiply its revenue by merely dividing its rates. The Commission cannot approve, as just and reasonable, a separate charge for a transportation service previously included under the line-haul rate, unless the Commission finds that the aggregate of the line-haul rate plus the separate charge is just and reasonable for the transportation service rendered.[33]

In *Interstate Commerce Commission* v. *Chicago &c. R'd Co.,* 186 U. S. 320, the issues related to a

[33] This finding could be stated in two parts, *i. e.,* that the line-haul rate is just and reasonable for the transportation service rendered excluding the service for which a separate charge is stated, and in addition that the separately stated charge is just and reasonable for the separate transportation service. In that case the aggregate of the two charges would necessarily be just and reasonable for the total transportation service rendered.

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terminal charge imposed by the carriers for making delivery to the stockyards at Chicago, "a point beyond the lines of the respective carriers", and for many years prior to the imposition of the separate terminal charge, the carriers had delivered carloads of cattle to the stockyards without making any charge therefor other than the line-haul rates (186 U. S. at 335).[34] In these circumstances the Court held that although "the terminal charge of $2, abstractly considered, would be just and reasonable" nonetheless that did not indicate that the $2 charge was just and reasonable as applied to the facts of the case inasmuch as "compensation for the terminal service was presumptively included in the through rate existing for so many years, and therefore, the $2 did not constitute the terminal rate, but * * * such rate

[34] Although the issue as to the legality of separately stating the terminal charges was not raised, the Court expressed the view that the carriers had a right to divide their rates and separately state terminal charges at "a point beyond the lines of the respective carriers," but the Court expressed no opinion as to whether such separate charges could be made applicable "to terminal services by a carrier on his own line which he was obliged to perform as a necessary incident of his contract to carry, and the performance of which was demanded of him by the shipper * * *" (186 U. S. at 335). Also, the Court held that even after the carriers separately stated terminal charges of $2.00 per car, the carriers had not divided their charges so as to segregate their line-haul rates from their terminal charges, stating that "[w]e think that it cannot be said that to add an additional amount to a former charge was necessarily to divide such former charge, without holding that to add one sum to another is necessarily to divide the other" (186 U. S. at 337).

after the $2 was imposed consisted of that sum plus the amount of compensation for the terminal service which had always been contained in, and which continued to be embraced in, the through rate" (186 U. S. at 337). In the absence of other circumstances, the Court would have sustained the order of the Commission setting aside the charge of $2.00 as unjust and unreasonable (186 U. S. at 338), but the Court held that the reasonableness of the entire charges for the transportation must be considered, *i. e.,* the line-haul rates plus the terminal charge, and since the line-haul rates had been reduced about $10.00 to $15.00 per car, the Court held that the $2.00 terminal charge was just and reasonable.

The principle that the Commission cannot approve a separate charge for unloading or making delivery, without finding that the "aggregate charge for the through service is reasonable" was also recognized by the Commission in *Unloading Lumber at New York Harbor,* 256 I. C. C. 463, 468, in which it was held:

> The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor . . . The nature and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an

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> adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47, 61. As such a showing was not made respondents have not met the requirements of the statute in that respect and accordingly have not sustained their burden as to the reasonableness of the proposed charge.

The same issue was also presented in *Fruits and Vegetables to Duane St., N. Y.,* 66 I. C. C. 135, 139, which involved two proposals by the Erie Railroad, the second of which was "to establish terminal charges on fruits and vegetables at its Duane Street station." Those terminal charges were intended to cover the two services of unloading and sorting and were to take the place of lower charges, previously in effect, which covered only the sorting service. In finding the proposed unloading and sorting charges not justified, the Commission held:

> The terminal charges present a somewhat different problem. It is proposed that they shall apply on all fruit and vegetable traffic delivered at Duane street station. As is customary on Manhattan Island, delivery, including unloading, has heretofore been made at Duane street under the line-haul rates. * * * The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruit and vegetables at Duane street. They are performed on all

> of that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching after placement at unloading point. Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic, merely pointing out that the rates on California fruit are blanketed to all territory east of the Colorado common points and that 15 years ago, when the traffic began to be handled in the manner above described, no corresponding increase was made in the through rates. This blanket has been voluntarily maintained by the carriers for many years and appears to have been satisfactory to all concerned. We find that the establishment of terminal charges higher than the present assorting charges has not been justified.

In *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47, the Commission held invalid a proposed separate unloading charge to be added to the line-haul rates because the railroads had not shown the reasonableness of their line-haul rates. The basis for the Commission's decision, which is squarely applicable in the case at bar, is as follows (35 I. C. C. 47, 61):

> The assessment of any charge for terminal handling, the service having heretofore been performed under the freight rate, would have the effect of increasing that rate; and a proper justification of such an

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increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate. There is no evidence to warrant any finding upon the adequacy of the compensation now received by the carriers for their complete service.

* * * * *

The Commission strongly favors the analysis of service and rates as an aid to their measurement and comparison. But it holds that, *where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through service.* [Emphasis supplied.]

This principle was also recognized in *Terminal Charges at Pacific Coast Ports,* 255 I. C. C. 673, 677, where a separate charge for terminal service, including unloading, was not shown to be just and reasonable. It was there held:

> We have frequently approved the separation of certain charges for accessorial services from the line-haul rates. But this has only been upon a clear showing that the resulting separate charges for each portion

> of the total services were just and reasonable. In a number of these instances, the inclusion of certain services in the line-haul rates was for the benefit of particular shippers, and the extra cost entailed was not considered when the level of the line-haul rates was determined. Here, however, the entire body of these export and import rates have been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of these terminal services as a part of the through transportation to and from the docks. *Their proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services.* [Emphasis supplied.]

Commissioner Knudson, dissenting, in the Commission's report dated May 7, 1952, challenged in this proceeding, referred to the prior decisions by the Commission, which the Commission ignored in this case, stating:

> In several reports the Commission found that charges for unloading freight at New York piers incident to delivery to the consignee were included in the line-haul rates; that "delivery to the consignee is not effected until the cars are unloaded and the lading placed at a convenient location on the pier floor"; and that where a terminal

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service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation theretofore received for such through service. *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47; *Bills of Lading,* 52 I. C. C. 671; *Erie R. Co.* v. *Alabama & V. Ry. Co.,* 98 I. C. C. 268; *Fruits and Vegetables to Duane St., N. Y.,* 66 I. C. C. 135; *Allowances for Stacking,* 179 I. C. C. 780; *Unloading Lumber at New York Harbor,* 256 I. C. C. 463. These reports, supporting protestants' contention herein and specifically referred to in the examiners' proposed reports, are omitted from the report of the majority (I R. 23ee–23ff, 286 I. C. C. 119, 144).

The decisions by this Court and by the Commission, *supra,* pp. 64–71, require that the Commission's orders in this case, approving the delivery charges, be set aside. For over 50 years the carriers have included unloading of freight at New York and at certain terminals at Philadelphia as an integral part of the delivery required to be made under their line-haul rates, *supra,* pp. 30–53, and the carriers cannot now impose a separate charge on a component part of the transpor-

> of the total services were just and reasonable. In a number of these instances, the inclusion of certain services in the line-haul rates was for the benefit of particular shippers, and the extra cost entailed was not considered when the level of the line-haul rates was determined. Here, however, the entire body of these export and import rates have been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of these terminal services as a part of the through transportation to and from the docks. *Their proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services.* [Emphasis supplied.]

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service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation theretofore received for such through service. *Lighterage and Storage Regulations at New York,* 35 I. C. C. 47; *Bills of Lading,* 52 I. C. C. 671; *Erie R. Co.* v. *Alabama & V. Ry. Co.,* 98 I. C. C. 268; *Fruits and Vegetables to Duane St., N. Y.,* 66 I. C. C. 135; *Allowances for Stacking,* 179 I. C. C. 780; *Unloading Lumber at New York Harbor,* 256 I. C. C. 463. These reports, supporting protestants' contention herein and specifically referred to in the examiners' proposed reports, are omitted from the report of the majority (I R. 23ee–23ff, 286 I. C. C. 119, 144).

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tation service previously covered by their line-haul rates without showing the reasonableness of the aggregate charges for the transportation service rendered. Even assuming, *arguendo,* that because of an increase in the cost of unloading, the carriers are no longer *adequately* compensated for making delivery in their line-haul rates, the decisive fact is that the line-haul rates prior to November 1, 1948, included payment for the delivery, including unloading, performed at New York and Philadelphia, *supra,* pp. 36–53. It is, therefore, impossible to determine whether the proposed delivery charges are just and reasonable without determining the extent to which payment is being made for the delivery in the line-haul rates.

No evidence was introduced to show that the railroads are not being adequately compensated in their line-haul rates for the entire transportation rendered, including delivery, and it is significant that the Commission did not, in its final report in 1952, make any finding that the carriers are not adequately compensated in their line-haul rates for making delivery. "In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant" (I R. 100). Various rate increases have been granted in the line-haul rates from time to time, and effective October 6, 1947, a 30% increase in all

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freight rates was approved by the Commission (I R. 23b; 286 I. C. C. 119, 120). Subsequently, additional increases in freight rates of 10% [35] and 15% [36] were approved by the Commission. The increases of 30%, 10%, and 15% were cumulative, so that the aggregate increase in freight rates since October 1947 is approximately 64%.[37] But assuming, *arguendo,* that even with these increases the railroads are not being adequately compensated for the transportation rendered, the entire line-haul rates must be considered and evidence adduced must warrant a finding by the Commission that the entire charges proposed for the transportation, including delivery, consisting of the line-haul rates plus the proposed delivery charges, are just and reasonable. Otherwise the railroads will be receiving double payment for the service rendered. The extent, if any, to which the railroads are not at present being adequately compensated for making delivery under their line-haul rates—and, therefore, the extent to which an additional charge may now be imposed for making delivery—cannot be determined with-

[35] *Increased Freight Rates, 1948*, 272 I. C. C. 695, 276 I. C. C. 9, 279 I. C. C. 303.

[36] *Increased Freight Rates, 1951*, 280 I. C. C. 179, 281 I. C. C. 557, 284 I. C. C. 589, 289 I. C. C. 395.

[37] A limitation was provided in the Commission's decisions approving the increased rates as to the line-haul rates on fresh fruits and vegetables, but the aggregate increase in the line-haul rates on carload shipments of these commodities is almost as great as the increase in the rates for other freight.

out considering the reasonableness of the entire line-haul rates.

At any hearing involving a change in a rate, fare, or charge the "burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *" (49 U. S. C. § 15 (7)). The respondents, by failing to prove the reasonableness of the aggregate charges for the transportation to be rendered, have failed to sustain the burden of proof in this proceeding, and the Commission's orders approving the proposed charges are not supported by any evidence or findings in this respect. No valid order can be issued in this proceeding until the carriers demonstrate the reasonableness of their aggregate charges, *i. e.,* their line-haul rates plus the delivery charges, for the transportation service rendered. The orders of approval by the Commission in this case fail to observe the statutory requirements relative to the approval of rates or charges as just and reasonable. An order of the Commission which fails to apply a proper statutory standard is invalid, and should be set aside. *United States* v. *Carolina Carriers Corp.,* 315 U. S. 475, 489. Action by an administrative agency which is not consonant with an applicable statute, or which "operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Co.* v. *Commissioner,* 297 U. S. 129, 134.

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If the railroads are entitled to an increase in revenue because of the increased costs of unloading, the respondents have an adequate remedy under the Act for procuring such additional revenue. The delivering carriers, *i. e.*, the railroads in this case, incur a large proportion of the total costs involved in the transportation of freight to New York and Philadelphia from various parts of the country, but they are compensated, for the costs of making delivery, in the line-haul rate divisions. Before computing the division of the line-haul rates between the carriers involved, the delivering carriers receive an allowance out of the line-haul rates, and the balance is then divided among the carriers (I R. 100; II R. 571, 588). If the delivery costs have increased to the extent that the delivering carriers no longer receive an equitable division of the line-haul rates, the delivering carriers may secure an equitable division of the line-haul rates under § 15 (6) of the Act which provides:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise estab-

> lished), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers * * *. In so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to * * * whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge (49 U. S. C. § 15 (6)).

If the facts subsequently adduced at a hearing under § 15 (6) of the Act reveal the need for a further allowance in favor of the delivering carriers, the Commission has the power to authorize such an allowance. See *United States* v. *Great Northern,* 343 U. S. 562, 569–578; *Erie R. R. Co.* v. *A. & V. Ry Co.,* 98 I. C. C. 268. But the Commission cannot indirectly adjust the line-haul division in the present proceeding by imposing illegal charges for unloading, *i. e.,* delivering the freight. "Assuming the carriers are entitled to additional compensation for the cost of unloading freight at New York and Philadelphia, their remedy, under the Interstate Commerce Act, is to secure it by agreement with connecting carriers affected or make application to the Commission for a greater division of the line-haul rates to

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cover the needed additional costs instead of loading such costs on the farmers of this country" (I R. 207; 114 F. Supp. 420, 427, Judge DeVane, Dissenting).

II. THE ORDERS OF THE COMMISSION, APPROVING IDENTICAL DELIVERY CHARGES AT NEW YORK AND PHILADELPHIA EVEN THOUGH IT IS CONCEDED THAT DELIVERY COSTS AT PHILADELPHIA ARE SUBSTANTIALLY LOWER THAN AT NEW YORK, ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE OR ADEQUATE FINDINGS

The Commission found in 1952 that "[u]nloading operations are less expensive at Philadelphia than at New York" (I R. 23d; 286 I. C. C. 119, 122). The Commission also found in 1948 that the same disparity of costs existed (I R. 24s; 272 I. C. C. 648, 663). Nonetheless the Commission's orders in 1948 and 1952 approved identical charges for making delivery at New York and Philadelphia (I R. 24r; 272 I. C. C. 648, 663; I R. 23bb; 286 I. C. C. 119, 141).

The Commission, in its 1952 report, sets forth no basis for approving identical charges at New York and Philadelphia, stating merely that "[a]s indicated in the prior report, it is desirable that the charges for unloading at New York and Philadelphia be the same" (I R. 23bb; 286 I. C. C. 119, 141). But the Commission's report in 1948 manifests no basis for the Commission's approval of identical charges at New York and Philadelphia. To be sure, the 1948 report con-

cluded that: "The same schedule of charges was published for application at both New York and Philadelphia because of the long-standing competitive relation between those cities" (I R. 24c; 272 I. C. C. 648, 650),[38] "the record indicates the desirability of a parity of charges for unloading at New York and Philadelphia" (I R. 24r; 272 I. C. C. 648, 663), and "the charges for unloading should be the same at both points" (I R. 24r; 272 I. C. C. 648, 663). That statement of the Commission's ultimate conclusion is not supported by any evidence or adequate findings. Neither the evidence nor the Commission's reports afford any basis for concluding that there is a "desirability of a parity of charges" at New York and Philadelphia.[39]

With respect to commercial competition the Commission found that "[p]roduce dealers in the Philadelphia market are in competition with like dealers at points such as Baltimore, Md., Pittsburgh, Pa., and New York, because these markets are accessible to certain buyers who normally procure their fruits and vegetables in Philadelphia" (I R. 23u; 286 I. C. C. 119, 136).

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[38] This statement in the Commission's report is based entirely on the following statement, not based on any evidence, at page 10 of the railroads' *brief* before the Commission:

> The same charges were published at both New York and Philadelphia in order to preserve the long-standing relationship between these two cities.

[39] "It is no less inequality to have equality among unequals." Mr. Justice Frankfurter, dissenting, in *New York* v. *United States*, 331 U. S. 284, 353.

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Hence the commercial competition between New York and Philadelphia is but a phase of the general commercial competition among all eastern cities and affords no basis for imposing identical charges for making delivery at those two cities when, as is conceded, there is a substantial difference between New York and Philadelphia in the unloading or delivery expenses.

An order of the Commission is illegal if it is not based on adequate findings and substantial evidence on the record as a whole. *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61, 81; *New York* v. *United States,* 331 U. S. 284, 301–310; *Interstate Commerce Commission* v. *Mechling,* 330 U. S. 567, 583; *North Carolina* v. *United States,* 325 U. S. 507, 520; *Alabama* v. *United States,* 325 U. S. 535, 537; *Eastern-Central Motor Carriers Association* v. *United States,* 321 U. S. 194, 209–212; *City of Yonkers* v. *United States,* 320 U. S. 685, 689–692; *United States* v. *Baltimore and Ohio R. Co.,* 293 U. S. 454, 462–465; *Florida* v. *United States,* 282 U. S. 194, 215. Here, as in *United States* v. *Carolina Freight Carriers Corp.,* 315 U. S. 475, 488–489, an erroneous application of the law is obscured by vague findings. Nothing is revealed in the findings by the Commission as to why the unloading or delivery charges in New York and Philadelphia should be the same even though the unloading or delivery costs at Philadelphia are substantially lower than the costs at New York. The desir-

ability of "a parity of charges," for unloading or delivery in the two cities, is not made out by mere assertion. An assertion in the findings that it is desirable to establish "a parity of charges" for unloading or delivery in the two cities falls short of the criteria of clarity and completeness which were held to be necessary in *Colorado-Wyoming Gas Co.* v. *Federal Power Commission,* 324 U. S. 626, 634; *Automatic Canteen Co.* v. *Federal Trade Comm.,* 346 U. S. 61, 81. It is not the function of the Court to "search the record to ascertain whether, by use of what there may be found, general and ambiguous statements in the report [of the Commission] intended to serve as findings may by construction be given a meaning sufficiently definite and certain to constitute a valid basis for the order." *Atchison Ry.* v. *United States,* 295 U. S. 193, 201–202. Findings may not be supplied by implication. *Ibid.*

Since the Court is charged with the duty of reviewing the correctness of the standards which the governmental agency has applied and the essential fairness of the mode by which the agency reached its conclusions, the agency should do more than shelter its conclusions "behind uncritical generalities or such looseness of expression as to make it essentially impossible" for the Court to determine what really lay behind the conclusions which are being reviewed. *Automatic Canteen Co.* v. *Federal Trade Comm.,* 346 U. S. 61, 81. The assertions set forth in the find-

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ings by the Commission that the unloading charges at New York and Philadelphia should be the same notwithstanding a substantial difference in the unloading expenses are manifestly inadequate for the purpose of judicial review. Also assuming, *arguendo,* the adequacy of the findings, the record does not contain substantial evidence on which to support the findings and conclusions of the Commission.

III. THE CHARGES FOR MAKING DELIVERY OF FRESH FRUITS AND VEGETABLES AT NEW YORK ARE UNJUST DISCRIMINATIONS AND UNDUE AND UNREASONABLE PREJUDICES OR DISADVANTAGES IN VIOLATION OF §§ 2 AND 3 (1) OF THE INTERSTATE COMMERCE ACT INASMUCH AS SIMILAR PERISHABLE AGRICULTURAL COMMODITIES ARE DELIVERED AT NEW YORK UNDER THE LINE-HAUL RATES

The Commission found that prior to November 1, 1948, "when the charges under consideration became effective, there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic" at the New York piers (I R. 23c; 286 I. C. C. 119, 121). "The charges which became effective on that date apply only on fresh fruits and vegetables" (I R. 23c; 286 I. C. C. 119, 121). The Commission further found that "[a]s regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner

in which fruits and vegetables are car-floated and unloaded" (I R. 23f; 286 I. C. C. 119, 123).

The carriers deliver all freight at the New York piers, other than fresh fruits and vegetables, without any charge other than the line-haul rate. Perishable agricultural commodities, *e. g.,* butter, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk are included in the products delivered under the line-haul rates (I R. 23h; 286 I. C. C. 119, 125). The Hearing Examiner found that "respondents have continued to perform such unloading without charge in respect of other commodities at the identical New York pier stations at which charges are collected for unloading fruits and vegetables. For instance, canned fruit juices originating at points in Florida are unloaded without additional charge, other than the line-haul rate, at the same New York piers at which charges are collected for unloading fruits and vegetables. As there is keen competition between fresh fruits and fruit juices in household consumption, the assailed unloading charges are unduly prejudicial to fresh fruits and unduly preferential of fruit juices in violation of section 3 (1) of the act" (I R. 114). The Hearing Examiner concluded that upon "further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable,

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and that they are also in violation of section 3 (1) of the act" (I R. 115–116). The Commission reversed the Examiner's finding and stated that the "record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of section 2 or 3 of the act" (I R. 23bb; 286 I. C. C. 119, 142).

In its 1948 report, the Commission stated that the "substance of respondents' explanation for this seeming disparity of treatment is that since fruits and vegetables constitute the bulk of the shipments received at these stations, it was considered appropriate in the first instance to institute charges for unloading these perishables and to defer publication of similar charges on other traffic. It is indicated that consideration is being given to the establishment of unloading charges on traffic other than fruits and vegetables but that no definite conclusion has been reached" (I R. 24b; 272 I. C. C. 648, 649). In its 1952 report the Commission repeated that consideration is "being given by respondents to the establishment of unloading charges on traffic other than fresh fruits and vegetables, but as yet no definite conclusion in respect of such action has been reached" (I R. 23c; 286 I. C. C. 119, 121). In these circumstances set forth in the Commission's findings it is manifest that the fresh fruit and vegetable traffic has been discriminated against by the railroad carriers. There is no substance to the "respondents'

explanation [in 1948] for this seeming disparity of treatment" (I R. 24b; 272 I. C. C. 648, 649); the railroads have subjected the fresh fruit and vegetable traffic to an undue and unreasonable prejudice or disadvantage, and the railroads have unjustly discriminated against the fresh fruit and vegetable traffic in violation of §§ 2 and 3 (1) of the Act (49 U. S. C. §§ 2 and 3 (1)).[40]

Judge DeVane, dissenting in this case, concluded that:

> In my opinion the carriers not only failed to meet the requirements of Section 15 (7) of the Act, but the evidence in the case also clearly establishes a violation of Sections 2 and 3 (1) of the Act. Unloading is performed by the carriers of almost all perishable freight consigned to New York. The unloading charges are made applicable only to fruits and vegetables, while other similar perishable products, such as butter, butter solids, cheese, eggs, dressed poultry, fresh meat, fish, oysters, and raw milk, are unloaded by the carrier without the imposition of any unloading charges. This, in my opinion, constitutes a clear violation of Sections 2 and 3 (1) of the Act (I R. 205–206; 114 F. Supp. 420, 426).

The principal evil at which the Interstate Commerce Act is aimed is discrimination in its various manifestations. *New York* v. *United States,* 331

[40] This issue was raised in the administrative proceeding and in the District Court on review, and is properly before this Court on appeal. See Brief for the Secretary of Agriculture Opposing Motions to Affirm, pp. 2–6.

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U. S. 284, 296; *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740, 749. It is the purpose of Congress to insure equality of treatment for all shippers by rail. *Chicago & Alton R. R. Co.* v. *Kirby,* 225 U. S. 155, 166; *New Haven R. R.* v. *Interstate Com. Comm.,* 200 U. S. 361, 391; *Union Pacific Railway* v. *Goodridge,* 149 U. S. 680, 690–691. The Act provides that the public interest shall be served by prohibiting discrimination between commodities by carriers, *i. e.,* one commodity is not to be penalized for the benefit of another. Section 2 of the Act proscribes as an "unjust discrimination" "any special rate * * * charge, [or] demand * * * from any person * * * for any service * * * in the transportation of passengers or property" which is greater or less than the charge or demand from any other person "for doing for him * * * a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions * * *." 49 U. S. C. § 2. Also, the Act prohibits any carrier from subjecting "any particular description of traffic to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever * * *." 49 U. S. C. § 3 (1).

The uncontroverted facts and the Commission's findings show that no special service is rendered by the railroads with respect to the transportation of fresh fruits and vegetables as contradistinguished from the other similar com-

modities. The railroads unload all of the commodities and then make delivery at the New York piers, *supra,* pp. 82–84. There is no evidence and no finding, by the Commission, that any special or distinctive service is performed by the carriers for which an unloading, *i. e.,* delivery, charge is warranted for fresh fruits and vegetables, but not for other similar commodities. "The chief purpose of the Act was to secure uniformity of treatment to all [and] to suppress unjust discriminations * * *." *Kansas City So. Ry.* v. *Albers Comm. Co.,* 223 U. S. 573, 597. "The provisions of the bill [which became the Interstate Commerce Act] are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations * * *" (Sen. Rep. No. 46, 49th Cong., 1st Sess., p. 215; *Id.* at pp. 176–182). "The purpose of the Act * * * was to provide one rate for all shipments of like character. * * * In this way discrimination is avoided, and all receive like treatment, which it is the main purpose of the Act to secure." *Pittsburgh &c. Ry. Co.* v. *Fink,* 250 U. S. 577, 581. To make an additional charge on fresh fruits and vegetables and no charge for the same transportation service for "a like kind of traffic" is on

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its face an unjust discrimination, and as such it is violative of § 2 of the Act (49 U. S. C. § 2). *Ayrshire Corp.* v. *United States,* 335 U. S. 573, 584. Moreover it is conflictive with the national transportation policy, as declared by Congress, to establish and maintain, *inter alia,* reasonable charges "without unjust discriminations." [41]

[41] 54 Stat. 899, 49 U. S. C. 1946 ed. p. 5443. Charging different rates "for equal service" is "a plain case of discrimination," and different rates "for equal service without any showing that any additional service was rendered for the additional charge" are violative of § 305 (c) of the Act which proscribes "unjust discrimination" by water carriers. *Alabama G. S. R. Co.* v. *United States,* 340 U. S. 216, 227. See also, *Interstate Commerce Comm.* v. *Mechling,* 330 U. S. 567. All of the provisions of the Act shall be administered and enforced with a view to carrying out the declaration of national transportation policy. 84 Cong. Rec. 9861–9866; *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 82–84; *Eastern-Central Motor Carriers Ass'n* v. *United States,* 321 U. S. 194, 206; *United States* v. *Pennsylvania R. Co.,* 323 U. S. 612, 616–617; *Interstate Commerce Comm.* v. *Mechling,* 330 U. S. 567, 576. The provisions in §§ 2 and 3 (1) of the Act are similar to § 90 in The Railways Clauses Consolidated Act, 1845, 8 and 9 Vict. c. 20, and § 2 in The Railway and Canal Traffic Act, 1854, 17 and 18 Vict. c. 31. "It is the policy of Parliament that traders as a matter of indisputable right shall receive equal treatment." *North Staffordshire Rail. Co.* v. *Edge* [1920] A. C. 254, 262. See, also, *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Denaby Main Colliery Co.,* L. R. 14 Q. B. Div. 209, 224. The similarity between §§ 2 and 3 (1) of the Interstate Commerce Act and the above statutes in England has been recognized in cases under the Interstate Commerce Act. See, *e. g., Texas & Pac. Railway* v. *Interstate Com. Com.,* 162 U. S. 197, 222–234. See, also, Fifth Annual Report of the Interstate Commerce Commission (1891), p. 53; Aitchison, *The Evolution of the Interstate Commerce Commission:* 1887–1937, 5 George Washington L. Rev. 306 (1937).

The findings by the Commission, *supra,* pp. 82–84, show that the charges applicable to fresh fruits and vegetables result in other similar commodities, as to which no charges are imposed, having an "undue or unreasonable preference or advantage" in violation of § 3 (1) of the Act (49 U. S. C. § 3 (1)). A rail carrier cannot exact, for similar services, a higher rate from one class of shippers than from another. *Interstate Commerce Comm.* v. *Mechling,* 330 U. S. 567, 583. The special charge on fresh fruits and vegetables is not imposed because of any geographical situation or advantage peculiar to fresh fruits and vegetables (*Cf. Interstate Commerce Commission* v. *Diffenbaugh,* 222 U. S. 42, 46), but this traffic is subjected to the charge without any reason for selecting it and, at the same time, leaving free from the charge other like commodities. The action by the Commission is repugnant to the cardinal purpose of the Act to wipe out "discriminations of all types" (*United States* v. *Baltimore & O. R. Co.,* 333 U. S. 169, 175). To be sure, the Commission said in its report in 1948 and again in its report in 1952 that the railroads are giving "consideration" to the establishment of comparable charges on traffic other than fresh fruits and vegetables, *supra,* pp. 83–84. But the statute prohibits discrimination; and it is not enough for the Commission to say that the railroads are willing to consider a proposal to equalize or remove the discrimination. The Com-

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mission has found, in this proceeding, that "the movement of freight, other than fruits and vegetables, by carfloat to the New York piers, and the unloading of such freight to the pier platform * * * is identical with the manner in which fruits and vegetables are carfloated and unloaded" (I R. 23f; 286 I. C. C. 119, 123). One commodity is not to be penalized for the benefit of another, and the discrimination in this case is set forth in the Commission's findings which reveal the arbitrary character of the discrimination.

The assertion in the findings by the Commission that the "record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 or 3 of the act" (I R. 23 bb; 286 I. C. C. 119, 142) is refuted by the findings of the Commission that the services for fruits and vegetables are identical to the services for the other similar commodities, and neither the Commission's findings nor the record reveals or suggests any reason or basis for the discrimination.[42] The Commission's orders approving charges on fresh fruits and vegetables should be enjoined and set aside as violative of §§ 2 and 3 (1) of the Act (49 U. S. C. §§ 2 and 3 (1)).

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[42] The findings are inadequate in this respect, and for that reason also the action of the Commission is invalid. *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U. S. 61, 81; *New York* v. *United States*, 331 U. S. 284, 301–310; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488–489; *Florida* v. *United States*, 282 U. S. 194, 215.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed, and the orders of the Commission, approving the separate charges on fresh fruits and vegetables, should be set aside and enjoined.

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Solicitor,
NEIL BROOKS,
Associate Solicitor,
DONALD A. CAMPBELL,
Attorney,
U. S. Department of Agriculture.

APRIL 1954.

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APPENDIX

The following are the relevant provisions of the Agricultural Marketing Act of 1946 (60 Stat. 1087, 1088–1089):

SEC. 202. The Congress hereby declares that a sound, efficient, and privately operated system for distributing and marketing agricultural products is essential to a prosperous agriculture and is indispensable to the maintenance of full employment and to the welfare, prosperity, and health of the Nation. It is further declared to be the policy of Congress to promote through research, study, experimentation, and through cooperation among Federal and State agencies, farm organizations, and private industry a scientific approach to the problems of marketing, transportation, and distribution of agricultural products similar to the scientific methods which have been utilized so successfully during the past eighty-four years in connection with the production of agricultural products so that such products capable of being produced in abundance may be marketed in an orderly manner and efficiently distributed. In order to attain these objectives, it is the intent of Congress to provide for (1) continuous research to improve the marketing, handling, storage, processing, transportation, and distribution of agricultural products; (2) cooperation among Federal and State agencies, producers, industry organizations, and others in the development and effectuation of research and marketing programs to improve the dis-

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tribution processes; (3) an integrated administration of all laws enacted by Congress to aid the distribution of agricultural products through research, market aids and services, and regulatory activities, to the end that marketing methods and facilities may be improved, that distribution costs may be reduced and the price spread between the producer and consumer may be narrowed, that dietary and nutritional standards may be improved, that new and wider markets for American agricultural products may be developed, both in the United States and in other countries, with a view to making it possible for the full production of American farms to be disposed of usefully, economically, profitably, and in an orderly manner. In effectuating the purposes of this title, maximum use shall be made of existing research facilities owned or controlled by the Federal Government or by State agricultural experiment stations and of the facilities of the Federal and State extension services. To the maximum extent practicable marketing research work done hereunder in cooperation with the States shall be done in cooperation with the State agricultural experiment stations; marketing educational and demonstrational work done hereunder in cooperation with the States shall be done in cooperation with the State Agricultural extension service; market information, inspection, regulatory work and other marketing service done hereunder in cooperation with the State agencies shall be done in cooperation with the State departments of agriculture, and State bureaus and departments of markets (7 U. S. C. § 1621).

SEC. 203. The Secretary of Agriculture is directed and authorized:

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* * * * *

(j) To assist in improving transportation services and facilities and in obtaining equitable and reasonable transportation rates and services and adequate transportation facilities for agricultural products and farm supplies by making complaint or petition to the Interstate Commerce Commission, the Maritime Commission, the Civil Aeronautics Board, or other Federal or State transportation regulatory body with respect to rates, charges, tariffs, practices, and services, or by working directly with individual carriers or groups of carriers (7 U. S. C. § 1622 (j)).

The following are the relevant provisions of the Agricultural Adjustment Act of 1938 (52 Stat. 31, 36):

SEC. 201. (a) The Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. Before hearing or disposing of any complaint (filed by any person other than the Secretary) with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, the Commission shall cause the Secretary to be notified, and, upon application by the Secretary, shall permit the Secretary to appear and be heard (7 U. S. C. § 1291 (a)).

(b) If such rate, charge, tariff, or practice complained of is one affecting the public interest, upon application by the Secretary, the Commission shall make the Secretary a party to the proceeding. In such case the Secretary shall have the rights of

a party before the Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. The liability of the Secretary in any such case shall extend only to liability for court costs (7 U. S. C. § 1291 (b)).

The following are the relevant provisions of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U. S. C. § 1 *et seq.*):

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the

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above declaration of policy (49 U. S. C. preceding § 1).

* * * * *

SEC. 1 (3) (a). * * * The term 'transportation' as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported * * * (49 U. S. C. § 1 (3) (a)).

SEC. 1 (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful (49 U. S. C. Supp. V § 1 (5)).

SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of

unjust discrimination, which is hereby prohibited and declared to be unlawful (49 U. S. C. § 2).

SEC. 3 (1). It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description (49 U. S. C. § 3 (1)).

SEC. 6 (1). Every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and

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charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part (49 U. S. C. § 6 (1)).

SEC. 6 (7). No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transporta-

tion of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs (49 U. S. C. § 6 (7)).

SEC. 15 (6). Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accord-

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ance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge (49 U. S. C. § 15 (6)).

SEC. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its rea-

sons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or

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practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible (49 U. S. C. § 15 (7)).

SEC. 15a (2). In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service (49 U. S. C. § 15a (2)).

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HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 481

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION OF INTERSTATE COMMERCE COMMISSION TO AFFIRM

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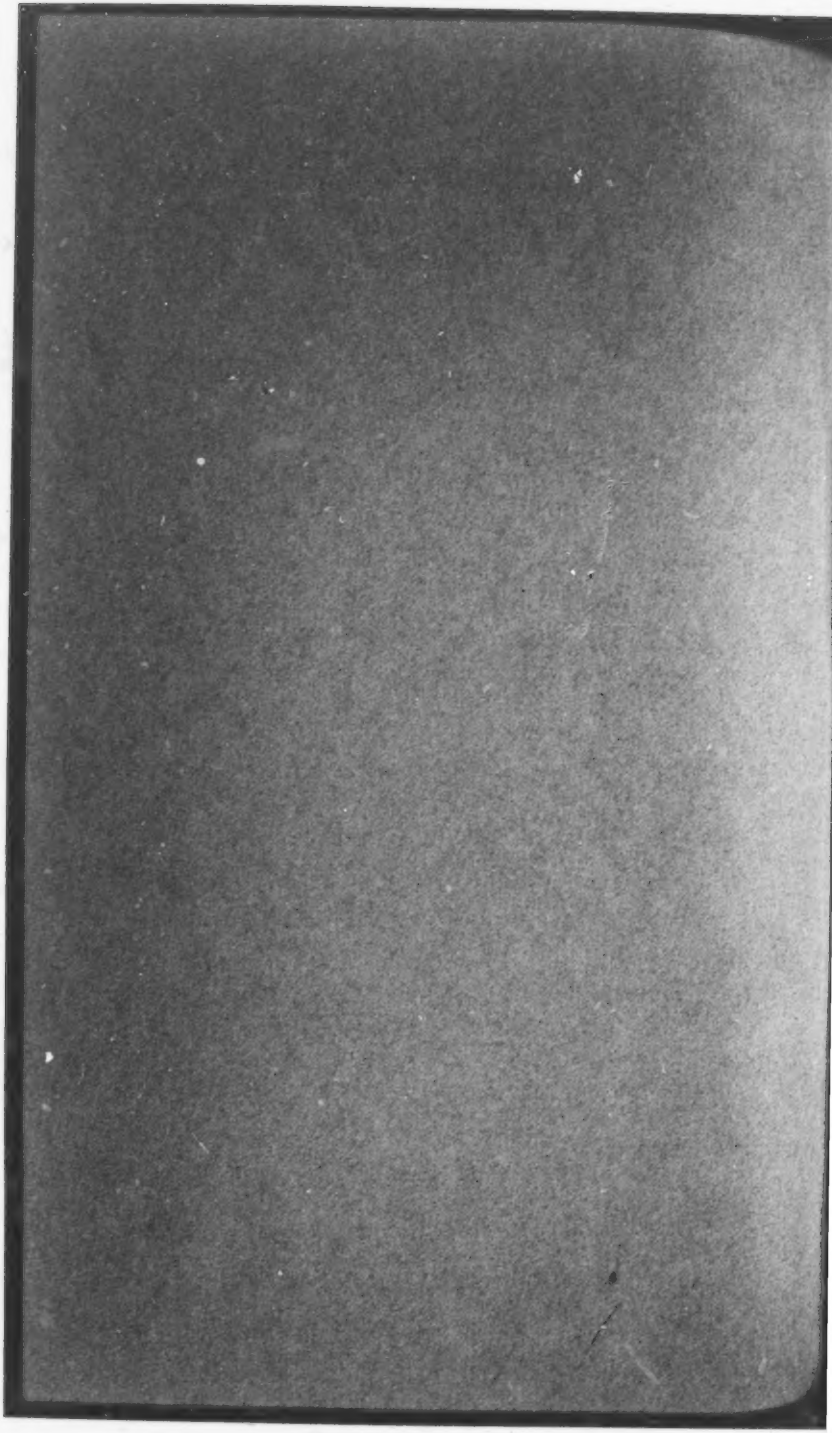
Counsel for the Appellee
Interstate Commerce Commission.



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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 597—Orl.—Civ.

FLORIDA CITRUS COMMISSION, ET AL., PLAINTIFFS

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL., INTERVENING PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., INTERVENING DEFENDANTS

MOTION TO AFFIRM

Filed Orlando, Fla.—Nov. 12, 1953. Julian A. Blake, Clerk.

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellee Interstate Commerce Commission moves that the judgment of the District Court be affirmed.

The two appeals herein are direct appeals from a final judgment, entered August 31, 1953, of a three-judge District Court convened pursuant to 28 U.S.C. 2284 and 2325, which dismissed a complaint seeking to set aside orders of the Interstate Commerce Commission. The opinion of the District

Court is reported at 114 F. Supp. 420. The appeals herein, one by the Secretary of Agriculture the other by the remaining plaintiffs, were allowed on October 28, 1953. Appeal papers were served upon appellee on October 30, 1953.

The orders herein assailed are based upon two reports issued by the Commission.[1] In the first report, dated October 4, 1948, the Commission, after a lengthy hearing before an examiner, followed by oral argument and reargument before the Commission, approved a proposal by certain eastern railroads[2] to establish charges for unloading carload shipments of fresh fruits and vegetables at New York and Philadelphia, in addition to the carriers' charges for the line-haul service, the unloading charges becoming effective November 1, 1948. Thereafter, upon petition of certain protestants, including most of the plaintiffs herein, the Commission reopened the proceeding and received additional evidence. On May 7, 1952, it issued its report on rehearing,[3] in which it found that the unloading charges under consideration "are not shown to be just and reasonable", but approved a schedule of substantially lower charges.[4] The rail-

[1] *Unloading Charges on Fresh Fruits and Vegetables at New York and Philadelphia*, 272 I.C.C. 648, and 286 I.C.C. 119.

[2] The Baltimore & Ohio Railroad Company, the Erie Railroad Company, The New York Central Railroad Company, the Pennsylvania Railroad Company, and the Reading Company, which have intervened as defendants in this action.

[3] 286 I.C.C. 119.

[4] The unloading charges approved were $1.05, $1.35, and $1.65 per ton of certain specified commodities, in lieu of the charges of $1.95, $2.28, and $2.60, respectively, then in effect.

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roads thereupon cancelled the higher charges, in compliance with the Commission's order, and filed schedules making the approved lower charges effective. Certain of the plaintiffs then filed with the Commission formal complaints attacking the lower charges as unjust and unreasonable, which complaints the Commission dismissed by order of December 15, 1952, for the stated reason that they assailed the charges "on substantially the same grounds" as those on which the parties had assailed them in the previously concluded proceeding.

The facts shown by the evidence as summarized in the Commission's two reports are undisputed. The opinion of the District Court contains the following condensation (p. 422 of 114 F. Supp.):

> Substantially all carload shipments of fresh fruits and vegetables destined to New York City from the South and West are brought to the Jersey side of the Hudson River, and the freight cars with their cargoes intact, are then ferried across the river on car floats. There are two methods of delivery on the New York side. One is to switch the railroad cars from the car floats to team tracks located on land in lower Manhattan, where the consignees unload the railroad cars and place the cargo directly onto trucks. There is no separate charge for these deliveries.
>
> By the other method, with which we are here concerned, the railroad cars are not switched to land tracks, but remain on the car floats which are placed alongside unloading piers where the carriers unload the cars, placing the

contents on the floor of the pier station, where they are picked up by the consignees. The consignees are not allowed to unload the freight cars themselves, as they do on the team tracks, as it is physically impossible to place the consignees's trucks alongside the car floats. The carriers therefore unload the cars, the consignees having access to shipments only after they have been unloaded and placed on the floor of the pier stations. Approximately 75% of the total traffic is handled in this manner, as the team tracks can accommodate only about 25% of the traffic, and it is not feasible to expand them.

For this unloading service the railroads, since November 1, 1948, have been authorized to make additional charges, over and above the line haul rates, at designated pier stations in Manhattan, first those proposed by the railroads and approved by the Commission Oct. 4, 1948, effective November 1, 1948, 272 I.C.C. 648, and later the lower rates approved by the Commission, May 7, 1952, 286 I.C.C. 119, here under attack. No delivery charges are imposed for other types of commodities unloaded at the pier stations in like manner as fresh fruits and vegetables. Prior to November 1, 1948, the carriers also unloaded fresh fruits and vegetables at pier stations without additional charges.

In Philadelphia, unloading operations are generally similar to those at New York, except that no car floatage is now performed, and the team tracks are more adequate, but there are designated stations at which the carrier per-

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forms the unloading before the consignee has access to the goods.

In approving as "just and reasonable" [5] the unloading charges first proposed, the Commission found that the unloading service performed by the carriers was in "substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published"; [6] also that charging for unloading fruits and vegetables, while continuing the free unloading of other commodities at the same locations, would not be discriminatory as against fruits and vegetables and in favor of the other commodities, the "circumstances and conditions affecting the unloading of these other commodities [not being] shown to be similar in material respects, to those affecting the unloading of fruits and vegetables." 272 I.C.C. 648, 662.

After finding that the "relative level of the [line-haul] rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading," the Commission stated that "we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates"; and found that the "establishment of specific charges for unloading at New York and Philadelphia,

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[5] 49 U.S.C. 15(7).

[6] Every common carrier by rail is required to file with the Commission and publish "schedules showing all the rates, fares, and charges for transportation * * * and shall also state separately all terminal charges, * * *." 49 U.S.C. 6(1).

without reference to the levels of the line-haul rates, is justified." 272 I.C.C. 648, 662.

In subsequently approving the lower scale of unloading charges, the Commission found that the method of handling shipments through the pier stations, where the unloading is performed by the carriers, "is of benefit to both shippers (including consignees) [7] and carriers"; that the carriers "have been willing to perform the unloading without a separate charge until, in recent years, the cost [8] thereof substantially increased"; and "that the cost of unloading should be borne partly by the shippers and partly by the respondents [the carriers]." 286 I.C.C. 119, 139.

Explaining its reason for approving the same level of unloading charges at Philadelphia as at New York, notwithstanding "the cost of service is less at Philadelphia than at New York", the Commission pointed out that a separate charge for special sorting is made by the carriers at New York, but not at Philadelphia, and furthermore, "the record indicates the desirability of a parity of

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[7] Benefits to consignees include the allocation of space on the piers for each consignment, consignees being permitted there to display the shipments to prospective purchasers, and to have the merchandise sold at auction or at private sales, all of said services being furnished by the carriers without charge and as incidents of pier-station delivery. 286 I.C.C. 119, 125, 127. Comparable benefits are enjoyed by Philadelphia consignees, p. 134.

[8] The unloading costs were shown to be substantially greater than, and as to some commodities more than double, the unloading charges approved by the Commission. 286 I.C.C. 119, 138.

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charges for unloading" at the two cities. 272 I.C.C. 648, 663; 286 I.C.C. 119, 141.

ARGUMENT

The assignments of error made by the appellants, including the Secretary of Agriculture, raise no substantial questions justifying further review by this Court. They merely reiterate the contentions[9] —fully considered and rejected by the District Court—that the Commission's findings were inadequate and without substantial evidentiary support, and that the Commission was without authority to approve the assailed unloading charges.

As the District Court held, the fact finding and policy making authority in these matters is the Interstate Commerce Commission, in which Congress has reposed the duty and authority to determine whether charges of this character are appropriate, reasonable, and just. *Arizona Grocery Co.* v. *Atchison, T. & S.F. R. Co.*, 284 U.S. 370, 386; *Penn. R. Co.* v. *International Coal Min. Co.*, 230 U.S. 184, 196; *Miss. Valley Barge Co.* v. *United States*, 292 U.S. 282, 286; *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 691.

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[9] The Secretary of Agriculture's assignment of error number 2 raises the question whether the imposition of unloading charges on fruits and vegetables constitutes an unjust discrimination and an unreasonable prejudice or disadvantage, in violation of 49 U.S.C. 2 and 3(1), "inasmuch as no similar charge is imposed on any other freight unloaded by the carriers at New York." That question was not raised in the District Court, and is not properly before this Court. *United States* v. *Hoffman*, 335 U.S. 77, 79; *United States* v. *Ruzicka*, 329 U.S. 287, 296; *Kay* v. *United States*, 303 U.S. 1, 5.

This Court has many times held, as the District Court in this case held, that "the Commission's determination of the point in time and place at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts." *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U.S. 368, 378; *Los Angeles Switching Case,* 234 U.S. 294, 311-14; *United States* v. *American Sheet & Tin Plate Co.,*[10] 301 U.S. 402, 408; *United States* v. *Pan American Petr. Corp.,* 304 U.S. 156, 158; *Baltimore & Ohio R. Co.* v. *United States,* 305 U.S. 507, 526-7; *Swift & Co.* v. *United States,* 316 U.S. 216, 222.

Furthermore, this Court has held, just as the Commission has long asserted in its decisions, that even though unloading may under some circumstances be considered a part of the transportation service, the cost of unloading "may be included in the line-haul tariffs or separately fixed or allowed as an additional charge." *Railroad Retirement Board* v. *Duquesne Co.,* 326 U.S. 446, 454; *Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925); *Berg Industrial Alcohol Co.* v. *Reading Co.,* 142 I.C.C. 161, 163-4 (1928); *Livestock Loaded and Unloaded at Chicago,* 213 I.C.C. 330, 336-7 (1925); and, as stated by the District Court, whether a terminal service, such as the unloading operation here involved, or as a part of, the service

[10] In the *Tin Plate* case this Court said (at p. 408 of 301 U.S.): "The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service."

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covered by the line-haul rate, is a question upon which the findings of the Commission are conclusive, if supported by substantial evidence. *Adams* v. *Mills*, 286 U.S. 397, 410; *Atchison, T. & S.F. R. Co.* v. *United States*, 232 U.S. 199, 221; *Los Angeles Switching Case, supra.*

That the mentioned findings, as well as all other material findings made by the Commission, had substantial evidentiary support, the District Court expressly held, after reviewing not only the evidence supporting the Commission's conclusion, but "the body of evidence opposed" thereto, *Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 488.

CONCLUSION

The Commission's findings and conclusions, from which followed its approval of the unloading charges herein assailed by the plaintiffs (appellants), were pursuant to and in accordance with provisions of the statute and with the decisions of this Court hereinabove cited. It necessarily follows that these two appeals present no substantial question for review. It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

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IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA ORLANDO DIVISION

No. 597—Orl.—Civil

FLORIDA CITRUS COMMISSION ET AL.,
Plaintiffs,

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.,
Intervening Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants,

THE BALTIMORE & OHIO RAILROAD COMPANY ET AL.,
Intervening Defendants

MOTION OF INTERVENING DEFENDANTS, APPELLEES TO AFFIRM

The intervening defendants, appellees, The Baltimore & Ohio Railroad Company, Erie Railroad Company, The New York Central Railroad Company, The Pennsylvania Rail-

road Company, and Reading Company, pursuant to Rule 12, Paragraph 3, of the Revised Rules of the Supreme Court of the United States, respectfully move that the judgment of the District Court be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

This motion is addressed to both the separate appeal by the Secretary of Agriculture of the United States and the joint appeal by the remaining plaintiffs and intervening plaintiffs in the above-entitled action. These appeals were allowed October 28, 1953, and were respectively served upon intervening defendants, appellees, on October 30 and 29, 1953. They are direct appeals from the same final judgment, entered on August 31, 1953, by a specially-constituted District Court of three judges, convened pursuant to 28 U. S. C., Sections 2284 and 2325, denying the prayer of plaintiffs that two orders of the Interstate Commerce Commission be annulled and set aside. The opinion of the said District Court is reported at 114 F. Supp. 420. The said orders of the Commission are (1) the order dated May 7, 1952, in I. & S. Docket No. 5500, which incorporated its reports of October 4, 1948 (272 I. C. C. 648) and May 7, 1952 (286 I. C. C. 119), vacated its order of October 4, 1948 authorizing higher unloading charges, and required cancellation of the previously authorized charges without prejudice to the establishment of the lower charges approved in the latter report; and (2) the order dated December 15, 1952, in Dockets Nos. 31105 and 31106 dismissing, in accordance with 49 U. S. C. 13(1), complaints (which alleged no new facts or changed conditions) against the same unloading charges which were approved and authorized by the report and order of May 7, 1953.[1]

[1] Copies of the orders of May 7, 1952, are annexed hereto as Appendices A and B, respectively. The text of 49 U.S.C. 13(1), which is Section 13(1) of the Interstate Commerce Act, is annexed as Appendix C hereto.

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No Substantial Question Is Presented

The unloading charges so approved and authorized apply at New York and Philadelphia on carloads of fresh fruits and vegetables when such carloads are delivered at railroad stations where the railroads, for physical reasons, perform the unloading. The unloading charges do not apply when such carloads are delivered at public team tracks or private sidings where the consignees perform the unloading.

Until these unloading charges became effective, New York and Philadelphia were the only exceptions to the general rule that carload freight must be unloaded by, or at the expense of, the consignees. The general rule is stated in Rule 27 of the Consolidated Freight Classification, the pertinent portion of which is quoted by the Commission at page 649 of its initial report, 272 I. C. C. 648.

The complaints in the District Court attacked the unloading charges on the alleged grounds that they are not "just and reasonable", which is the test prescribed by Section 1(5) of Part I of the Interstate Commerce Act, reading:

> "(5) All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."[2]

[2] It is to be noted that the Secretary of Agriculture, intervening Plaintiff-Appellant, here assigns as Error No. 2 that the unloading charges are an unjust discrimination and an undue and unreasonable prejudice or disadvantage in violation of Sections 2 and 3(1) of the Interstate Commerce Act. Since a violation of Sections 2 and 3(1) of the Interstate Commerce Act was not pleaded, briefed, or argued in the District Court, it cannot now be urged that the District Court erred in failing to annul and set aside the Commission's Orders under said Sections, and the question of "unjust discrimination and undue and unreasonable prejudice or dis-

The question presented is simple—did the District Court err in refusing to annul and set aside the finding of the Interstate Commerce Commission that these unloading charges are just and reasonable when the action of the Commission was specifically authorized by statute, when the Commission followed due process, and when its finding was supported by substantial evidence? The answer clearly is that the District Court did not err.

The statutory basis for the Commission's action is found in Section 15, paragraphs (1) and (7), of the Interstate Commerce Act—49 U. S. C. 15(1) and (7)—which specifically authorizes the Commission to determine whether any new rate or charge is unjust, unreasonable, unjustly discriminatory, or unduly preferential or prejudicial, or otherwise unlawful. The due process limitations imposed by the statute upon the Commission's power are that a hearing, upon reasonable notice, shall be held. The commission held not one but three hearings, all upon reasonable notice, and heard oral argument on four occasions. Plaintiff-Appellants do not contend otherwise.

The Commission's finding that these unloading charges are "just and reasonable" is supported by several lines of substantial evidence, three of which may be briefly summarized as follows:[3]

First: The Commission in its decision at 272 I. C. C. 649 and 650, pointed out that "The general rule is that shippers

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advantage" is, therefore, not before this Court on appeal. *Montana Railway Co.* v. *Warren*, 137 U.S. 348, 351. Violations of Sections 2 and 3(1) were, however, alleged before the Commission which specifically found that there was no showing of such violations. 272 I.C.C. 648, 649, 662; 286 I.C.C. 119, 142.

[3] All of these facts are found in the Commission's decisions previously referred to herein. The facts stated in these decisions, the accuracy of which is not challenged by Plaintiff-Appellants, amply support the Commission's action.

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must load or unload carload freight or make provision therefor at their own expense", that "There has been a gradual elimination of so-called free unloading of carload freight by carriers in official territory", that "Formerly, the carriers made exceptions to this rule at Chicago, Buffalo, Pittsburgh, and certain port cities * * *", and that "In the years following 1925, loading and unloading service by the carriers without charge, was discontinued at many other interior points in official territory until finally New York and Philadelphia remained the sole exceptions". When these unloading charges on fresh fruits and vegetables became effective, New York and Philadelphia were no longer exceptions to the general rule, and the practice of free unloading of these commodities by the railroads was completely eliminated. These facts are substantial evidence in support of the Commission's finding that the unloading charges at New York and Philadelphia are just and reasonable. Since the railroads are paid when they unload fresh fruits and vegetables at all other points, it is just and reasonable for them to be paid at New York and Philadelphia.

It is to be noted that in the *Five Per Cent Case*, 31 I. C. C. 351, 408, the Commission admonished the carriers to ascertain to what extent the practice of free unloading constituted an unjust burden upon them and to eliminate such free service. See also *Loading and Unloading Carload Freight*, 101 I. C. C. 394, 398.

Second: The heavy costs to the railroads of unloading fresh fruits and vegetables at New York and Philadelphia is additional substantial evidence to support the Commission's finding that the unloading charges are just and reasonable. The unloading charges are $1.05, $1.35, or $1.65 per ton depending upon the particular type of fruit or vegetable unloaded. The unloading cost of each of the deliver-

ing railroads substantially exceeds the unloading charge collected with respect both to New York and Philadelphia and with respect to each category of fruit or vegetable unloaded. These costs are stated by the Commission at 286 I. C. C. 126, 127, and 138. For example, at New York the unloading cost of the Pennsylvania Railroad is $2.22 per ton in cases where the unloading charge is only $1.05 per ton; the cost is $3.23 per ton where the unloading charge is only $1.35 per ton; and the cost is $4.11 per ton where the unloading charge is only $1.65 per ton. In other words, the unloading costs are double or more the unloading charges. These costs are substantial evidence in support of the Commission's finding that the unloading charges are no more than just and reasonable.

Third: As stated by the Commission at 286 I. C. C. 121, these unloading charges apply only at certain designated railroad stations at New York and Philadelphia where the railroads do the unloading. If the carloads of fresh fruits and vegetables are delivered on private sidetracks or team tracks or public delivery tracks in New York or Philadelphia, the consignees, and not the railroads, do the unloading, and the unloading charges do not apply in such instances. The unloading charges apply only when the carloads of fresh fruits and vegetables are delivered at certain designated railroad stations.

It should be emphasized that the station delivery of fresh fruits and vegetables, in connection with which the unloading charges under consideration apply, is highly beneficial to the trade as compared with team-track delivery. The Commission's reports state those benefits clearly and fully. For example, at 286 I. C. C. 125, the Commission found:

> "In taking pier station delivery, the fruit and vegetable trade has the advantage of displaying the entire

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contents of the car, thus affording the buyer the benefit of a thorough examination of the freight; of using the pier facilities as a sales' mart; and of occupying auction-room facilities without special charge therefor."

Again, at 286 I. C. C. 127, the Commission found:

"Prior to the arrival of the shipments at the piers, the carriers are informed of the contents of the cars, the names of the consignees, and other pertinent details. This permits notification of the receivers of the freight in advance of arrival and enables the carriers to allot space on their piers for each consignment. As regards the allotment of space, the piers are generally mapped out so as to give each consignee a specified location for the contents of the cars after unloading. Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers, who, prior to the auction, usually inspect the fruit while it is on display on the pier floor. Practically all the citrus fruit, as well as fresh fruit (other than citrus), after being unloaded on the piers, is sold at public auction in rooms on the second floors of the piers assigned for that purpose. Cantaloups and melons, as a rule, are not sold at auction, but are bought at private sales on the pier floor where the packages are displayed."

Similarly, at 286 I. C. C. 122, the Commission found:

"Respondents accord shippers numerous services in respect of the movement of fresh fruits and vegetables to pier stations in New York and Philadelphia. These services include, among others, notification to consignees of the location of their freight in transit, extra heat and light at the terminals incident to such traffic, and the providing of auction rooms and other similar services. This indicates the extent to which respondents have cooperated with the fruit and vegetable trade in facilitating the receipt of the freight and its sale."

Finally, at 286 I. C. C. 139, the Commission found that:

> "* * * delivery on the terminal platforms is more advantageous than team-track delivery to the Philadelphia consignees."

In substance, the station delivery of fresh fruits and vegetables which involves carriers' unloading at New York and Philadelphia, is a special type of delivery which carries with it special benefits to the trade not available from team-track or private siding delivery.

The handling of perishables at railroad stations at New York and Philadelphia is a most extraordinary and unusual operation. After the perishables are unloaded onto the station floors, the stations become huge wholesale stores at which the perishables are displayed, inspected by prospective buyers, and sold. This system of display, inspection, and sale is of great value to the trade, as found by the Commission and cannot be conducted at team tracks.

At the stations, however, the railroads do the unloading. The fact that the trade receives special benefits from station delivery where the railroads do the unloading, as contrasted with team-track delivery where the trade does its own unloading, is substantial evidence in support of the Commission's finding that these unloading charges at these stations are just and reasonable.

Thus, there is substantial evidence supporting the Commission's finding that these unloading charges are just and reasonable.

The Questions Presented Have Been Decided by the Supreme Court

The law applicable to this case is clear and well established. In *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286, the Supreme Court said: "The

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structure of a rate schedule calls in peculiar measure for the use of that enlightened judgment which the Commission by training and experience is qualified to form. * * * It is not the province of a court to absorb this function to itself." In *Swift & Co.* v. *United States*, 316 U. S. 216, 223, the Supreme Court said: "If there was evidence to sustain the Commission's findings on these matters, its conclusion * * * must be sustained." Similarly, in *Chicago, R. I. & P. Ry.* v. *U. S.*, 274 U. S. 29, 33, the Supreme Court said: "* * * if the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action." Likewise, in *McLean Trucking Co.* v. *U. S.*, 321 U. S. 67, 88, the Supreme Court said: "If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." Finally, in *I. C. C.* v. *Hoboken R. Co.*, 320 U. S. 368, 378, the Supreme Court said that a finding of the Commission "if supported by evidence, is conclusive on the courts."

The publication by railroads of separate charges for terminal services, which include unloading services, is specifically authorized by Section 6(1) of the Interstate Commerce Act.[4]

Plaintiff-Appellants assert that these unloading charges are improper because the unloading services precede delivery. There is no basis for such assertion. The Commission found at 272 I. C. C. 662 that:

> "Such charges are in substantially the same category as those for switching, transit, refrigeration, and var-

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[4] The text of this provision, 49 U.S.C. 6(1) is annexed hereto as Appendix D.

ious other special services for which separate charges are published."

All of these charges are for accessorial services performed prior to delivery.

Plaintiff-Appellants also assert that the Commission should have "investigated" the line-haul rates before approving and authorizing the unloading charges. The Commission remarked that the propriety of the separate unloading charges could be determined "without an extensive showing with respect to the reasonableness of the line-haul rates". (286 I. C. C. 140) The Commission, however, did not, as appellants suggest, totally disregard the question of the reasonableness of the line-haul rates. It pointed out that the level of the line-haul rates to New York and Philadelphia was not higher than the level of rates to other points where shippers unload or charges are assessed for unloading (286 I. C. C. 140). It should be noted in this connection that many of these rates have been prescribed or approved by the Commission (272 I. C. C. 662). In these circumstances the Commission properly took the view that the line-haul rates could be presumed to be just and reasonable in the absence of a showing otherwise by the protestants. Compare *Charges for Loading and Unloading Carload Freight,* 269 I. C. C. 25, cited, discussed, and quoted from at pages 140-141 of the Commission's report of May 7, 1952, here involved. (286 I. C. C. 119).

Various separate charges for all of the many accessorial services, such as refrigeration, transit, switching, reconsignment, unloading and so forth, have been published by the railroads and approved by the Commission without concurrently investigating the line-haul rates.[5] But the Plaintiff-

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[5] See, for example, *Loading and Unloading Carload Freight*, 101 I.C.C. 394; *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25; *Berg Industrial Alcohol Co.* v. *Reading Co.*, 142 I.C.C. 161; *Blocking and*

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Appellants are safeguarded as a matter of law with respect to the reasonableness of the line-haul rates by virtue of Section 13(1) of the Interstate Commerce Act which authorizes the filing of complaints.[6] If Plaintiff-Appellants were serious in their belief that the publication of separate charges for unloading made the line-haul rates unreasonable, they could have filed a complaint attacking the line-haul rates under Section 13(1). Plaintiff-Appellants still have the right to file such a complaint if they choose to do so. This is the proper procedure consistently followed in such cases. For example, in *Charges for Loading and Unloading Carload Freight*, 269 I. C. C. 25, 30-32, the Commission approved unloading charges at numerous points. The protestants argued that the railroads should not be permitted to increase the unloading charges without first justifying the level of the through charges which would result. The Commission said:

> "These line-haul rates, many of which have been prescribed or approved by this Commission, must, *unless otherwise shown in a proper proceeding*, be presumed to be just and reasonable." (Emphasis supplied).

The "proper proceeding" above referred to is a complaint proceeding under Section 13(1). The approval of the unloading charges in this case has never precluded, and does not now preclude, Plaintiff-Appellants from filing a complaint with the Commission attacking the reasonableness of the line-haul rates. In this connection it should be noted that the complaints filed in Nos. 31105 and 31106,

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Stacking Lumber, 168 I.C.C. 37; *Bracing Charges at North Atlantic Ports*, 279 I.C.C. 623; *Allowances for Stacking*, 179 I.C.C. 780; *Pickup and Delivery on Interterritorial Traffic*, 284 I.C.C. 581; and *Pick-Up and Delivery Charges in Official Territory*, I. & S. Docket No. 6013 (April 24, 1953).

[6] The text of this provision, 49 U.S.C. 13(1), is annexed as Appendix C hereto.

which were dismissed by the order of December 15, 1952, were directed to the unloading charges only, and not to the line-haul rates.

While the Commission is not precluded from considering the line-haul rates, it does not have to consider them in determining the reasonableness of separately stated accessorial charges. In *Barringer & Co.* v. *United States*, 319 U.S. 1, 9, 10, the Supreme Court said:

> "But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism."

A prior existing custom of performing the additional service without additional charge does not prohibit the making of a charge. *United States* v. *Smelting Co.*, 339 U. S. 186.

The reasons for a parity of unloading charges at New York and Philadelphia, in view of their long-standing competitive relationship, are fully stated by the Commission at 272 I.C.C. 648, 663.

Plaintiff-Appellants assert that the Commission's Orders should be annulled and set aside because the railroads did not carry the "burden of proof". The railroads put into the record all the facts necessary to justify the Commission's action, but the significant consideration now is that the facts of record do provide such justification.

It was entirely proper for the Commission to make its Order of December 15, 1952, dismissing the complaints against the approved unloading charges, because it had just completed a lengthy investigation, consisting of three sepa-

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rate hearings and four oral arguments, into the lawfulness of the unloading charges. There was no reason for a further investigation, particularly since the complaints alleged no new facts or changed conditions.

Conclusion

The law is clear and well established that the courts will not annul and set aside orders made by the Interstate Commerce Commission in accordance with the statute, upon due process, and with findings substantially supported by the evidence. That law is applicable here.

Accordingly, there being no substantial questions of law involved, this Motion to Affirm should be granted.

Respectfully submitted,

(S.) EDWARD K. GOETHE,
Counsel for Intervening Defendants,
Appellees.

FRANCIS L. BROWN,
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APPENDIX "A"

ORDER OF THE INTERSTATE COMMERCE COMMISSION—INVESTIGATION AND SUPERIOR COURT DOCKET NO. 5500

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 7th day of May, A. D. 1952.

Investigation and Suspension Docket No. 5500

UNLOADING CHARGES ON FRUITS AND VEGETABLES AT NEW YORK AND PHILADELPHIA

It appearing, That on October 4, 1948, the Commission made and filed its report and entered its order in the above-entitled proceeding, that on June 9, 1949, this proceeding was reopened for rehearing, and that by notice of October 10, 1950 the proceeding was assigned for further hearing;

It further appearing, That the proceeding has been reheard and further heard, and that the Commission, on the date hereof, has made and filed a report on rehearing and further hearing containing its findings of fact and conclusions thereon, which said report and the aforesaid report of October 4, 1948, are hereby referred to and made parts hereof:

It is ordered, That the aforesaid order of October 4, 1948, be, and it is hereby, vacated and set aside

It is further ordered, That said respondents be, and they are hereby notified and required to cancel the schedules naming the unloading charges under investigation herein, on or before July 3, 1952, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that the proceeding be discontinued.

W. P. BARTEL,
Secretary.

[SEAL.]

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APPENDIX "B"

ORDER OF THE INTERSTATE COMMERCE COMMISSION—DOCKET NOS. 31.105 AND 31,106

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 15th day of December, A. D. 1952.

No. 31105

FLORIDA CITRUS COMMISSION, ET AL.,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 31106

FLORIDA CITRUS COMMISSION, ET AL.,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

It appearing, That in Investigation and Suspension Docket No. 5500, Unloading Charges, Fruits and Vegetables, N. Y. and Phila., 286 I.C.C. 119, the Commission, on May 7, 1952, upon rehearing and further hearing, modified the finding in the prior report therein, 272 I.C.C. 648, and found that the shippers should not be required to pay more than certain specified unloading charges on fresh fruits and vegetables, in carloads, at New York, N. Y., and Philadelphia, Pa.; that respondents were required to cancel certain suspended schedules naming proposed increased unloading charges but without prejudice to the establishment of the unloading charges stated in the findings; and that respondents subsequently canceled the suspended schedules and made effective the stated charges;

It further appearing, That the complaints in Nos. 31105 and 31106 assail on substantially the same grounds the unloading charges approved in said report and published by the defendants; that complainants therein were parties to

I. & S. 5500; and that defendants' have filed motions to dismiss such complaints, and complainants have replied thereto;

And it further appearing, Upon consideration of such motions and replies that the circumstances and conditions with respect to the approved unloading charges have not materially changed since substantially the same issues were decided by the Commission in the I. & S. No. 5500, and that no reasonable grounds appear for further investigation of such charges or investigation of the matters in connection therewith specified in the complaints:

It is ordered, That defendants' motions to dismiss the complaints be, and they are hereby, granted, and that the complaints in Nos. 31105 and 31106 be, and they are hereby, dismissed.

By the Commission.

[SEAL.]

GEORGE W. LAIRD,
Acting Secretary.

APPENDIX "C"

PERTINENT SECTION OF THE INTERSTATE COMMERCE ACT—SECTION 13, PARAGRAPH (1)

49 U. S. CODE SEC. 13(1)

Sec. 13. (1) That any person, firm, corporation, company, or association or any mercantile, or agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time,

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to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

APPENDIX "D"

PERTINENT SECTION OF THE INTERSTATE COMMERCE ACT—
SECTION 6, PARAGRAPH (1)

SECTION 6, PARAGRAPH (1) OF INTERSTATE COMMERCE ACT—
49 U. S. CODE, SEC. 6(1)

SEC. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in

any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., APPELLEES

No. 481

FLORIDA CITRUS COMMISSION, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL., APPELLEES

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court of three judges is reported at 114 F. Supp. 420. The first report of the Interstate

Commerce Commission (R. 24)[1] appears at 272 I. C. C. 648, and its report on rehearing at 286 I. C. C. 119) (R. 23).

JURISDICTION

The final judgment of the district court was entered August 31, 1953 (R. 203), and the appeal was allowed October 28, 1953 (R. 220). The jurisdiction of this Court is invoked under 28 U. S. C. 1253 and 2101 (b). Probable jurisdiction was noted February 1, 1954 (R. 1555).

QUESTIONS PRESENTED

1. Whether, in the light of the peculiar conditions found to exist as to delivery of rail carload shipments of fresh fruits and vegetables at pier stations at New York City and at produce terminals at Philadelphia, the Interstate Commerce Commission acted within its powers in approving unloading charges by the railroad carriers at those places, over and above their charges for line-haul transportation.

2. Whether, in the light of the evidence before it, the Commission was warranted in its conclusion that the said unloading charges were not shown to be unjust and unreasonable.

3. Whether the evidence before the Commission warranted its finding that the said unloading charges were not shown to be unduly prejudicial or unjustly discriminatory as against fresh fruits

[1] As used herein, "R. —" refers to pages of the printed transcript of the record, and "O. R. —" to pages of the original record from the district court, not printed.

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and vegetables or unduly preferential of other traffic there unloaded by the carriers without charge.

4. Whether in the light of the evidence the Commission was warranted in finding that the charges for unloading at New York and Philadelphia should be the same.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act herein involved are set forth in the Appendix hereto.

STATEMENT

This is a direct appeal from the final judgment of a specially constituted district court, sustaining as valid in all respects the Interstate Commerce Commission's report on rehearing and its order in a proceeding entitled I. & S. (Investigation and Suspension) Docket No. 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia;* and the Commission's order (R. 26) dismissing two complaints filed with it by certain of the appellants herein, bearing docket numbers 31105 and 31106, and each entitled *Florida Citrus Commission et al.* v. *The Baltimore and Ohio Railroad Company et al.* (R. 28 and 35).

The proceeding docketed as I. & S. No. 5500 was instituted by the Commission in 1947 after certain railroads (now appellees herein) had filed schedules proposing to establish charges for unloading

carload shipments of fresh fruits and vegetables at New York, N. Y., and Philadelphia, Pa., and numerous parties, including most of the appellants herein, had protested the said charges (R. 24a). Upon the filing of the protests the Commission, acting under 49 U. S. C. 15 (7), suspended operation of the rates and ordered an investigation to determine the lawfulness of the proposed charges (O. R. 409). Thereafter the railroads voluntarily deferred the effective date of the schedules pending determination of the said proceeding (R. 24a).

Following a hearing before a Commission examiner, at which evidence was presented by the railroads and numerous opposing parties, and after oral argument and reargument, the Commission, on October 4, 1948, issued its report (272 I. C. C. 648, R. 24) in which it found that the proposed unloading charges, increased 30% under Ex Parte 166, were just and reasonable. It thereupon vacated the suspension and permitted the charges to become effective on November 1, 1948 (R. 23a).

The said charges for unloading were in addition to the line-haul rates and as made effective were as follows on the respective commodities named:

	Per net ton
Citrus fruits	$1.95
Fresh fruits (other than citrus)	2.28
Melons (including cantaloups)	2.60
Vegetables, fresh or green, not cold pack or frozen	1.95
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.60

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Thereafter, on June 9, 1949, upon consideration of petitions for reopening and reconsideration filed by the appellants herein and others, the Commission reopened the proceeding for rehearing (R. 292), which was held in September, 1949. A proposed report by two examiners, in which they recommended that the Commission reverse its decision of October 4, 1948, was issued May 16, 1950 (R. 51). The railroads excepted (R. 23a) to the proposed report, to which exceptions the opposing parties replied (R. 23a), with the result that the Commission ordered (R. 317) a further hearing, which was conducted in June, 1951. The examiner's proposed report on that hearing was issued August 23, 1951 (R. 81), again recommending that the Commission find the questioned charges unlawful. Upon consideration of the entire record, including exceptions to the proposed report (R. 393) and replies (R. 453, 466) to the exceptions, the Commission, on May 7, 1952, issued its final report (286 I. C. C. 119, R. 23). Therein it found (R. 23bb) "that the charges under consideration (that is, those already in effect) are not shown to be just and reasonable" and "that the shippers should not be forced to pay more than $1.05, $1.35, and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect."[2]

[2] As before indicated, the charges then in effect were 30 percent higher than the original charges, reflecting general increases in rail rates authorized by the Commission in Ex Parte No. 166, *Increased Freight Rates*, 270 I. C. C. 93 and 403.

On the same date, May 7, 1952, the Commission entered its order (R. 25) canceling the considered schedules and discontinuing the proceeding. The railroads thereupon canceled the higher unloading charges in effect since November 1, 1948, and filed schedules making effective the charges of $1.05, $1.35 and $1.65, thus found by the Commission to be just and reasonable.

On September 22, 1952, certain of the plaintiffs herein filed with the Commission two complaints, one of them (No. 31105, R. 28) attacking the charges then in effect for unloading fruits and vegetables at New York, the other (No. 31106, R. 35) attacking the charges for unloading at Philadelphia. The complaints alleged, among other things, that the unloading charges were "unjust and unreasonable in violation of Section 1 of the [Interstate Commerce] Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having been included in the line-haul rates * * *" (R. 33, 40). Upon consideration of the record in the two proceedings, including the railroads' motions to dismiss (R. 1541), the Commission, on December 15, 1952, entered its order (R. 26) dismissing the complaints, stating among the reasons for the dismissal that the complaints assailed the unloading charges "on substantially the same grounds" as those on which the same parties had assailed them in I. & S. No. 5500.

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The principal issue presented in the Commission proceedings was whether the railroads might lawfully impose charges for unloading carload shipments of fresh fruits and vegetables at pier stations in New York City and at produce markets in Philadelphia, the unloading charges being in addition to the carriers' rates for the line-haul transportation. The facts as shown by the evidence[3] before the Commission are set forth in detail in its two reports (272 I. C. C. 648 and 286 I. C. C. 119, R. 24 and 23). The accuracy and completeness of the statement of facts there set forth appears to be undisputed. It is virtually the same as the factual statement contained in the proposed reports of the examiners (R. 51 and 81), to which the appellants herein did not except. For these reasons, and for the sake of brevity,

[3] At 13 different places in the brief of the Secretary of Agriculture reference is made to testimony and pleadings in other cases decided by the Commission, as to some of which it was necessary for counsel for the Secretary to go to the National Archives to obtain the cited data. See the Secretary's brief in No. 480, pp. 27, 28, 39 (3 references), 40, 41, 42 (3 references), 43 (2 references), and 44. This Court said in *United States* v. *Abilene & So. Ry. Co.*, 265 U. S. 274, 288, that in a Commission proceeding "Nothing can be treated as evidence which is not introduced as such". Apparently the Secretary justifies his going outside the record in this case on the ground that the files referred to are "public records". In the *Abilene Ry.* case, however, this Court annulled an order of the Commission because one of its findings rested, in part, "upon data taken from the annual reports filed with the Commission by the plaintiff carriers *pursuant to law*" (p. 287). [Emphasis supplied.]

we here set forth only a summary or condensed statement of the facts, and for a more detailed statement we respectfully refer the Court to the Commission's reports above mentioned.

The arrangements as to unloading fruits and vegetables at New York and Philadelphia have been in effect for many years (R. 23c). They are covered by exceptions to the general rule stated in the governing tariff which is that shippers and consignees of carload freight must perform loading and unloading or make provision therefor at their own expense (R. 24b). The exceptions to that rule contemplate that the railroads shall perform the unloading of fresh fruits and vegetables at designated stations at the two cities named, without interference from consignees or receivers. Prior to November 1, 1948, there were no separate charges, in addition to the line-haul rates, for unloading fresh fruits and vegetables at those stations (R. 23b). Since that date separate unloading charges have been in effect, first, those approved by the Commission in its 1948 report plus the Ex Parte 166 increase, (R. 24r), and later the lower charges approved by the Commission in its report on rehearing in 1952 (R. 23bb) and under attack in this appeal.

Deliveries at New York City

(a) Pier-Station Delivery: Unloading Charges Assessed

There are two types of rail delivery of fresh fruits and vegetables at New York City. They

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are commonly referred to as "pier station delivery" and "team track delivery". At pier stations the unloading is performed by the railroads, for which service they assess and collect the charges now assailed. But when delivery is made at team tracks or railroad sidings, the consignees or receivers perform the unloading and of course there is no unloading charge by the railroads. Approximately 75 percent of the total volume of fresh fruits and vegetables consigned to New York City is delivered at railroad pier stations. (R. 23e.)

Rail freight cars loaded with fresh fruits and vegetables shipped from the South and West, upon arriving at points on the western or New Jersey side of the Hudson River, opposite New York City, are there loaded upon "car floats" and then floated across the river to the railroads' piers, which are located adjacent to the wholesale market area in the lower part of Manhattan Island (R. 23e). The several railroads have a total of nine piers equipped for the unloading of fruits and vegetables (R. 23e). The area covered by them is approximately 40 acres, of which one-half consists of the piers, and the remainder, the slips between the piers which accommodate the car floats (R. 23f).

The unloading performed by the railroads is from the cars (while still on the car floats) to the floor of the piers. There are no physical means by which consignees' trucks can reach the car

floats (R. 23g). The pier floor is the first place where, after the freight has been unloaded, delivery can be taken (R. 23g). In taking delivery there, the fruit and vegetable trade has the advantage of displaying the entire contents of a car to prospective buyers, of using the pier station facilities as a sales' mart, and of occupying auction-room facilities without special charge therefor (R. 23h).

The Commission's first report describes one railroad's method of unloading in the following language (R. 24d–24f):

> The Erie conducts its unloading of fresh fruits and vegetables at night, generally starting around 8 p. m. on weekdays and somewhat earlier on Sundays and holidays. Usually, the unloading operations are completed early the following morning, about 5 a. m. or 6 a. m. When a car is ready for unloading a crew of workmen places gangplanks in positions so that the lading can be removed from the cars onto the piers. Thereafter and during the course of the unloading operations this crew adjusts gangplanks to meet changing tide conditions, and performs other assigned duties. On occasion these workmen break the seals of the cars, remove wooden bracing from the cars, and dispose of such bracing, although these particular duties ordinarily are handled by so-called "wood gangs." The "unloading gangs", each comprising

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seven men, unload the cars. An "unloading gang" consists of one carman or checker who has charge of the crew, makes a tally of the contents of the car, and loads hand trucks in the car, a second carman who assists in the loading of hand trucks, three truckers who handle the loaded trucks from the car to the dock and return the empty trucks from the dock to the car, and two dockmen who unload the trucks on the dock and assort and stack the packages of freight on the pier floor. The "unloading gangs" also move commodities on the piers to make room for subsequent unloading operations. A crew of so-called "dock-counters" checks to see that the "unloading gangs" have placed the packages at the correct locations on the floor of the piers and sees that any improperly placed packages are moved to their assigned positions. Damaged containers are segregated and then moved to another location on the pier. If the lading is not damaged the packages are recoopered and returned to their indicated locations on the pier.

The above-described operations are performed by employees of the Seaboard Terminal and Refrigeration Company, hereinafter referred to as the Seaboard Company, pursuant to contractual arrangements between it and the Erie. In addition to the workmen referred to above, the Seaboard Company employs six or more float foremen who supervise the work of the "un-

loading gangs." These float foremen devote all of their time to this work. The Seaboard Company also employs "sweepers" who clean and sweep the Erie piers, removing the accumulated debris so that the required standard of sanitation may be maintained. The "sweepers" may be assisted by the "unloading gangs" when the latter are not otherwise occupied. The Seaboard Company employs a night general foreman and three or more assistants to supervise all of the described operations; also a night time-keeper. The Erie supplies the Seaboard Company with office space at pier 21. Clerical and accounting work in connection with the unloading operations is performed by employees of the latter company at that location. The Seaboard Company also furnishes so-called "A-Line" men who handle damaged packages that have been recoopered, placing them in their regular stacks and setting aside packages that are not in acceptable condition so that they may be inspected and subsequently delivered to the consignee or a salvage agent. Another employee, known as a "seal and ice clerk," observes and records the amount of ice in the car bunkers, the position of ventilators, the condition of the car seals, and seals the cars when necesary.

"The described operations of the Erie and the practices in connection therewith are typical of other unloading operations at New York con-

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ducted by * * * the Baltimore & Ohio, Pennsylvania, and New York Central, except that the Pennsylvania uses mechanized equipment to move the produce from the cars to the pier floor". (R. 24g.)

Further with respect to pier-station delivery at New York, the Commission found (R. 23j) that:

> Prior to the arrival of the shipments at the piers, the carriers are informed of the contents of the cars, the names of the consignees, and other pertinent details. This permits notification of the receivers of the freight in advance of arrival and enables the carriers to allot space on their piers for each consignment. As regards the allotment of space, the piers are generally mapped out so as to give each consignee a specified location for the contents of the cars after unloading. Many shipments are displayed by the consignees at these locations on the piers so as to facilitate inspection of the commodities by prospective purchasers, who, prior to the auction, usually inspect the fruit while it is on display on the pier floor. Practically all the citrus fruit, as well as fresh fruit (other than citrus), after being unloaded on the piers, is sold at public auction in rooms on the second floors of the piers assigned for that purpose. Cantaloups and melons, as a rule, are not sold at auction, but are bought at private sales on the pier floor where the packages are displayed. Fresh or green

vegetables, particularly those not top-iced, frequently reach the consignee without prior sale at the piers. With the exception of tomatoes, they are not sold at auction.

The costs per ton of unloading[4] fresh fruits and vegetables (not including the costs of sorting and stacking, for which a separate charge is made, R. 24i) at New York pier stations during given periods from 1946 to 1949 were shown to be as follows (R. 23j), the lowest and highest figures for each commodity here stated:

Citrus fruit	from	$1.76	to $2.22
Other fruit	from	2.49	to 3.23
Melons and cantaloups	from	2.63	to 4.11
Fresh vegetables (not top-iced)	from	1.72	to 2.62
Fresh vegetables (top-iced)	from	2.70	to 4.11

These prices have risen sharply in recent years, the cost to one railroad being 96 percent greater on December 31, 1946, than immediately prior to

[4] The Commission found (R. 24–1) that "The unloading of melons, top-iced vegetables, and deciduous fruits requires more time and more care than in the case of citrus fruits. Thus, unloading costs for citrus fruits are lower than for other commodities. The additional expense of unloading top-iced vegetables and melons results from the difficulties encountered in removing the ice in order to reach the packages, from the great care which must be exercised in handling the packages to keep the produce in good condition, and from the fact in the case of melons that they are easily damaged. There also are added costs for cleaning the pier or terminal floor and confining the water from the melted ice. The higher costs of handling deciduous fruits results from the fact that these products are shipped in relatively small boxes. A citrus carload consists of 525 boxes, as compared with 1,500 boxes for a carload of cherries, 1,050 boxes of plums, and 800 boxes for peaches."

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World War II, and being even higher in June 1951 (R. 23j).[5]

(b) Team-Track Delivery: No Unloading Charge

Team-track delivery on Manhattan Island is quite different from pier-station delivery, although in both operations the movement across the Hudson River is identical. However, when cars for team tracks reach Manhattan they are accorded additional switching to reach the team-

[5] The record shows that the appellants declined to cross-examine the railroad witnesses who testified as to the costs to the carriers of performing the unloading at both New York and Philadelphia (R. 1246–1247):

"Mr. LaRoe [Attorney for Port of New York Authority]. Mr. Examiner, in accordance with your suggestion, counsel for the protestants conferred during the recess and concluded that they would not cross examine any of the witnesses.

"Exam. Brown. Have you any statement to make in connection with your failure to cross examine?

"Mr. LaRoe. Yes. We fail to cross examine, not because we accept the figures as accurate, but because we feel that, whether they are accurate or not, they have nothing to do with the issue in the proceeding because it is quite immaterial, as we see the case, what the cost of unloading is.

"Exam. Brown. The Commission might disagree with you on that point. They might consider that the unloading charges should be considered separately from the line-haul charges. Have you lost any rights in your failure to cross examine?

"Mr. LaRoe. Well, that is a risk we have to take, and we are willing to take it.

"Exam. Brown. All right, sir. There will be no cross examination of these cost accounting witnesses; therefore, they are now excused."

track yards. After placement of a car on a team track, the consignee has two days free time to unload it. He unloads directly from the rail car to his trucks. There is more car detention and more switching, and the unloading process is substantially longer, with respect to team-track delivery than with pier-station delivery. (R. 23i.)

Most of the railroads have team-track yards on the New Jersey side as well as the Manhattan side of the Hudson River, and at least one of them (the Pennsylvania) prefers to deliver fruit and vegetables at Jersey City team-track yards rather than at New York piers, on account of the difficulties and expense of car-float service. (R. 23k.) The Commission found, however, that "Receiving fruits and vegetables at team tracks in New Jersey would be inconvenient to the public because the vast volume of these commodities consigned to New York is consumed east of the Hudson River" (R. 23k); also, that the present location of the wholesale produce markets, on the lower west side of New York, adjacent to the pier stations, and convenient to the area of greatest consumption, would change if the railroads should continue to increase their deliveries on the New Jersey side. Such a change in the location of the markets would require trucking of the cargoes from Jersey City to New York City, which would cause highway traffic congestion and much delay. (R. 23–1.)

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Team-track facilities on Manhattan Island are inadequate to accommodate more than a relatively small part of the total volume of fruit and vegetable traffic consigned to New York City (R. 24h), and it would be impracticable, if not impossible, to expand those facilities to the extent necessary to accord such delivery to all of the traffic (R. 23n). The inhabitants of the City consume over 5 billion pounds of fruits and vegetables per year, and the unloading charges assessed and collected by the railroads are ultimately borne by these consumers (R. 23o).

Contrasting pier-station delivery with team-track delivery, the Commission found that "The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee" (R. 23n).

Deliveries at Philadelphia

(a) Produce terminal delivery: Unloading charges assessed

Prior to 1927 fresh fruits and vegetables received at Philadelphia were distributed from Delaware River piers in unloading operations similar to those presently conducted at New York piers, and without charge therefor by the railroads other than the line-haul rate. During 1927 the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce termi-

nals, at both of which unloading as previously performed at the piers was continued at the line-haul rate. These terminals are 3½ and 4 miles, respectively, from the produce market area of Philadelphia (R. 23r).

Since construction of the produce terminals in 1927, the greater portion of the total volume of fruits and vegetables consigned to Philadelphia has been delivered at the terminals (R. 23r). The Pennsylvania's terminal consists of two platforms or sheds, each with a floor space of 83,600 square feet (R. 24j). One platform is used principally for unloading fruits and vegetables to be sold at auction, and the other for fruits and vegetables intended for private sale (R. 23r). It is only at these platforms that the railroad performs the unloading (R. 23s). It maintains auction rooms for the convenience of the trade and provides heat and light throughout the terminal (R. 24k). The only change in the operations since November 1, 1948, is that the Pennsylvania now charges for the unloading service, and now refuses the consignees the privilege of unloading their own freight on the platforms if they elect to do so (R. 23s).

The Baltimore & Ohio and the Reading operate a joint produce terminal at Philadelphia, at which unloading on the terminal platform is performed by railroad employees in much the same manner, with comparable benefits to the trade, and

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at the same charges as at the Pennsylvania's produce terminal (R. 23s).

The per ton costs to the railroads of performing the unloading service at produce terminals in Philadelphia during given periods was shown to be as follows (R. 23x):

	Penn.	*B. & O.*
Citrus Fruit	$1.91	$1.23
Other fresh fruit	2.53	1.53
Melons	3.42	
Vegetables (not top-iced)	1.91	

No separate charge is made by the railroads for sorting fruits at Philadelphia, the cost of that service being included in the charge for unloading (R. 23x).

(b) Team-track delivery: no unloading charge

Each railroad delivering fresh fruits and vegetables at Philadelphia also has team track facilities there, at which consignees may unload the commodities directly from rail car to truck, and, of course, without paying the railroad an unloading charge. As to this type of unloading, the Commission found (R. 23t):

> * * * Since the unloading charges became effective, 63 per cent of the commodities originally unloaded, sorted, sold, and delivered on the terminal platform is now unloaded on team tracks by consignees.
>
> Receivers of fruits and vegetables in Philadelphia who formerly, in many instances, unloaded their own freight at the terminal platforms are dissatisfied with

> the arrangement under which they must either unload at team tracks or have the unloading at the platforms, for which charges are collected, performed by the carrier. * * *

As to the adequacy of team tracks at Philadelphia, and the desirability to the consignees of using them, the Commission found (R. 23y):

> The team-track facilities are sufficient to accommodate a large number of cars. There is no indication that these facilities are inadequate to accommodate the fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such services. However, *team-track delivery is not desired for fruit, the auction facilities being more desirable.* At certain times there has been congestion at team tracks as a result of the manner in which trailer-trucks were placed in the driveways. Those driveways are 65 feet in width and are comparable with those at team tracks generally. *Except during the strikes or similar conditions, there has been no time when the team-track capacity at Philadelphia has not been sufficient to accommodate all cars unloaded at the produce terminals in addition to those unloaded at the team tracks.* The team-track capacity can be increased. However, delivery on the terminal platforms is more advantageous than team-track delivery to the Philadelphia consignees. (Emphasis added.)

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Deliveries at Other Cities: Unloading Charges Assessed

In all cities in Official Territory,[6] except New York and Philadelphia, railroads delivering carload freight to receivers at station platforms, have for many years performed the unloading only at an additional charge. Otherwise stated, New York and Philadelphia were the only places where, prior to November 1, 1948, no separate charges were made for unloading services performed by carriers (R. 24c). Moreover, "The relative level of the rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading" (R. 24q).

Discussing this situation, the Commission stated in its first report (R. 24b):

> There has been a gradual elimination of so-called free unloading of carload freight by the carriers in official territory. It does not appear that there are points other than New York and Philadelphia that are exceptions to the general rule that the obligation of unloading carload freight rests with the shippers. Formerly, the carriers made exceptions to this rule at Chicago, Buffalo, Pittsburgh, and certain port cities to meet competitive situations at those points, and for some time where loading and unloading of carload freight was per-

[6] Roughly, the States north of the Potomac and Ohio Rivers and east of the Mississippi, plus portions of Virginia, Kentucky, Missouri, and Iowa. 164 I. C. C. 314, 322.

formed by the carriers there was no charge. In 1924, however, the carriers began discontinuance of this practice where appropriate. During that year tariffs became effective which provided for loading and unloading charges at the interior cities just mentioned, but not at the ports. This difference in treatment was due principally to water competition. Water carriers generally load and unload at their own expense and apparently the rail lines then felt that they could not compete effectively if they were to establish loading and unloading charges in the absence of similar charges by the water lines. Loading and unloading by the railroads, without charge, was continued at the port cities for some years thereafter. In the years following 1925, loading and unloading service by the carriers without charge was discontinued at many other interior points in official territory until finally New York and Philadelphia remained the sole exceptions.

In this connection it should be mentioned also that the line-haul rates for transporting carload freight to New York City from points in other states are the same, or are on the same basis, whether the freight is unloaded by the carriers and delivered on station platforms (including pier stations), or delivered to and unloaded by consignees at team-tracks. The same is true as to the line-haul rates to Philadelphia.

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The Commission's conclusions

Considering all the facts the Commission concluded that "the present method of handling shipments through the pier stations [at New York] is of benefit to both shippers (including consignees) and carriers. It is also helpful in the avoidance of traffic congestion. The acquisition of land in that area for additional track facilities would be impracticable if not impossible. The [carriers] have been willing to perform the unloading without a separate charge until, in recent years, the cost thereof substantially increased. Upon this amplified record we conclude, as hereinafter explained, that the cost of unloading should be borne partly by the shippers and partly by the [carriers]." (R. 23z)

Treating as "unsound" the contention of the then protestants (now the appellants) that the cost of unloading should be borne by the railroads because they do not provide team tracks adjacent to the pier stations, the Commission pointed out that "physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is a general community problem and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing difficulties if this congested area is to be served by railroad transportation. * * * there is little likelihood that the ship-

pers would divert any substantial amount of this traffic from the pier stations as long as they are able to obtain the present terminal services at costs which are not unduly burdensome to them or unduly disproportionate as compared with total costs to them of a satisfactory substitute for pier deliveries. * * *" (R. 23z.)

Answering one of the principal arguments then and now made by the protestants (appellants), the Commission stated that "the propriety of the separate unloading charges may be determined without an extensive showing with respect to the reasonableness of the line-haul rates. The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect". (R. 23aa.)

The Commission's ultimate findings (R. 23bb) were (1) "the shippers should not be forced to pay more than $1.05, $1.35, and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect"; (2) the charges at New York and Philadelphia should be the same; (3) the "record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 and 3 of the act"; and "the charges under consideration [i. e., the higher scale of charges] are not shown to be just and reasonable, and * * * will be ordered canceled * * * without prejudice to the establish-

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ment of charges in conformity with the views expressed herein".

Following entry of the Commission's order (R. 25) canceling the higher unloading charges, the railroads filed new schedules making effective the approved lower charges. Thereafter, on September 22, 1952, certain of the appellants herein filed with the Commission two complaints (R. 28 and 35) attacking the then effective lower charges as "unjust and unreasonable in violation of Section 1 of the Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading having been included in the line-haul rates". On December 15, 1952, the Commission entered its order (R. 26) dismissing the two complaints, among other reasons because they assailed the unloading charges "on substantially the same grounds" as those on which the same parties had attacked them in the previously concluded proceeding, I. & S. No. 5500.

The complaining parties, Florida Citrus Commission and others, thereafter brought this suit to set aside the Commission's orders (R. 1). The United States and the Commission filed separate answers (R. 199 and 178), the answer of the United States being a "neutral" one. (R. 199.) With leave of the court numerous other parties intervened as plaintiffs and filed their complaints, adopting for the most part the allegations of the complaint originally filed (R. 117, 131, 134, 151,

154, 157, 174). And the railroads, having been permitted to intervene as defendants, filed their joint answer seeking to uphold the Commission's order (R. 197).

At the hearing before the three-judge district court, a complete transcript of the proceedings before the Commission, including exhibits, was introduced in evidence. The court's opinion and its judgment dismissing the suit were filed August 31, 1953 (R. 203–215).

SUMMARY OF ARGUMENT

I

What the appellants sought of the Commission was an order disallowing all charges for unloading carload shipments of fresh fruits and vegetables at New York and Philadelphia on the ground that compensation for the unloading service was included in the carrier's line-haul rate and the additional charges would represent duplicate payment for the same service.

In deciding the question, however, the Commission could not overlook the following factors: According to well-established rule the duty of unloading carload freight ordinarily rests upon the shipper or consignee; New York and Philadelphia were the only places where, prior to November 1, 1948, carriers made no separate charges for unloading such commodities; the level of line-haul rates on the movement of fresh fruits and vegetables from producing points to New

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York and Philadelphia was not higher than the rates to other consuming points where consignees unloaded or separate charges were assessed for unloading; the level of such rates was the same whether the shipments were unloaded by the carriers at pier stations in New York (platforms in Philadelphia) or by the consignees at team tracks; the cost of pier-station and platform unloading, performed by the carriers, had increased considerably in recent years; and consignees received numerous and very substantial benefits in connection with the unloading service performed by the carriers.

Taking these factors into account, the Commission could properly, and did, find that the cost of the unloading should be borne partly by the shippers (or consignees) and partly by the carriers; and that, while the charges proposed by the carriers were not shown to be just and reasonable, it would be lawful for them to establish a lower scale of unloading charges determined by the Commission to be just and reasonable upon consideration of all the evidence.

II

The Commission was warranted in finding and concluding that the approved unloading charges were not shown to be unduly prejudicial and unjustly discriminatory as against fresh fruits and vegetables transported to New York, and unduly preferential of other traffic there un-

loaded by the carriers without charge. The numerous and substantial benefits shown to be enjoyed by consignees of fresh fruits and vegetables unloaded by the carriers at pier stations in New York, which benefits were not shown to be enjoyed by consignees of other freight there unloaded, afford a rational basis for this finding and conclusion.

III

Notwithstanding the evidence that the cost to the carriers of performing the unloading service was greater at New York than at Philadelphia, the Commission was warranted in its finding and conclusion that the unloading charges should be the same at both places. This finding and conclusion has substantial support in the evidence, including evidence that at Philadelphia, in connection with the unloading service, the carriers also perform, without a separate charge, the service of sorting the merchandise according to types and grades, to facilitate its display and sale by the consignees, whereas at New York a separate charge is made for sorting and stacking.

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ARGUMENT

I

In determining the issues raised in these proceedings, it was essential that the Commission consider all of the facts and circumstances found to exist as to delivery of fruits and vegetables at New York and Philadelphia; and upon consideration thereof the Commission was warranted in its conclusion that the approved unloading charges were not shown to be unjust and unreasonable

The appellants alleged in their complaint that the unloading charges approved by the Commission and now in effect "are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates" (R. 18). This contention raises the principal issue presented to the Court for decision.

The appellants' contention appears to be that the carriers' rate for line-haul transportation includes delivery of the merchandise at destination and necessarily includes the service of unloading when performed by the carriers, regardless of the cost of that service, the substantial benefits derived by the consignees therefrom, or any of the other facts and circumstances found to exist in connection with the unloading.

Sections 1 (4) and 1 (5) of the Interstate Commerce Act, relied upon by the appellants,

provide in substance that common carriers by railroad shall establish "just and reasonable" rates and charges for transportation, that "all charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable", and that "every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful".

At the outset of its consideration of this question the Commission referred (R. 24b) to the general rule long recognized by this Court, that the "duty of loading and of unloading carload shipments rests upon the shipper or consignee". *Pennsylvania R. Co.* v. *Kittaning Co.*, 253 U. S. 319, 323; *Warehouse Co.* v. *United States*, 283 U. S. 501, 504.

The carriers' effective tariff states this general rule and provides for exceptions thereto in the following language[7] (R. 24b):

> Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, except where tariff of carriers at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier.

[7] Rule 27 of the Consolidated Freight Classification.

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The arrangements as to unloading at New York and Philadelphia, also the unloading charges under consideration, are covered by exceptions to the governing classification (R. 24b).

"There are no physical means by which consignees' trucks can reach the car floats" at New York (R. 23g), hence it is necessary for the carriers to perform the unloading there. It being necessary for them to perform the service, the question presented is whether in all events and under all circumstances they are required to perform it under their rates for the line-haul transportation. Otherwise stated, are unloading charges unlawful *per se*?

In deciding this question in the negative and holding that, under the facts and circumstances shown to exist, the imposition of additional charges for unloading would be just and reasonable, the Commission followed its many decisions to the effect that such accessorial services as loading and unloading are not necessarily included in the line-haul rates, and that whether they are to be included or separate charges allowed therefor must be determined according to the peculiar facts and circumstances of each case. *Wholesale Fruit and Produce Assn.* v. *A., T. & S. F. R. Co.,* 14 I. C. C. 410 (decided in 1908); *New England Coal & Coke Co.* v. *N. & W. R. Co.,* 33 I. C. C. 276 (1915); *Loading and Unloading Carload Freight,* 101 I. C. C. 394 (1925); *Charges*

for Loading and Unloading Carload Freight, 269 I. C. C. 25 (1947).

In explaining its conclusion the Commission said: "For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates. The establishment of specific charges for unloading at New York and Philadelphia, without reference to the levels of the line-haul rates, is justified. Such charges are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published. * * *" (R. 24q.)

In the *Wholesale Fruit* case, *supra,* the Commission had for consideration, as it did in the instant case, the question of the legality of a separate charge for unloading carload shipments of fresh fruits and vegetables (at Chicago). There one of the carriers, instead of delivering carloads of fruit in packages on team tracks, delivered them at fruit houses or platforms owned and controlled by the carrier. The platforms and fruit houses were provided by the carrier for unloading and sorting the merchandise and to protect it from freezing, and a separate charge was imposed for the unloading, in addition to the line-haul rate.

The Commission's decision was (1) that there is no hard-and-fast rule of law as to the consignee's duty to unload carload freight, but that

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in each case it is necessary to consider the nature of the commodity and the factual situation at the unloading place; (2) that as a practical matter it was necessary in the considered case for the unloading of the cars of fruit to be done by the carrier; (3) that it was necessary for the carrier to have exclusive control of the fruit platforms and fruit houses; and (4) that the maintenance of those facilities, together with the extra labor necessary, entailed upon the carrier an additional expense for which a charge might reasonably be made in addition to the published rate for transportation.

In the *New England Coal* case, *supra,* in upholding the legality of a railroad's charge for dumping (unloading) coal in addition to the rate for the line haul, the Commission said, "When delivery must be made in a peculiar way the carrier is entitled to an extra charge therefor" (33 I. C. C., at 279).

Another proceeding before the Commission in which was involved a question quite similar to that now before the Court was *Loading and Unloading Carload Freight,* 101 I. C. C. 394. There the Commission said (at 413):

> Protestants particularly urge that the line-haul rates include loading and unloading, and that under the law respondents not only have to justify the charge for those services but the burden is upon them to show that the line-haul rates heretofore

> contemplating the loading and unloading services are reasonable when demanded by the respondents for the road haul alone. * * *
>
> * * * Many of the line-haul rates to and from these points have been prescribed or approved by us, and our reports do not indicate that we have given any consideration to the cost of unloading carload freight in arriving at such rates. The same line-haul rates are assessed on shipments to and from industrial sidings or outlying team tracks at these points although the loading and unloading is not performed by the carriers. The same rates, or the same bases of rates, apply to or from other points in the same group or for a similar distance, and the rates do not include loading or unloading. All of these facts indicate that the general measure of the rates to and from the points in question are not unreasonable for the line-haul service alone, and warrant the conclusion that if the carriers justify the charge for the loading and unloading services, they have borne their burden of proof under the law.

Virtually the same question was presented to the Commission in the recent (1947) case of *Charges for Loading and Unloading Carload Freight,* 269 I. C. C. 25. In upholding the lawfulness of the considered unloading charges over and above the line-haul rates, the Commission based its conclusion upon findings (in addition to findings as to the cost of rendering the un-

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loading service) that the line-haul rates were the same as those which applied on traffic when no unloading service was performed; that they applied on that traffic regardless of whether a loading or unloading service was performed; and that the line-haul rates, many of which had been prescribed or approved by the Commission, must, unless otherwise shown in a proper proceeding, be presumed to be just and reasonable.

No court attack was made upon the Commission's orders in any of the four proceedings discussed next above, according to our best information.

These four Commission decisions, among many to the same effect, should be sufficient to demonstrate that there is nothing novel or revolutionary about the Commission's determination of the instant case. On the contrary, the Commission's decision herein was in accord with principles of law long followed by it. The basic question before the Commission was whether a terminal service, i. e., the considered unloading service, should in the circumstances involved be treated as a part of, or in addition to, the service covered by the line-haul rate. The district court held, in accordance with precedents established by this Court, that the question was one upon which the findings of the Commission were conclusive if supported by substantial evidence.

This Court has said that "the Commission's determination of the point in time and place at

which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the courts." *Interstate Commerce Commission* v. *Hoboken R. Co.,* 320 U. S. 368, 378. Also, "That the Commission is authorized to establish the point where line-haul service begins and ends is not to be doubted. The question, in reviewing the Commission's determination of the convenient points at which line-haul or carrier transportation service begins and ends, is whether such determination is supported by substantial evidence * * *". *United States* v. *U. S. Smelting Co.,* 339 U. S. 186, 193. To the same effect: *Los Angeles Switching Case,* 234 U. S. 294, 311–14; *United States* v. *American Sheet & Tin Plate Co.,* 301 U. S. 402, 408; *United States* v. *Pan American Petr. Corp.,* 304 U. S. 156, 158; *Baltimore & Ohio R. Co.* v. *United States,* 305 U. S. 507, 525–26; *Swift & Co.* v. *United States,* 316 U. S. 216, 222; *United States* v. *Wabash R. Co.,* 321 U. S. 403, 408.

In the *Tin Plate* and *Pan American* cases, *supra,* this Court accepted as controlling the Commission's findings that under the conditions shown to exist, the interchange tracks of the industry were convenient and usual points for the receipt and delivery of the interchanged cars, that the rail line-haul service accordingly ended there, and for that reason the industry performed no service in spotting cars on its own tracks for which the rail carrier was compensated under its line-haul

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rates and for which the industry was entitled to be compensated by allowance out of the line-haul charges. In the *Tin Plate* case the Court said (301 U. S. 408):

> * * * The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service.

In further support of the proposition that it is within the Commission's province to determine what is within and what is without the service of transportation, it may be pointed out that this Court has held that whether a rail rate for line-haul transportation of livestock includes yardage charges (for such service as weighing, watering, feeding, or holding livestock in stockyards) is "a question to be decided by the Commission upon the facts of each particular case, and not by mechanical application of a fixed rule of law * * *. The propriety of the yardage charges in the present case was a question for decision by the Commission in the exercise of its judgment, and not for decision according to any fixed rule of law." *Swift & Co.* v. *United States,* 316 U. S. 216, 225.

The appellants insisted before the district court, and they still insist, that before separate unloading charges might lawfully be approved, it was necessary for the railroads to offer evidence and prove, and for the Commission to find, that the line-haul rates were inadequate to cover the unloading service also. When the Commission con-

sidered this contention, along with all the facts shown by the evidence, its conclusion was that "the propriety of the separate unloading charges may be determined without an extensive showing with respect to the reasonableness of the line-haul rates. The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect" (R. 23aa).

If the Commission, in this proceeding, had gone more fully into the question of reasonableness of the line-haul rates, as the appellants contend it should have done, and if as a result it had required the carriers to reduce the level of those rates by the amount of the unloading charges, the obvious result would have been to establish rates for line-haul transportation to pier stations at New York and produce platforms at Philadelphia lower than the level of the charges assessed at other stations at those two destinations and at other points in the vicinity of those destinations. Merely to describe the situation should be sufficient to demonstrate that the resulting rates would be unreasonably low. A somewhat similar question was involved in *Interstate Commerce Commission* v. *Stickney,* 215 U. S. 98, 105, where this Court said:

> * * * For services that it [the carrier] may render or procure to be rendered off its own line, or outside the mere matter of

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> transportation over its line, it may charge and receive compensation. *Southern Ry. Co.* v. *St. Louis Hay Co.*, 214 U. S. 297. If the terminal charge be, in and of itself, just and reasonable, it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust.

The district court's view as to this question was that "What the Commission is really deciding here is, not the adequacy or inadequacy of the line-haul rates to cover the unloading service, but where the carrier's line haul service ends, and whether unloading is a justifiable additional service, of value to the consignee, for which he should pay at least a part of the cost" (R. 213). The appellants contend that this holding of the District Court is not a correct description of the Commission's findings. This argument is erroneous. A review of the two reports of the Commission shows, we submit, that the District Court was right, because the Commission did conclude that the unloading service performed by the carriers was not a part of the transportation service re-

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quired of them under the line-haul rates, and further held that, "without reference to the levels of the line-haul rates", specific charges for unloading at New York and Philadelphia were justified. (R. 24q.)

Whether or not such a finding was made or may be inferred from the Commission's other findings and conclusions, no such specific finding was required as a basis for the Commission's order. This Court has expressly held that even though unloading may under some circumstances be considered a part of the transportation service, the cost of unloading "may be included in the line-haul tariffs or separately fixed or allowed as an additional charge". *Railroad Retirement Board* v. *Duquesne Co.,* 326 U. S. 446, 454, citing *Adams* v. *Mills,* 286 U. S. 397, 410–415.

The holding in *Adams* v. *Mills, supra,* was that the question whether a terminal service, in the particular facts and circumstances, was reasonably to be treated as additional to or as a part of the service covered by the line-haul rate was a question upon which the findings of the Commission were conclusive if supported by evidence; citing *Atchison, T. & S. F. R. Co.* v. *United States,* 232 U. S. 199, 221, and *Los Angeles Switching Case,* 234 U. S. 294, 310, 311.

Barringer & Co. v. *United States,* 319 U. S. 1, involved the lawfulness of a Commission order finding just and reasonable (1) the proposed elimination by rail carriers of loading charges on compressed cotton originating in Oklahoma and

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moving to Texas Gulf ports, and (2) the proposed retention of such charges on similar shipments moving to points in the Southeast, the circumstances as to the two movements being substantially different. On the question whether consideration might be given to a loading charge without regard to the line-haul rate, this Court said (at pp. 9–10):

> * * * the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge [i. e., loading or unloading charge], or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism.

While the facts in the *Barringer* case are not closely similar to those in the case now before the Court, that case is important as another recognition, not only by the Commission but by the Supreme Court, of the principle that a rail carrier's line-haul rate does not necessarily and in all instances include the service of loading or unloading; and that separate unloading charges are not unjust, unreasonable, and unlawful *per se,* but their reasonableness in a particular case is for the Commission to determine from the facts and circumstances in that case.

The Commission having made that determination in this case (that the challenged unloading

charges were not shown to be unjust and unreasonable), it would appear necessarily to follow, under the above-cited authorities, that the Commission's orders to that effect are not unlawful *per se,* and should be upheld if its determination is found to be supported by substantial evidence.

The evidence supporting the Commission's subordinate findings and its ultimate finding approving the now-assailed unloading charges is summarized in the Commission's two reports (R. 23 and 24), to which we again respectfully direct the Court's attention. We desire here to refer only to so much of the uncontroverted evidence, as in our opinion, affords substantial support for the Commission's finding and conclusion.

The appellants contend specifically that there is no evidence to support the finding that the unloading charges of $1.05, $1.35, and $1.65 are just and reasonable. This contention overlooks the very abundant evidence as to the cost to the railroads of performing the unloading service. That evidence shows the cost at more than double the charges approved by the Commission (R. 23j and 23x). It might have been sufficient to support the higher unloading charges previously in effect, except for the Commission's further finding that the cost of unloading should be borne partly by the consignees and partly by the carriers (R. 23z). That being true, the same evidence unquestionably affords substantial sup-

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port for the Commission's approval of the lower charges now assailed.

In this connection we cannot do better than quote what the district court said as to the lower scale of charges approved by the Commission (R. 214):

> Plaintiffs assert that they were not given an opportunity to be specifically heard upon the reasonableness of the reduced rates of $1.05, $1.35, and $1.65 per ton, and claim that they were thereby denied due process. But the Commission had just concluded, not one but two, exhaustive and comprehensive investigations of the entire subject of unloading charges at these points, based upon the higher rates then in effect, during which plaintiffs, and others, were afforded a full opportunity to be heard upon all phases of the subject. As a result of these hearings, the Commission found the existing rates too high, but that the reduced rates above mentioned would be reasonable, and that the charge was justified as for an additional service.
>
> Instead of merely setting aside the old rates, thus leaving the matter undetermined, the Commission brought the controversy to a close by setting the old rates aside "without prejudice to the establishment of charges in conformity with the views expressed herein," that is, in the Commission's report. The carriers then put the reduced rates into effect.
>
> Having just completed a thorough investigation of the entire subject, during which

> plaintiffs were fully heard, it would have been a work of supererogation to conduct a further hearing upon these lower rates, the reasonableness of and justification for which was already shown by the evidence. It was clearly within the Commission's power not only to condemn the then existing rates as unreasonable, but at the same time and upon the evidence already taken to fix rates that would be just and reasonable. In this, there was no denial of due process to plaintiffs. Plaintiffs were fully heard upon the entire matter. The situation is the same in principle as where a plaintiff demands $1,000 of a defendant, the court finding that he is not entitled to $1,000 but that on the evidence he is entitled to $500, and awards that sum. In these circumstances the defendant could not complain of a denial of due process because he was not again heard on his liability for $500. *Akron, C. & Y. Ry. Co.* v. *United States, D. C.,* 22 F. 2d 199, 203.

(See also *Tagg Bros.* v. *United States,* 280 U. S. 420, 440–1.)

Among the most important subordinate findings made by the Commission, certainly ones which afford an equitable, just, and reasonable basis for its ultimate finding and conclusion, are the findings that the consignees derive substantial benefits from performance of the unloading service by the carriers, and that the cost of the service should be borne partly by the consignees and partly by the carriers. Those findings, inso-

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far as they pertain to unloading performed at pier stations in New York, are supported by undisputed evidence that:

(a) Consignees are notified in advance of arrival of loaded cars at piers. (R. 23j.)

(b) Space on the piers is allocated for each consignment. The piers are generally mapped out so as to give each consignee a specified location for his portion of the contents of the cars after unloading. (R. 23j.)

(c) Consignees are permitted to display the shipments at those locations on the piers, thus facilitating inspection of the commodities by prospective purchasers. (R. 23k.)

(d) After being unloaded the fruit is sold at public auction in auction rooms on the piers. (R. 23k.)

(e) Cantaloups and melons are sold at private sales on the pier floor where the packages are displayed. (R. 23k.)

(f) All of the above-listed services are furnished by the carriers without charge and as incidents of the unloading service performed by them.

(g) The pier stations are located adjacent to the wholesale produce markets in lower Manhattan, hence pier-station delivery saves the consignees the extensive trucking operations which would be required in connection with team-track delivery. (R. 23–1.)

The evidence also shows benefits to the appellant, the City of New York, from pier-station delivery, over and beyond the above-listed benefits derived by its inhabitants and business establishments. These benefits include an avoidance of the increased traffic congestion which would result from trucking all fruit and vegetable shipments from team tracks either in Manhattan or New Jersey (R. 23–1). It would appear that the Port of New York Authority, also an appellant herein, is likewise benefited by pier-station delivery, for the reason that its Hudson River tunnels and bridges are thereby relieved of the heavy volume of truck traffic which delivery and unloading at New Jersey team tracks would necessitate.

The Commission's findings and comments in this connection are pertinent. The following appears in its final report (R. 24z):

> Protestants' contention, that as respondents do not provide team tracks adjacent to the pier stations or sufficient team tracks at other points on Manhattan to accommodate the fruit and vegetable shipments the cost of the unloading must be borne by the respondents, is unsound. Physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is *a general community problem* and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing diffi-

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> culties if this congested area is to be served by railroad transportation. Adequate team tracks at respondents' other stations on Manhattan might constitute sufficient answer to protestants' contention. Although it seems that such existing team tracks could not handle all of the fruit and vegetable traffic which now moves through the pier stations, there is little likelihood that the shippers would divert any substantial amount of this traffic from the pier stations as long as they are able to obtain the present terminal services at costs which are not unduly burdensome to them or unduly disproportionate as compared with total costs to them of a satisfactory substitute for pier deliveries. Respondents are under no obligation to provide an excessive amount of terminal service or a particular type of service for which there is no reasonable expectation that it will meet a public need. * * * (Emphasis supplied.)

There can be no question, therefore, that there is substantial evidence to support the finding that the consignees as well as the railroads benefit from pier-station delivery and unloading at New York and that the cost of such unloading should be borne in part by each group.

There is also substantial evidence of benefits to consignees from unloading performed by the carriers at produce terminal platforms at Philadelphia, including the following:

(a) In connection with such unloading, the commodities are sorted by the carriers without additional charge. (R. 23x.)

(b) Consignees are permitted to display the commodities for sale on the platforms, and to exhibit them to prospective buyers for inspection. (R. 23s.)

(c) An auction company, acting for the consignees, is permitted to conduct auction sales at one of the Philadelphia platforms, and consignees are permitted to sell the commodities privately at the other. (R. 23s.)

In this connection the Commission made the following specific findings as to unloading at Philadelphia (R. 23y):

> The team-track facilities are sufficient to accommodate a large number of cars. *There is no indication that these facilities are inadequate* to accommodate the fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such services. However, *team-track delivery is not desired for fruit, the auction facilities being more desirable.* (Emphasis added.)

Considering these benefits from platform delivery enjoyed by consignees at Philadelphia, and the fact that they prefer platform delivery of fruit to team-track delivery, and also considering the cost to the railroads of performing the unloading at produce platforms, we reiterate that the evidence abundantly supports the finding and

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conclusion that the shippers or consignees should pay a part of the unloading costs.

In reaching its conclusion that the cost of unloading should be borne partly by the shippers or consignees and partly by the railroads, the Commission considered "of major importance" evidence that the level of the line-haul rates for transporting carload shipments of fresh fruits and vegetables from producing points to New York and Philadelphia "is no higher than the rates to other consuming points where shippers [or consignees] unload or charges are assessed for unloading" (R. 23aa). It is essential to bear in mind, in this connection, that at all principal eastern cities except New York and Philadelphia the practice of rail carriers in unloading carload shipments of such commodities without a separate unloading charge had been discontinued long prior to 1948 when unloading charges first became effective at those two points (R. 24c). The evidence that, on shipments moving to eastern cities other than New York and Philadelphia, the carriers had for many years assessed and collected unloading charges, separate from and in addition to the line-haul rate, shows beyond a doubt that the unloading service performed at those other cities was not included in the line-haul transportation. That being the situation at cities other than New York and Philadelphia, we submit there is no reason why it should not be permitted at those two cities also. As a matter of fact, the

establishment of the unloading charges herein assailed makes applicable at New York and Philadelphia the same rule which is of nearly universal application, viz., that rail carriers load and unload carload shipments only at specific stations and only when additional charges are assessed for unloading.

Another persuasive circumstance is that the line-haul rates to New York were the same whether the unloading was performed by the carriers at pier stations or by the consignees at team tracks. Likewise, the line-haul rates to Philadelphia were the same on shipments unloaded by the carriers at produce platforms as on those unloaded by the consignees at team tracks. This is but further proof that the rates for line-haul transportation did not necessarily cover the service of unloading when performed by the carriers.

Lastly in this connection, the evidence shows that the cost of unloading at pier stations in New York and at produce terminal platforms in Philadelphia has increased sharply in recent years (R. 23j), and has reached figures much higher than the scale of unloading charges approved by the Commission (R. 23bb) and now assailed. The carriers were willing to absorb and did absorb the cost of unloading for many years, until it became too burdensome (R. 23z). This is a factor which the Commission properly could and did consider in reaching its decision that it would be

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"just and reasonable" for the consignees to bear a part of the cost.

It is submitted, therefore, that the Commission was warranted by the law and by the evidence in its conclusion that the approved unloading charges were not shown to be unjust and unreasonable.

II

In consideration of the differences in the circumstances and conditions as between the unloading of fresh fruits and vegetables at New York and the unloading there of other commodities without charge, the Commission was warranted in its conclusion that the approved unloading charges were not shown to be unduly prejudicial and preferential or unjustly discriminatory

The appellant, the Secretary of Agriculture, contends that the unloading charges on fresh fruits and vegetables at New York are an unjust discrimination or an undue or unreasonable prejudice or disadvantage, in violation of Sections 2 and 3 (1) of the Interstate Commerce Act, inasmuch as no similar charges are imposed on any other freight there unloaded by the carriers. The Commission, in its motion to affirm, took the position that this question was not properly before this Court on appeal because it was not raised in the District Court. *United States* v. *Hoffman,* 335 U. S. 77, 79; *United States* v. *Ruzicka,* 329 U. S. 287, 296; *Kay* v. *United States,* 303 U. S. 1, 5.

While we are still of the opinion, for the reason stated, that the question of unjust discrimination

or undue and unreasonable prejudice is not properly before this Court, the Commission's report shows that certain of the appellants had alleged in this proceeding that Sections 2 and 3 "would be violated if charges are made for unloading fresh fruits and vegetables at the respective piers, while continuing the free unloading of other commodities at the same locations" (R. 24r). The Commission found, however, that although the movement by carfloat to the piers is the same with respect to other commodities as with respect to fresh fruits and vegetables (R. 23i), the "circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables" (R. 24r).

The evidence does not show, for example, that the numerous and substantial benefits hereinabove described, which are enjoyed by consignees as incidents of the unloading by the carriers of fresh fruits and vegetables, are likewise enjoyed by consignees of other commodities also unloaded. As already stated, consignees of fresh fruits and vegetables unloaded at pier stations enjoy, in connection with the unloading, and without any additional charge, the benefit of what amounts to a wholesale produce mart where they display and sell their merchandise both at auction and at private sales. The evidence shows no such benefits to consignees of other commodities unloaded

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by the carriers. That is to say, dairy products, eggs, and the other commodities alleged by the appellants to be preferred over fresh fruits and vegetables, do not share in the auction facilities and other benefits enjoyed by fresh fruits and vegetables. This factor, without more, is sufficient to show that the circumstances and conditions surrounding the unloading of the two classes of commodities are not the same and that the questioned unloading charges are not unjustly discriminatory or unduly prejudicial as against fresh fruits and vegetables.

In deciding this question adversely to the contention now made by the Secretary of Agriculture, the Commission was following the long-established rule that in order to sustain a finding of unjust discrimination it must appear that the property transported is "like traffic" and that the transportation service is performed under substantially similar circumstances and conditions. *Richmond Chamber of Commerce* v. *Seaboard A. L. R. Co.,* 44 I. C. C. 455, 464; upheld in *Seaboard A. L. R. Co.* v. *United States,* 254 U. S. 57.

The Commission's hearing examiner, in his proposed report, cited as an example of unjust discrimination and undue preference the fact that "canned fruit juices originating at points in Florida are unloaded without additional charge, other than the line-haul rate, at the same New York piers at which charges are collected for unloading fruits and vegetables." The examiner

also referred to the "keen competition between fresh fruits and fruit juices in household consumption." (R. 114.) It is readily apparent, however, that fresh fruits and canned fruit juices are not "like traffic" and that the unloading of the two classes of commodities is not performed under "substantially similar circumstances and conditions." The two types of traffic are packed differently, they require different handling, and upon unloading they receive quite different treatment. Fresh fruits and vegetables being perishable, the trade therein finds extremely valuable, perhaps almost indispensable, the quick method of selling facilitated by the pier-station display and sales facilities which are incidents of carrier-unloading; whereas canned fruit juices, not being perishable, do not require and do not receive such beneficial handling.

In *Nashville Railway Co.* v. *Tennessee,* 262 U. S. 318, 322, this Court, in an opinion by Mr. Justice Brandeis, said: "Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, as a question of fact, on the matters proved in the particular case". The Commission has made its determination of this question of fact, based upon all the evidence in this case. We submit that its determination that there is no unjust preference or prejudice should not be set aside.

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III

The Commission was warranted in its conclusion that the unloading charges at New York and Philadelphia should be the same

The Secretary of Agriculture contends, also, that the Commission's conclusion that the unloading charges should be the same at New York and Philadelphia is not supported by adequate findings and substantial evidence. Supporting his argument the Secretary points out that the Commission's report shows that unloading costs at Philadelphia are lower than at New York.

The Commission dealt with this question in its first report, saying: "The same schedule of charges was published for application at both New York and Philadelphia because of the long-standing competitive relation between those cities" (R. 24c). Also: "The cost of service is less at Philadelphia than at New York, but no separate charge for special sorting and stacking is made at that point [Philadelphia]. Furthermore, the record indicates the desirability of a parity of charges for unloading at New York and Philadelphia" (R. 24r).

The same finding was made in the second report, after rehearing and further hearing: "As indicated in the prior report, it is desirable that the charges for unloading at New York and Philadelphia be the same" (R. 23bb).

Thus the finding that the unloading charges at the two cities should be the same appears to

be based upon two considerations. One of them is that although the cost of unloading at Philadelphia is less than at New York, no separate charge for special sorting and stacking is made by the carriers at Philadelphia, whereas such a charge is made at New York. We submit that the undisputed evidence to this effect, without more, affords a rational basis for the finding that the unloading charges should be the same at the two cities. That a special charge is made for sorting and stacking fruits and vegetables at New York and not at Philadelphia is a strong circumstance, it seems to us, justifying the imposition of unloading charges at Philadelphia representing a higher proportion of the unloading costs than do the charges imposed at New York.[8] Otherwise stated, the unloading charges at Philadelphia are off-set, to some extent, by reason of the sorting and stacking services there performed without charge.

The Commission's other stated reason—that "the record indicates the desirability of a parity of charges for unloading" at the two cities—is more general, it is true, but we think it affords an equally sound basis for the conclusion reached. By the statement that "the record indicates" the Commission doubtless meant that it had decided, upon consideration of the entire record and all the circumstances and conditions shown by it,

[8] At both New York and Philadelphia the present charges are much below the cost of unloading.

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that the charges should be the same at the two cities. We submit that in doing so the Commission was acting within its statutory authority and discretion as the administrative rate-making agency. That its power and authority in such matters are very broad is shown by what this Court said in *Atchison, T. & S. F. R. Co.* v. *United States,* 232 U. S. 199, 220–1:

> What is a proper rate on fruit in precooling shipments, or a fair charge for hauling necessary ice or rendering other transportation services, are all rate-making matters committed to the Commission. It may determine what shall be the difference in rate between carload and less than carload lots; it may decide whether the difference in revenue, due to a difference in method of loading, warrants a difference in the rate on carload shipments of the same article. It may prescribe the form in which schedules shall be prepared and arranged (Sec. 6), and may approve tariffs stating that the single rate includes both the line haul and accessorial services absorbed in the rate. Conversely, it may prescribe a tariff fixing a through rate which includes not only the haul of the fruit, but the haul of the ice necessary to keep the fruit in condition. *All these are matters committed to the decision of the administrative body, which, in each instance, is required to fix reasonable rates and establish reasonable practices. The courts have not been vested with any such*

> *power. They cannot make rates. They cannot interfere with rates fixed or practices established by the Commission unless it is made plainly to appear that those ordered are void.* * * * (Emphasis added).

United States v. *Chicago Heights Trucking Co.,* 310 U. S. 344, dealt with alleged rate discriminations, and we think what the Court there said is authority for the proposition that the Commission has the power to determine on the evidence before it that the unloading charges should be the same at New York and Philadelphia. We quote from the opinion (at pp. 350–353):

> Respondents contend that the Commission improperly concluded that the canceled tariffs create undue preference or advantages resulting in unjust discriminations in violation of [section] 216 (d) *because there was no evidence* that the suspended rates would subject any particular person or type of traffic to disadvantage or injury; * * *
>
> * * * * *
>
> * * * So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. * * * *And*

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> *the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts,* of the existence of forbidden preferences, advantages, and discrimination. (Emphasis added.)

And in *Ayrshire Corp.* v. *United States,* 335 U. S. 573, 593, the Court said:

> * * * We would depart from our competence and our limited function in this field if we undertook to accommodate the factors of transportation conditions, distance and competition differently than the Commission has done in this case. That is a task peculiarly for it. In fashioning what the Commission called a differentially related and finely balanced rate structure for this coal, there is no place for dogma or rigid formulae. The problem calls for an expert, informed judgment on a multitude of facts. The result is that *the administrative rate-maker is left with broad discretion as long as no statutory requirement is overlooked.* * * * (Emphasis added.)

It is worth noting in this connection that, while the Secretary of Agriculture appears to contend that if any unloading charges are to be allowed the charges should be less at Philadelphia than at New York, at least one of the appellants, The Port of New York Authority, does not subscribe to that view, in fact seems to take a directly contrary position. We quote the following from

pages 1019–1021 of the Record, in connection with the testimony of Edward K. Laux, traffic manager for and a witness on behalf of the Port Authority:

By Mr. MILLER [attorney for the railroads]:

Q. Can you tell me whether the Port Authority would be opposed to a reduction in the level of charges at Philadelphia as compared with those at New York?

A. Which charges are you talking about?

Q. These charges.

A. Unloading charges? Our position is simply this—I think I made it plain in my testimony—we want the charge abolished entirely. We are not concerned directly.

Q. I understand that, Mr. Laux. My question is, would you be opposed or in favor of a difference in charges for unloading this traffic at Philadelphia as against New York.

Mr. LAROE [attorney for Port Authority]. To the disadvantage of New York.

By Mr. Miller:

Q. Well, assuming that the charges would be lower at Philadelphia than at New York.

A. Well, my answer would be, we are opposed to any kind of a charge, whether it is lower or higher. If there is a charge, we are against it.

Q. Assuming there is going to be a charge at both places, would you be op-

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posed to or in favor of the publication of lower charges at Philadelphia?

Mr. LaRoe. I do not think we should be called upon to answer that, Mr. Examiner, because it is not in issue. I want to be frank with counsel; in similar cases in the past we have taken the position of opposition to anything that would operate to the disadvantage of New York in that manner, and I should think we probably would take that same position if an attempt were made to favor Philadelphia. But that issue is not here.

Mr. Miller. The issue is raised, Mr. Examiner, by a number of the petitions for reopening and reconsideration.

Exam. Brown. That is correct. And the question is what is the position of the Port of New York Authority. I think that is a question you might ask of counsel.

Mr. Miller. Very well, Mr. LaRoe.

Mr. LaRoe. Well, our position regarding that is that, as Mr. Laux has well explained, there should be no charge for unloading at all. Now, if there is a proposal to favor Philadelphia in that matter, I should think that we would have to oppose it. But our Port Authority has not acted on any such thing as yet, and I am hesitant to take the position in absence of official action.

In other words, I, as a lawyer, cannot determine their policy. I can only determine what their policy will be, and I think it will be a policy of opposition.

Exam. BROWN. When you refer to discrimination and prejudice during the course of your testimony, then you were not referring to Philadelphia in any respect?

Mr. LAROE. We were not, no sir.

The WITNESS. No, sir.

* * * * *

It is submitted, therefore, that the Commission's conclusion that the unloading charges at New York and Philadelphia should be the same is based upon adequate findings, supported by substantial evidence, and was not unjustly discriminatory or unduly prejudicial or preferential.

CONCLUSION

For the reasons herein set forth, it is submitted that the judgment of the District Court should be affirmed and the orders of the Commission sustained.

Respectfully,

EDWARD M. REIDY,
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Assistant Chief Counsel,
Attorneys for the Interstate
Commerce Commission, Appellee.

APRIL 1954.

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APPENDIX

The following are the pertinent provisions of the Interstate Commerce Act (49 U. S. C. Sec. 1, *et. seq.*):

SEC. 1 (3) (a). "* * * The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported * * *" (49 U. S. C. Sec. 1 (3) (a)).

SEC. 1 (5). "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful" (49 U. S. C. Supp. V Sec. 1 (5)).

SEC. 2. "That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for

him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful" (49 U. S. C. sec. 2).

SEC. 3 (1). "It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description" (49 U. S. C. Sec. 3 (1)).

SEC. 6 (1). "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over

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the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part." (49 U. S. C. Sec. 6 (1))

SEC. 6 (7) "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor

shall any carrier charge or demand or collect or receive a greater or less different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs (49 U. S. C. Sec. 6 (7)).

SEC. 15 (6) "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be

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received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge" (49 U. S. C. Sec. 15 (6)).

SEC. 15 (7) "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal peading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier

or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge,

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classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible" (49 U. S. C. Sec. 15 (7)).

SEC. 15a (2) "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service" (49 U. S. C. Sec. 15a (2)).

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HAROLD B. WILLEY

Nos. 480-481

IN THE

Supreme Court of the United States

October Term 1953

No. 480

SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Appellant,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

No. 481

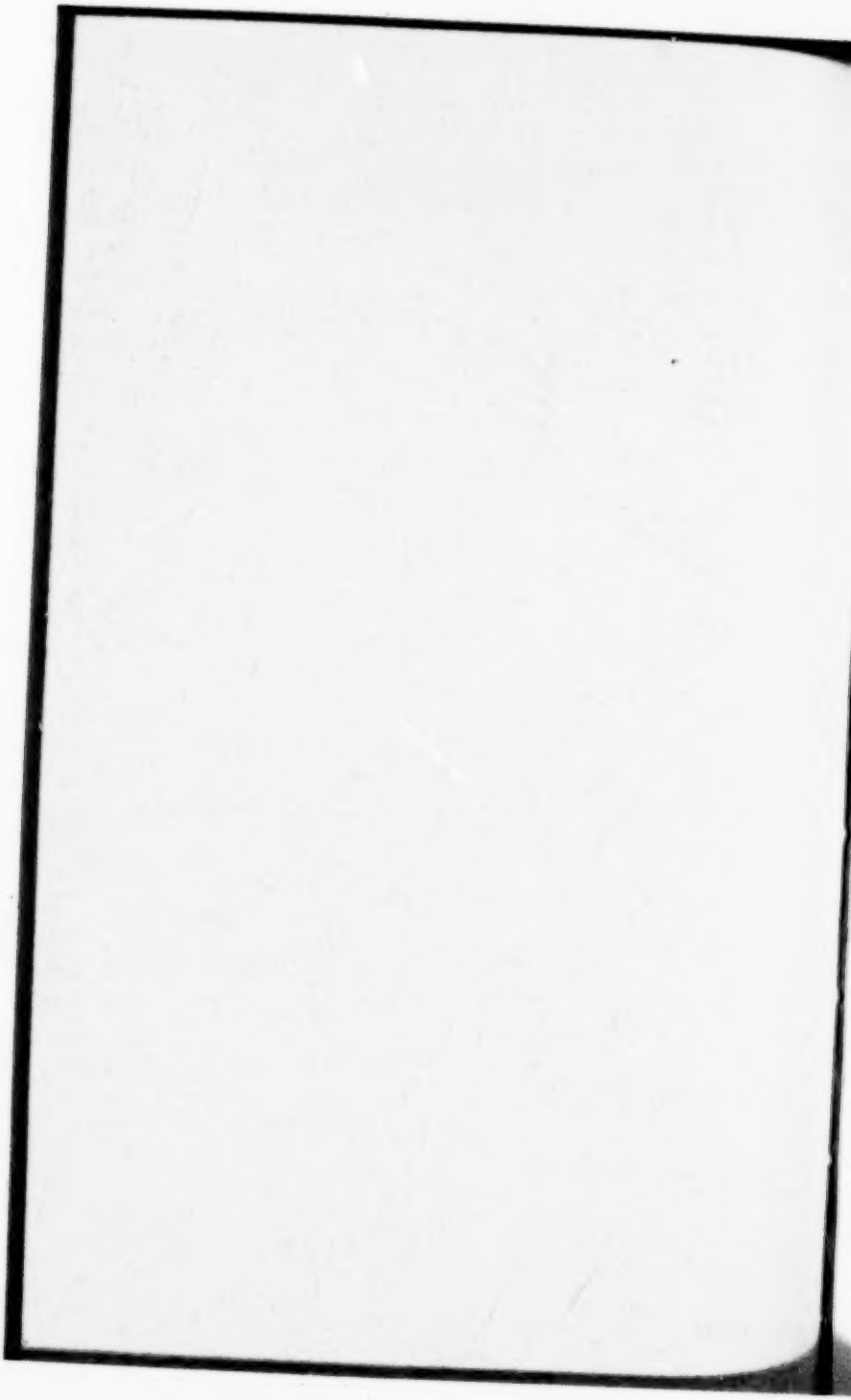
FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF AMERICA, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE BALTIMORE AND OHIO RAILROAD COMPANY, ERIE RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY and READING COMPANY, APPELLEES



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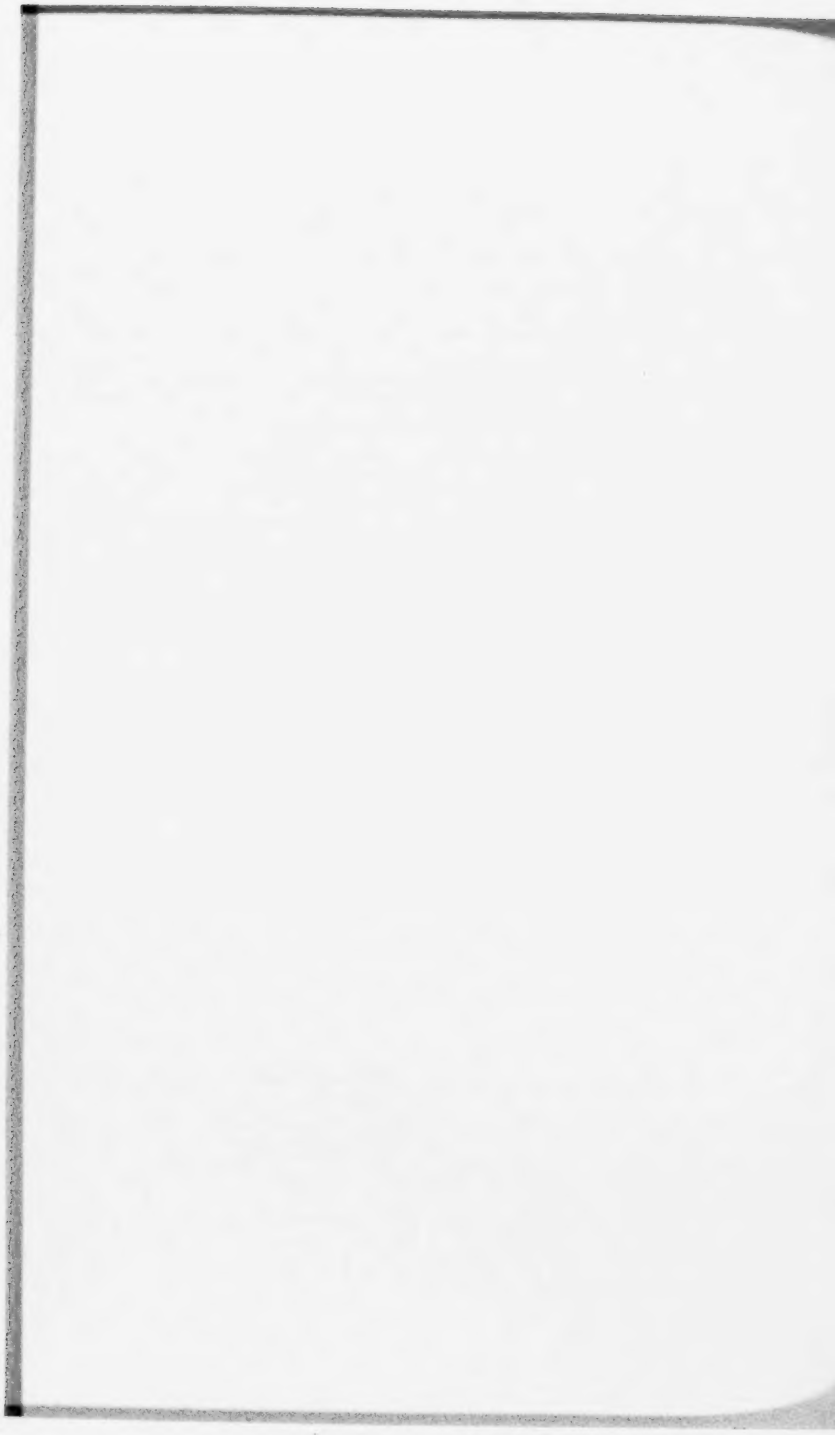

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IN THE

Supreme Court of the United States

October Term 1953

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OPINIONS BELOW

The opinions in the District Court (R. I-208-215, 204-207) are reported in 114 F. Supp. 420. The original report of the Interstate Commerce Commission (R. I-24-24s) is reported at 272 I.C.C. 648, and its re-

port on rehearing and further hearing (R. I-23-23gg) is reported at 286 I.C.C. 119.

JURISDICTION

The judgment of the District Court dismissing this suit to set aside orders of the Interstate Commerce Commission (R. I-203-204) was entered on August 31, 1953. Separate appeals (1) by the Secretary of Agriculture of the United States and (2) by the remaining plaintiffs and the intervening plaintiffs in the original action, were allowed on October 28, 1953. R. I-220-221. Motions to affirm in both appeals were filed on November 27, 1953, by the Interstate Commerce Commission and by the intervening railroads. Probable jurisdiction was noted on February 1, 1954, and the two appeals were ordered consolidated for argument. R. III-1555. Jurisdiction of the appeals is invoked under U.S.C., Title 28, Secs. 1253 and 2101(b).

QUESTION PRESENTED

The Interstate Commerce Commission, after extended investigation and hearing, approved the imposition by five rail carriers of charges in addition to the line-haul rates for unloading fresh fruits and vegetables at certain designated stations on the island of Manhattan and in Philadelphia. The question presented is whether the Commission's orders approving the charges have a basis in law and are supported by substantial evidence.

STATUTE INVOLVED

The pertinent sections of the Interstate Commerce Act involved in these appeals are set out at pages 94-101 of appellant's brief in No. 480, and at pages 65-69 of appellants' brief in No. 481.

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STATEMENT

A. The Proceedings Before The Commission:

In 1947 the five railroad appellees* filed schedules proposing to establish, effective June 1, 1947, charges for the unloading of carload shipments of fresh fruits and vegetables at certain designated stations at New York, New York, and Philadelphia, Pennsylvania. Following protests, the Commission suspended the operation of the proposed schedules for the full statutory seven months' period—until December 31, 1947—and instituted an investigation into their reasonableness and lawfulness. See R. I-224. Evidence was taken before an Examiner, the case was argued before Division 3, and reargued before the full Commission. R. I-14, 24a. The statutory suspension period having expired in the meantime, the carriers voluntarily deferred the effective date of the schedules pending determination of the proceeding. R. I-24a.

On October 4, 1948, the full Commission made its initial report in which it concluded, first, that there was no showing that the proposed schedule of charges created an unjust discrimination or undue prejudice in violation of either Sections 2 or 3 of the Interstate Commerce Act, and second, that the proposed schedule of charges was just and reasonable. R. I-24q-24r. The Commission thereupon entered an order vacating the suspension and discontinuing the proceeding. R. I-224. The proposed charges, increased 30 percent to reflect general increases authorized in the interim, became effective November 1, 1948. R. I-23a.

Upon petitions for reopening and reconsideration filed by several of the appellants herein, the proceed-

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* The Baltimore and Ohio Railroad Company, Erie Railroad Company, The New York Central Railroad Company, The Pennsylvania Railroad Company and Reading Company.

ing was reopened (R. I-292-293), a rehearing was held for the receipt of additional evidence, a proposed report was served, exceptions thereto were filed, and the matter was again argued orally to the full Commission. R. I-23a. On October 10, 1950, following the reargument, the Commission assigned the matter for still further hearing in order to remedy deficiencies which appeared to exist in the record. R. I-293-294. Following that hearing, a supplemental proposed report was prepared, exceptions were filed, and the matter was orally argued for the fourth time. R. I-23a. On May 7, 1952, the Commission filed a Report on Rehearing and Further Hearing in which it concluded that the unloading charges previously approved should be reduced so as not to exceed certain specified amounts, and modified its ultimate finding in the prior report accordingly. R. I-23a, 23bb. The order accompanying this report, which incorporated by reference the findings of fact and conclusions contained in the Commission's two reports (R. I-25, and see R. I-23b), required cancellation of the tariff schedules naming the unloading charges and discontinued the proceeding without prejudice to the establishment of the reduced charges in the amounts so specified. R. I-25, 23bb-23cc.

B. The Reports Of The Commission:

The facts as found by the Commission in its two reports may be summarized as follows:

The general rule is that shippers must load and unload carload freight, or make provision therefor, at their own expense, and that where loading or unloading of such freight is done by the carrier a charge is made. R. I-23c, 24b. Rule 27 of the Consolidated Freight Classification provides, in part, as follows (R. I-23c):

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> "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at CL ratings or rates, except where tariff of carriers at point of origin or destination or stopover station (as the case may be) provides for loading or unloading of CL freight by carrier."

Prior to 1924, the railroads in Official Territory* made exceptions to this general rule at certain inland points and port cities. R. I-24c. Beginning in that year, however, the carriers began to eliminate the exceptions by publishing tariffs assessing a charge for loading or unloading at several of the inland points. Following the approval of those tariffs by the Commission in 1925 (*Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925)), loading and unloading by the carriers without charge** was gradually discontinued at other interior and port cities in Official Territory until finally New York and Philadelphia remained the sole exceptions. R. I-24c. At the time of the first report of the Commission in 1948, those two cities were the only points in Official Territory where unloading of carload freight was performed by the carriers without a separate unloading charge, and even at those cities such unloading service was not performed generally but only at certain specified stations therein or at designated platform locations in such specified stations. R. I-24c, 24h, 24j, 23s.

The charges here in issue apply only to the unloading of fresh fruits and vegetables at certain designated

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* Roughly, the area east of the Mississippi and north of the Ohio and Potomac Rivers.

** The terms "without charge" or "free" will be used in this brief as meaning without charge in addition to the line-haul rate.

stations on the island of Manhattan and in Philadelphia.* There are other commodities consigned to Philadelphia and to the New York pier stations which were also unloaded without charge in addition to the line-haul rate (R. I-23e-23f, 23h), but since fruits and vegetables constituted the bulk of the shipments received and unloaded without separate unloading charge at New York and at the Philadelphia perishable produce terminals, it was considered appropriate to institute charges for unloading these perishables and to defer publication of similar charges on other traffic. R. I-24b. The Commission also took note of the fact that the carriers were considering the establishment of similar charges for the unloading operations of all commodities at New York and Philadelphia. R. I-24b. In fact, in 1950, the carriers imposed such

* The unloading charges which were originally proposed (R. I-23b) were increased, before they became effective on November 1, 1948, as a result of the general increase authorized by the Commission in Increased Freight Rates, 1947, 269 I.C.C. 33 (1947), 270 I.C.C. 81, 95, 403 (1947). R. I-23b. No further increases in the charges were authorized by the Commission in the later general increases authorized in 1948 and 1951. In its last report, the Commission approved the reduced schedule of charges which is now in effect. R. I-23bb. The details, on a per ton basis, are as follows:

Products	Proposed Charges	Charges as Effective 11/1/48	Present Charges
Citrus fruits	$1.50	$1.95	$1.05
Fresh fruits (other than citrus)	1.75	2.28	1.35
Melons (including cantaloupes)	2.00	2.60	1.65
Vegetables, fresh or green, not cold pack or frozen	1.50	1.95	1.05
Vegetables, fresh or green, not cold pack or frozen, when top icing or body icing is used	2.00	2.60	1.65

There has been no objection to the grouping of commodities in this fashion. R. I-23c.

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charges on the balance of the carload freight theretofore unloaded at Philadelphia without extra charge. R. I-322. See *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953).

The schedule of unloading charges, both as originally proposed by the carriers, and as finally approved by the Commission, was identical for New York and Philadelphia. The Commission approval of this feature of the charges was based on the long-standing competitive relationship between those cities. R. I-23bb, 24c. The physical situations at the two cities, however, are dissimilar. Because of the geographical location of New York, freight consigned to that point must generally be moved across the Hudson River, either by car float or by lighter; only the New York Central has an all-rail line into Manhattan for the delivery of freight (R. I-23f), although that company also has a New York pier station in the vicinity of Barclay Street to which cars must be transported on platform floats. R. I-23f, 24h. At Philadelphia, since 1927, all the movements have been by rail. R. I-23r.

At New York

There is a large and fairly steady volume of fresh fruits and vegetables received by railroad in New York each year. About 75 percent of these shipments are delivered at pier stations of the Erie, Pennsylvania, Baltimore & Ohio, and New York Central located on the west side of Manhattan Island between Barclay and Canal Streets, near the Washington Market, the primary fruit and vegetable market for the entire New York metropolitan area. R. I-23e, 24d. The remainder

is delivered to team tracks and sidings, or to chain store warehouses, in other parts of the city. R. I-23e. It is principally at the pier stations where unloading is performed by the carriers; hence it is principally with respect to the operations there that there is controversy regarding the unloading charges.*

The operations of the Erie are typical of the pier operations at New York. R. I-24g. Carloads of fruit and vegetables, received by it generally at points in Indiana, proceed by rail to the Erie rail terminals in Jersey City, New Jersey. There they are moved onto car floats equipped with tracks and transported by Erie tugs across the Hudson River to Piers 19, 20 or 21, the pier stations leased by the Erie from the City of New York. R. I-24d. All of these operations are performed in the late afternoon and at night in order to meet the needs of the market for the following day. R. I-23g, 24d. At the pier stations the cars are unloaded, onto the floor of the pier, by a contractor, the Seaboard Terminal and Refrigeration Company, employed by the Erie. The Erie itself supplies the necessary unloading equipment, such as hand trucks, gangplanks, and the like; provides light, heat, and maintenance of the piers; supplies the necessary clerical and supervisory force for the unloading operations; and either by its own employees or through the Seaboard Terminal, keeps the piers clean and sanitary. The unloading is performed with a high degree of speed and efficiency; two and sometimes three car floats are un-

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* The New York Central also performs the unloading with respect to cars which move by rail or via float bridge to its freight house located near the Bronx Terminal Market. R. I-24h.

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loaded at the same pier space in the course of a single night. R. I-23f-23h, 24d-24g.

The Erie is informed, prior to the arrival of the cars, of their contents and the names of the consignees which permits it to notify the receivers in advance of the arrival of the cars, and to allot space on the piers for each consignment. The pier floor is mapped out to give each consignee a specified location for the contents of the car after unloading. Many shipments are displayed by the consignees at those locations to facilitate inspection by prospective purchasers. Practically all of the fruit, after being inspected on the piers by prospective purchasers, is sold at public auction in rooms on the second floor of the pier which are provided by the Erie for that purpose. Some of the produce, particularly cantaloupes and melons, is bought at private sale after being inspected on the pier floor, and some, particularly vegetables, reaches the consignee without prior sale at the piers. R. I-23j-23k, 24f-24g. The consignees, or the purchasers, truck the produce from the pier to its ultimate destinations in New York City. R. I-23k, 24i. Thus, in taking pier station delivery, the fruit and vegetable trade has advantages not available in connection with team-track delivery, including the displaying of the entire contents of the car, the use of the pier facilities as a sales mart, and the use of auction-room facilities. R. I-23d, 23h.

When delivery is to be on a team track on Manhattan Island, the movement (except by the New York Central) is identical across the Hudson River. R. I-23i. When the car floats reach Manhattan the cars are switched and placed on the team tracks, where the consignee himself does the unloading. R. I-23i. The cost to the carriers of delivery on team tracks is, of course,

substantially less than the cost of delivery at the pier stations when unloading at the pier stations is included.*

The team-track capacities of the carriers on Manhattan Island range from 45 cars on the part of the Baltimore & Ohio, to 350 for the New York Central. R. I-23f. These team tracks are largely used for delivery of non-perishable freight, but some shippers specify such delivery for fruits and vegetables. If all receivers of fruits and vegetables at New York desired team-track delivery on Manhattan, the existing facilities would not be sufficient, and it would be impracticable, if not impossible, to expand rail facilities on Manhattan Island to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York. R. I-23f, 23n, 23q. However, most shippers have preferred and hence have specified delivery at the special pier station terminals provided for the receipt of perishable freight (R. I-23q, 24l), and in the judgment of the Commis-

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* The relative costs to the carriers, on a per car basis, of team-track and pier station delivery on Manhattan Island are not spelled out for each carrier in the Commission's findings. The findings of the Commission show that, *apart from the costs of unloading*, the relative costs are: New York Central—team tracks, $22.30, pier stations, $38.02 and $43.94 (depending on where the car float is loaded); Erie—team tracks, $45.44, pier stations, $44.30, with an estimated additional unloading cost of $39.57 at the pier stations. *When unloading at the piers is included*, the costs for the Baltimore and Ohio are—team tracks, $70.46, pier stations, $119.86, and for the Pennsylvania—team tracks, $73.57 and pier stations, $122.73. R. I-23o. The exhibits, however, show that in 1950, the composite costs of all carriers of handling cars at the Manhattan piers, including unloading, were $90.11 per car, and at the Manhattan team tracks were $30.40 per car. The details and the references to the supporting exhibits are tabulated at R. I-450.

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sion shippers will not divert any substantial amount of this traffic from the pier stations so long as they are able to obtain the present terminal services at costs which are not unduly burdensome or unduly disproportionate as compared with the costs of a satisfactory substitute for such delivery. R. I-23z.* Additional team-track facilities are available on the New Jersey side of the Hudson River, which are accessible by tunnel or ferry from New York. R. I-23h-23i, 23k-23l.

When delivery is to be at the pier stations, it is impracticable for the consignees to do the unloading, and they are not permitted to do so. R. I-23e, 24i. There are no physcial means by which consignees' trucks can reach the car floats, and the carriers refused a request by one consignee following the original decision by the Commission in 1948 approving the original, higher schedule of unloading charges, that the consignees be permitted to perform the unloading. R. I-23h. Consignees do, of course, have access to the cars on the car float for the purposes of inspection, but they are not permitted to take delivery of their freight there. R. I-23g-23h.

The carriers made studies of the costs incurred by them in connection with this unloading operation at the piers. These cost studies were attacked before the Commission on various grounds, but the Commission concluded that they were carefully prepared and were

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* The New York Central, which has the largest team-track capacity and which in 1950 handled 12,144 cars of fruits and vegetables at team tracks and only 1,888 at pier stations (R. I-23q), has asserted that its team-track facilities can accommodate all cars of fruits and vegetables which it may transport to New York (R. I-24h), although it could not handle the total volume of fruit and vegetable shipments to that point by all carriers. R. I-23f.

sufficient to prove the facts. R. I-24p. They show for 1947 the following weighted average costs per ton of the carriers which made delivery in this way, as compared with the charges then proposed (R. I-24s):

Product	Costs of Unloading	Proposed Charges
Citrus fruits	$1.25	$1.50
Fresh fruits (other than citrus)	1.76	1.75
Melons	1.90	2.00
Vegetables (not iced)	1.94	1.50
Vegetables (iced)	3.42	2.00

The latest cost figures, for 1949, and the charges ultimately approved by the Commission and now in effect, are as follows (R. I-23j):

Product	Costs of Unloading*	Present Charges
Citrus fruits	$1.99	$1.05
Fresh fruits (other than citrus)	3.11	1.35
Melons	3.02	1.65
Vegetables (not iced)	2.075	1.05
Vegetables (iced)	3.26	1.65

At Philadelphia

Prior to 1927, fresh fruits consigned to Philadelphia were unloaded at piers on the Delaware River adjacent to the Dock Street wholesale produce market, the cars being either floated to the piers or moved to them over the city streets. Unloading was by the carriers, without extra charge. This operation, which was similar to the present pier operation in New York City, was changed in 1927, when the Pennsylvania and the Baltimore and Ohio each constructed a perishable

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* These figures are the arithmetical averages of all four carriers calculated from the separate figures given at R. I-23j. All are for a given period in 1949 (although somewhat different periods for each carrier) except that the figures for the Erie are the 1946 and 1947 figures revised to reflect the increases in the wages of Seaboard Terminal employees through March 1951. R. I-23j.

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produce terminal. Since that time, and until the unloading charges became effective in 1948, approximately 95 percent of the fruits and vegetables consigned to Philadelphia, other than for chain stores, has been handled at the Pennsylvania produce terminal. R. I-23r.

This terminal, in addition to team-track facilities for 510 cars, has two platforms with a combined capacity of 72 cars; it is only at these platforms that the Pennsylvania does the unloading. R. I-23r-23s, 24j. About one third of the total volume of these shipments is unloaded by the Pennsylvania at these platforms, and the balance on the team tracks by the consignees. R. I-24l. One of the two platforms, known as platform "A", is used almost entirely for the unloading of fruits to be sold at auction by the Philadelphia Terminal Auction Company. When produce to be sold by the auction company is about to arrive at Philadelphia, the auction company receives orders from the receivers relating to the commodities it will offer for sale the next morning. The auction company, in preparation for these sales, prints a catalogue for prospective purchasers, and the Pennsylvania, when it unloads the cars, sorts and arranges their contents according to size, grade, brand, or other factors as listed in the catalogue. No charge is made for this special sorting service. R. I-23s, 24j-24k.* The Pennsylvania also provides auction rooms for the conve-

* At New York, when the carrier is requested by the consignee to sort the packages, either as they are unloaded or after they have once been stacked on the pier, a separate charge is made pursuant to appropriate tariff authority. Allowances for Stacking, 179 I.C.C. 780 (1931).

ience of the trade, as well as heat and light for the terminal. R. I-24k.*

Platform "B" is used for fruits and vegetables intended for private sale. The cars are unloaded by the railroad employees, but they do not perform the sorting of freight which they do on Platform "A".

When cars are spotted at the team tracks, the consignees do their own unloading. The Pennsylvania maintains in Philadelphia not only extensive team tracks at the produce terminal, but additional team tracks at other locations in the city. R. I-24j. There is no indication that these facilities are inadequate to accommodate the entire fresh fruit and vegetable traffic, or that anyone desiring team-track delivery has been denied such services, and the team-track facilities can be increased if necessary. In fact, delivery at the terminal platforms with their auction and other facilities is more advantageous to the consignees (R. I-23y) and, including the cost of unloading, much more expensive to the carriers.**

The unloading costs at Philadelphia are somewhat less than at New York (R. I-23d), although they increased substantially between 1947 and 1949. R. I-24s, 23x. A comparison of the Philadelphia costs with the charges approved by the Commission and with

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* Operations at the joint Baltimore and Ohio and Reading terminal, which is nearby, are substantially identical. R. I-23s-23t, 24k-24l.

** For the Baltimore and Ohio, the costs per car are—team tracks, $27.66, auction sales platform, $75.94; for the Pennsylvania —team tracks, $39.64, auction sales platform, $109.36. R. I-23o-23p.

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those presently in effect, on a per ton basis, follows (R. I-24s, 23x):*

Product	Unloading Costs 1947	Unloading Costs 1949	Present Charges
Citrus fruits	$1.04	$1.57	$1.05
Fruits (other than citrus)	1.41	2.03	1.35
Melons	1.10	3.42	1.65
Vegetables (not iced)	0.98	1.91	1.05

Following the additional hearings in this proceeding in 1949 and 1950, the Commission took note of the effect of the unloading charges, which had been in effect since November 1, 1948. At New York, the Commission noted that when the unloading charges became effective, some consignees took delivery at outlying team-track stations, particularly in New Jersey, trucking from there to the market. R. I-23h-23i. Deliveries of fresh fruits and vegetables at the piers were about 50 percent less in February 1949 than in the corresponding month in 1948, with substantial increases in truck delivery from team tracks in New Jersey. R. I-23i. However, the Pennsylvania had spent a large sum in extensive reconditioning of its New Jersey team tracks, and to a large extent their increased use was not the result of the unloading charges. R. I-23k. The Commission noted that the delivery of fresh fruits and vegetables at team tracks in New Jersey, away from the produce markets and the area where the bulk of the produce is consumed, would not only be somewhat slower, but would tend to split the New York metropolitan area. R. I-23k-23l. The Commission also took note of "intimations" and "apprehensions" that the loading charges might interfere with programs by the city of New York to rehabili-

* The 1947 figures are weighted average costs per ton. Figures for 1949 are the arithmetic averages of the separate figures for the Pennsylvania and the Baltimore and Ohio given at R. I-23x.

tate the piers and the Washington Market, and of the temporary abandonment, due to the unloading charges, of plans by the Port of New York Authority to construct a union water front terminal combining into one integrated operation all of the pier stations of the several carriers. R. I-23m-23n.

In Philadelphia, the Commission found that after the original unloading charges became effective in 1948, 63 percent of the produce originally delivered on the terminal platforms was unloaded on team tracks by consignees (R. I-23t), and concluded that the charges at the 1948 levels would accentuate the trend toward diversion of shipments to trucks which has been manifest, with certain fluctuations, since 1930. R. I-23u-23w. The consignees at Philadelphia, shortly after the unloading charges first became effective in 1948, requested the carriers to permit the auction company to do the unloading, believing that they could do it for less than the unloading charge. The Pennsylvania refused, on the ground that the terminal platforms were public facilities and that it could not permit dual methods of unloading. R. I-23v.

C. The Commission's Conclusions:

Both reports of the Commission begin with a statement of the general principle, embodied in Rule 27 of the Consolidated Freight Classification, that owners are required to load and to unload carload freight. R. I-23c, 24b.

In its first report the Commission concluded that it was not convinced that adequate compensation for the unloading services at the designated stations at New York and Philadelphia "is or should be included in the line-haul rates" and that the establishment of specific charges for unloading at those points without reference

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to the levels of the line-haul rates was justified. R. I-24q. The Commission described the charges as falling "in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published." R. I-24q.

The Commission also considered the contention that the unloading charge was an undue preference and an unjust discrimination under Sections 2 and 3 of the Act. It found that the carriers had not yet imposed an unloading charge on other freight which may be delivered at the New York piers (R. I-23e-23f), but that the circumstances and conditions affecting the unloading of these other commodities were not shown to be similar (R. I-24r) and, moreover, as already stated, it recognized that the carriers were considering imposing similar unloading charges for all freight delivered at Philadelphia and at the Manhattan piers. R. I-24b.

The Commission's second report, which it regarded as supplemental to the first (R. I-23b), was in large part devoted to a discussion of the consequences of the charges originally approved, as disclosed by experience, and to the arguments made by those protesting the charges in relation to the available alternative methods of receiving freight at Philadelphia and New York.

In dealing with the situation at Philadelphia the Commission concluded that there was no indication that the team-track facilities provided there are inadequate to accommodate the fresh fruit and vegetable traffic or that anyone desiring team-track delivery had been denied such services. The Commission further specifically concluded that "except during the strikes or similar conditions, there has been no time when the team-track capacity at Philadelphia has not been sufficient to accommodate all cars unloaded at the produce termi-

nals in addition to those unloaded at the team tracks." R. I-23y.

In discussing the unloading charges at New York the Commission concluded in part as follows (R. I-23y-23z):

> "An unusual situation, arising primarily from the topography of the area, exists on lower Manhattan as a result of which the present method of handling shipments through the pier stations is of benefit to both shippers (including consignees) and carriers. It is also helpful in the avoidance of traffic congestion. The acquisition of land in that area for additional track facilities would be impracticable if not impossible. The respondents have been willing to perform the unloading without a separate charge until, in recent years, the cost thereof substantially increased. Upon this amplified record we conclude, as hereinafter explained, that the cost of unloading should be borne partly by the shippers and partly by the respondents."

The Commission rejected as unsound the argument that the carriers must bear the unloading costs because they do not have team tracks in New York adequate to handle all of the traffic, stating that the physical limitations imposed on the movement of produce by rail into Manhattan created a general community problem rather than exclusively a railroad problem. R. I-23z-23aa. It further concluded that although the Manhattan team tracks and sidings are not adequate to handle all the Manhattan traffic in fruits and vegetables there is little likelihood that shippers would divert a substantial amount of traffic from pier stations if the unloading charges were not unduly burdensome to them or unduly disproportionate as compared with the cost of a satisfactory substitute for pier deliveries. R. I-23z. The Commission also pointed out that if terminal costs can-

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not be kept within reasonable bounds the carriers might eventually be forced to undertake the establishment of team-track facilities in Jersey City within a reasonable trucking distance of lower Manhattan as a substitute for direct service to the latter area. R. I-23z-23aa.

The Commission also concluded that, inasmuch as the level of the line-haul rates on fresh fruits and vegetables to New York and Philadelphia was not higher than the rates to other consuming points where shippers unload or separate unloading charges are assessed, the propriety of the unloading charges could be determined without an extensive showing as to the reasonableness of the line-haul rates (R. I-23aa), thus reaffirming the similar conclusion reached in its first report.

On the other hand, the Commission modified its earlier conclusion by finding that the level of charges as established in 1948 would cause a considerable diversion of traffic. In the light of that, and of the various benefits to the carriers from pier delivery (R. I-23bb), the Commission concluded that only a lower basis of charges could be approved. R. I-23aa-23bb. These charges are about 60 percent of the charges which had been in effect since November 1, 1948 (R. I-23bb), and approximately half of the cost to the carriers of unloading, at Manhattan and Philadelphia combined, in 1949. R. I-23j, 23x.

In its second report the Commission considered anew the contention that the unloading charges violated Sections 2 and 3 of the Act and again concluded that there was no warrant for a finding that those sections were violated. R. I-23bb.*

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* Since June 1, 1950, there has been no unloading by the railroads at Philadelphia of other commodities except when a separate charge is made. R. I-322. See National Carloading Corp. v. Pennsylvania R. Co., 288 I.C.C. 481 (1953).

Accordingly, the Commission decided that the unloading charges then in effect had not been shown to be just and reasonable, and should be cancelled, but without prejudice to the establishment of charges in conformity with a schedule of unloading charges stated in its opinion, which it found would be just and reasonable. R. I-23bb.

D. Subsequent Commission Proceedings:

The order of the Commission directed that the unloading charges previously approved be cancelled by July 3, 1953. R. I-25. Pursuant to that order the carriers cancelled the charges on that date and filed new tariffs imposing at New York and Philadelphia the schedule of unloading charges which the Commission had approved. R. I-31, 37. On September 16 and 23, 1952, shortly after the final report of the Commission and the filing of these new tariffs, two formal complaints were filed with the Commission (Docket Nos. 31105 and 31106) attacking the unloading charges at New York and Philadelphia, respectively, as unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act. See R. I-28, 35. The railroad defendants therein moved to dismiss the complaints (R. III-1541, 1546) and after responses to the motions had been filed (R. I-42-50), but without further hearing of testimony, the Commission dismissed the complaints on December 15, 1952, on the ground that they assailed on substantially the same grounds the unloading charges approved in the Commission report of May 7, 1952. R. I-26-27.

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E. The Proceedings In The Court Below:

On March 3, 1953, the complaints herein were filed in the District Court for the Southern District of Florida seeking to annul and set aside the order of May 7, 1952, insofar as it approved and authorized the establishment of the present unloading charges, and the order of December 15, 1952, dismissing the complaints filed with the Commission. R. I-1-178. Answers were filed (R. I-178-201), including one by the United States, named as a defendant pursuant to 28 U.S.C. Sec. 2322, in which it stated that it "should remain neutral in this case." R. I-199, 200-201. The railroads who are now appellees here sought and were accorded permission to intervene. R. I-202-203. In accordance with the requirement of 28 U.S.C. Supp. V., Sec. 2325, a three-judge court was empaneled, and on August 31, 1953, the complaints were dismissed. R. I-203-204.

The majority of the court (Strum, Circuit Judge, and Barker, District Judge), stating that the "point at which the carrier's line haul service begins or ends is a question of fact to be determined by the Commission" (R. I-212), concluded that the findings of the Commission were amply supported by the evidence, and warranted the Commission in concluding that "unloading by the carrier is a desirable and justifiable accessorial service, of value to the consignee, and that he should pay a part of the costs". R. I-214. The court denied that a prior custom of performing the additional service without charge was of controlling significance, or that it was necessary for the Commission to review in detail the line-haul rates before approving the unloading charges (R. I-213), particularly where the Commission also found that the level of the line-haul rates

to New York and Philadelphia is no higher than the rates to other consumer points where shippers unload or where charges are assessed for unloading. R. I-213. The court also held that there was there no denial of due process, in refusing to reexamine the propriety of the charges in connection with the complaints filed in 1952, or otherwise. R. I-214-215. District Judge de Vane dissented. R. I-204-207.

On October 28, 1953, appeals to this Court were allowed. R. I-220-221. Motions to affirm were filed on November 27, 1953, and probable jurisdiction was noted on February 1, 1954. R. III-1555.

SUMMARY OF ARGUMENT

I

The Court has consistently held that the decision of questions such as those here involved—the extent of the carriers' transportation duty and the obligations which the carriers assume in return for the payment of the line-haul rates—turns upon the appraisal of facts and that consequently the determinations of the Commission will be accepted if they are supported by substantial evidence. See, *e.g., Los Angeles Switching Case,* 234 U.S. 294, 311, 314; *Swift & Co.* v. *United States,* 316 U.S. 216, 225; *United States* v. *U. S. Smelting, Mining & Refining Co.,* 339 U.S. 186, 193. The Commission, in the exercise of its authority to determine the extent of the carriers' transportation duty, has recognized certain rules and principles, among which is the rule that shippers or consignees are obliged to do their own unloading of carload freight. The application of this principle to the facts of the present case is only the latest step in a long history of Commission action directed to the unloading practices of

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the carriers in Official Territory. By 1948 application of that principle had resulted in the elimination of unloading by the carriers without a charge in addition to the line-haul rates at all points in that Territory except New York and Philadelphia. The orders in the present case thus have substantially eliminated this practice at the last remaining points where it had continued to exist.

II

Appellants do not attack most of the findings and conclusions that support the Commission's determination. Their primary objection is that it was error for the Commission to approve separate charges for unloading without making a full-dress investigation of the reasonableness of the line-haul rates. Their contention is without substance.

A. The fact that the carriers have not imposed a separate unloading charge in the past does not establish either that the carriers' duty under the line-haul rates requires them to provide unloading without a separate charge or that compensation for the unloading service is presently included in the line-haul rates. *Interstate Commerce Commission* v. *Stickney*, 215 U.S. 98. Consistently in the past the Commission has permitted or required carriers to decrease or eliminate a part of the total quantum of terminal services previously performed under the line-haul rates without making a complete investigation of the reasonableness of those rates. *Loading and Unloading Carload Freight*, 101 I.C.C. 394 (1925); *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25 (1947); *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953); *Charges for Protective Service to*

Perishable Freight, 241 I.C.C. 503 (1940); *United States* v. *U. S. Smelting, Refining & Mining Co.,* 339 U.S. 186. In the present case the Commission's conclusion that unloading was not required of the carriers under the line-haul rates is supported by the evidence showing the special nature and value of the unloading services and the costs of performing those services. It is also supported by the evidence that the line-haul rates for fruits and vegetables to Official Territory are, from many origins, identical to wide geographical areas around both New York and Philadelphia, and do not vary depending on whether unloading is performed by the carriers. In thus determining the scope of the carriers' obligation under the line-haul rates the Commission also acted on the basis of its thorough familiarity with the general structure of the rates on fresh fruits and vegetables to points in Official Territory. There are no prior decisions of the Commission which are inconsistent with its conclusion in the present case.

B. The Commission's orders do not result in a charge for delivery. Appellants refuse to recognize that the carriers are simply making available at the perishable produce terminals in Philadelphia and at the pier stations on Manhattan Island a special type of terminal service, which has many advantages for a shipper or consignee, but which includes extra services by the carriers for which they are entitled to some reimbursement. That the services precede delivery is irrelevant. Likewise, since shippers and consignees prefer this alternative and more expensive type of delivery, it is irrelevant that the team tracks on Manhattan Island could not accommodate all of the traffic in these commodities. *Swift & Co.* v. *United*

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States, 316 U.S. 216, 227. At Philadelphia the team-track facilities are completely adequate and at New York the Commission properly concluded that the unusual physical conditions warranted some sharing between the carriers and their patrons of the burden of overcoming the difficulties in that congested area.

C. The objection, made only by appellant in No. 480, that the Commission erred in fixing the same level of charges at both New York and Philadelphia is without merit. The Commission has wide discretion in fixing the level of rates as between various designations, and the record is fully adequate to support its conclusion in the present case that the existing parity between these two cities should not be disturbed.

III

The challenge to the orders of the Commission under Sections 2 and 3 of the Act may not be available to appellants in the Court, but the objection is in any event without substance. Questions of discrimination, undue prejudice and the like are peculiarly within the province of the Commission, which has established well recognized standards of proof in such matters. Appellants failed to present evidence that satisfied those standards of proof. When the Commission in its first opinion advised appellants that the record before it wholly failed to meet those standards, appellants took no steps to meet that deficiency in their proof. The conclusion of the Commission that the record was inadequate to sustain any finding of violation of Sections 2 or 3 is clearly correct.

IV

Appellants' objection that they were not permitted a hearing on the final reduced level of charges was

completely answered in the court below, as was the similar objection that the Commission was required to reexamine all questions because of complaints filed subsequent to its final decision in these cases. The burden of proof required by the statute was imposed by the Commission. It did not err in disagreeing with the contrary conclusions reached by its Hearing Examiners, nor are the reports of those Examiners significant in this Court.

ARGUMENT

The Interstate Commerce Commission, in determining the legality of the unloading charges involved in this case, was required to resolve complex transportation problems which called for the exercise of its informed judgment and experience. Those problems arise both because of the nature of the traffic involved and because of the particular conditions existing at the destinations and stations at which the unloading charges apply. In a number of important respects the problems are peculiar to this case and cannot be resolved by reference to other situations or to general precedents; that is particularly true, for example, of the problems created by the situation existing on the island of Manhattan where physical conditions place severe practical restrictions upon the extent of the delivery and unloading services that may reasonably be required of rail carriers. In deciding this case it was necessary for the Commission not only to determine what the facts were but also to determine, on the basis of those facts and in the light of the practical problems that they created, what adjustment between the rights of carriers and shippers would be both fair and feasible.

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The Commission gave careful consideration to the facts, both before the unloading charges became effective and again after the charges had been in effect long enough for the Commission to form an opinion as to their probable practical consequences. Upon the basis of that appraisal, and in the light of the particular conditions existing at New York and Philadelphia, the Commission, in the exercise of its judgment, determined that a part of the cost of unloading fresh fruits and vegetables should be borne by the carriers and a part by the shippers. Accordingly, the Commission by its orders permitted the carriers to impose charges which reimburse them for part but not all of the cost of unloading at these two points.

Appellants attack the Commission's orders on a variety of grounds. Although these attacks purport to rest on asserted errors of law, analysis of appellants' arguments shows that in reality they are merely criticising the Commission for the way in which it has exercised its judgment on the transportation problems which Congress has authorized it to decide.

In reply to these arguments we shall show, first, that the Commission's orders in this case are an exercise of the Commission's undoubted jurisdiction to determine the extent of the carriers' transportation duty and of their obligations under the line-haul rates; second, that in exercising that jurisdiction the Commission made findings and conclusions that are fully supported by the evidence; third, that the Commission's orders create no preference or undue prejudice as among shippers or commodities within the meaning of Sections 2 or 3 of the Act; and, finally, that there is no substance in the various claims of procedural irregularity made by appellants. These matters will be considered in the subsequent sections of this brief.

I

THE ORDERS OF THE COMMISSION ARE AN EXERCISE OF ITS EXCLUSIVE JURISDICTION TO DETERMINE THE EXTENT OF THE CARRIERS' TRANSPORTATION DUTY AND THEIR OBLIGATION UNDER THE LINE-HAUL RATES

What is involved in this case is a question of the extent of the obligation of rail carriers to provide facilities and services at certain termini on Manhattan Island and in Philadelphia. That question, in turn, requires a consideration of both the extent of the carriers' transportation duty, and the obligations which the carriers assume in return for the payment of the line-haul rates. These are questions—whether they be phrased in terms of unloading or in terms of delivery, or in terms of terminal services generally—which have been committed by Congress to the Interstate Commerce Commission.

For many years this Court has held that the decision of such questions turns upon the appraisal of facts and that accordingly the determinations of the Commission will be accepted if they are supported by substantial evidence. *Los Angeles Switching Case,* 234 U.S. 294, 311, 314; *United States* v. *Wabash R. Co.,* 321 U.S. 403, 408; *Swift & Co.* v. *United States,* 316 U.S. 216, 225; *Armour & Co.* v. *Alton R. Co.,* 312 U.S. 195, 200. For example, in the *Los Angeles Switching* case, *supra,* the question before the Commission was whether the carriers were entitled to impose an extra charge for delivery of cars upon industrial spur tracks. The conclusion of the Commission that in the circumstances of that particular case the extra charge was unjustified was upheld by the Court. The opinion pointed out that the question whether delivery on industrial spur tracks is included in the line-haul rate

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"is a question of fact to be determined according to the actual conditions of operation" and was "manifestly one upon which it is the province of the Commission to pass". 234 U.S. at p. 311.* Again, in *Swift & Co.* v. *United States*, 316 U.S. 216, the Commission determined that rail carriers satisfied their obligations under the line-haul rates by delivering livestock into suitable pens at a public stockyard, even though the shipper was thereafter required to pay a yardage charge to the stockyard company in order to obtain egress for the livestock from the pens. This Court affirmed the Commission's order, stating its opinion that the question of the carrier's obligation was one to be decided "by the Commission upon the facts of each particular case, and not by mechanical application of a fixed rule of law." 316 U.S. at p. 225.

The same principle has been applied by the Court in a long line of cases involving the validity of Commission orders resulting from its investigation of another aspect of delivery practices, *i.e.*, the switching of cars on industrial tracks or the making of allowances to shippers who do such switching for themselves. *Ex Parte No. 104, Propriety of Operating Practices—Terminal Services*, 209 I.C.C. 11 (1935). In these cases the Commission has been repeatedly and uniformly sustained by the Court in ordering the carriers to refrain from performing, without an extra charge, services which the Commission has determined to be beyond the proper scope of the line-haul rates (or in making allowances

* At points in their argument appellants seem to take the position that this decision lays down an absolute and universally applicable rule of law as to what constitutes proper delivery under the line-haul rates. This is not correct. The Court regarded the question as one of fact to be determined by the Commission on the basis of the particular circumstances presented.

for such services when performed by shippers or consignees). See, *e.g., United States* v. *U. S. Smelting, Mining & Refining Co.,* 339 U.S. 186; *Goodman Lumber Co.* v. *United States,* 301 U.S. 669; *A. O. Smith Corp.* v. *United States,* 301 U.S. 669; *United States* v. *Pan American Petroleum Corp.,* 304 U.S. 156; *United States* v. *Wabash R. Co.,* 321 U.S. 403; *Hanna Furnace Corp.* v. *United States,* 323 U.S. 667; *Corn Products Refining Co.* v. *United States,* 331 U.S. 790.*

In *United States* v. *U. S. Smelting, Mining & Refining Co.,* 339 U.S. 186, the most recent of these cases, this Court repeated with approval (at p. 193) the state-

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* The reports of the Commission itself reflect numerous other situations in which, without any subsequent judicial review of its orders, it has exercised its authority to determine the scope of the carriers' obligation under the line-haul rates. Sometimes the issue is whether the carriers should be required, as in the Ex parte 104 cases, to impose special charges for special services. Thus special loading, unloading, sorting and split delivery services, without charges in addition to the line-haul rates, were condemned by the Commission in Freight Forwarding Investigation, 229 I.C.C. 201 (1938). The furnishing of special storage facilities, without charge in addition to the line-haul rates, was condemned in Propriety of Operating Practices — New York Warehousing, 198 I.C.C. 134 (1933). The sorting and stacking of freight, without a charge in addition to the line-haul rate, was condemned in Allowances for Stacking, 179 I.C.C. 780 (1931). Sometimes the issue is whether the special charges published by the carrier for special services are warranted. Thus additional charges for bracing and blocking have been repeatedly approved. Dunnage Allowances, 30 I.C.C. 538 (1914); Blocking and Staking Lumber, 168 I.C.C. 37 (1930); Berg Industrial Alcohol Co. v. Reading Co., 142 I.C.C. 161 (1928); Bracing Charges at North Atlantic Ports, 279 I.C.C. 623 (1950). Or again, the issue may be presented by the elimination of special services. Thus the Commission has authorized carriers to abandon, or to impose an additional charge for, pick-up and delivery services

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ment in *United States* v. *Wabash R. Co.*, 321 U.S. 403, 408:

> "In sustaining the Commission's findings in these proceedings, as in related cases, this Court has held that the point in time and space at which the carrier's transportation service ends is a question of fact to be determined by the Commission and not the courts, and that its findings on that question will not be disturbed by the courts if supported by evidence."

In the exercise of this authority to determine the extent of the carriers' transportation duty and of their obligation under line-haul rates, the Commission has recognized certain general rules or principles. One of these general rules or principles is that shippers or consignees are obligated to do their own unloading of carload freight. The report of the Commission in this proceeding states (R. I-23c):

> "As regards carload freight the general rule is that shippers and consignees must perform the loading and unloading or make provisions therefor at their own expense."

This principle is embodied in Rule 27 of the Consolidated Freight Classification, which contains the

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without a compensating reduction of the line-haul rates. Pick-up and Delivery Cancellation in New England, 277 I.C.C. 745 (1950). See also Pickup and Delivery on Interterritorial Traffic, 284 I.C.C. 551 (1952); Pickup and Delivery Charges in Official Territory, 288 I.C.C. 555 (1953). In the case last cited, the Commission authorized a charge of 10 cents per hundred pounds for either pick-up or delivery service, in addition to the line-haul rate, even though that charge was substantially lower than charges then being made by some of the carriers for those services, and despite the fact that in some cases no charge whatever had been made for such services.

basic rules governing the respective rights and obligations of the shipper, carrier and receiver. See R. I-23c. See also *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U.S. 446, 453; *Pennsylvania R. Co.* v. *Kittanning Co.*, 253 U.S. 319, 323.

The Commission's application of this principle to the facts of the present case is the latest step in a long history of Commission action directed to the unloading practices of the carriers in Official Territory. Despite the general rule that shippers and consignees have the obligation to load and unload carload freight, the carriers in Official Territory, because of competitive conditions, for many years followed the policy of loading and unloading carload freight at a number of points, including such important locations as New York, Philadelphia, Chicago, Baltimore, Pittsburgh, Buffalo and St. Louis, without making a separate charge for the service.

In 1914, in *The Five Per Cent Case*, 31 I.C.C. 351, 408 (1914), the Commission directed the carriers in Official Territory to ascertain the extent to which these services constituted an unjust burden upon the carriers or resulted in an unjust discrimination among shippers.* Although efforts by the carriers to reduce this free loading and unloading during the next decade came to naught by reason of the inability of the carriers to cooperate on the matter (see *Loading and Unloading Carload Freight*, 101 I.C.C. 394, 398 (1925)), in 1924 the carriers discontinued the practice

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* A year later, in 1915 Western Rate Advance Case, 35 I.C.C. 497 (1915), the Commission again made the same point (p. 630): "Special services in particular localities should be paid for by special charge and the cost not distributed generally among all the rates upon a commodity."

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of free loading and unloading by publishing charges for such services at a number of inland points. The unloading charges were challenged before the Commission, on grounds essentially similar to those now advanced, and were sustained. *Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925). An increase in the loading and unloading charges at inland points was approved by the Commission in 1947. *Charges for Loading and Unloading Carload Freight,* 269 I.C.C. 25 (1947).

Following the Commission's decision in 1925, separate charges for loading and unloading were published by the carriers at more and more points. At the ports, however, elimination of loading and unloading without separate charge was delayed by the competition of water carriers, which generally load and unload at their own expense. R. I-24c. The Commission continued to express its interest. In *Freight Forwarding Investigation,* 229 I.C.C. 201 (1938), the Commission not only directed the carriers to revise their tariff charges to reflect the cost of loading and unloading forwarder traffic (p. 237), but generally commented (p. 302):

> "Practices which encroach upon respondents' revenues and impair their ability to render efficient service to the public must be condemned. * * * If extraordinary services are to be performed appropriate charges should be established for them."

See also *Emergency Freight Charges,* 215 I.C.C. 439, 464 (1936). By 1948, New York and Philadelphia remained the only points in Official Territory where loading or unloading was performed without a charge in addition to the line-haul rates. R. I-24c. In that

year the charges here involved eliminated the major items which had been unloaded at those points without an additional charge, and in 1950 the last vestige of unloading without charge was eliminated at Philadelphia, with the approval of the Commission. R. I-322. See *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953).

Thus it appears that the Commission's order in this case, viewed in the light of this Court's decisions on similar Commission orders and against the background of prior Commission action, is a normal and proper exercise by the Commission of its authority to decide on the basis of the facts before it a transportation question of the kind that Congress has committed to its jurisdiction. Under the rules of judicial review established by this Court the Commission's order accordingly should be sustained if it is supported by evidence. That question will be considered in the next section of this brief.

II

THE COMMISSION'S ORDERS ARE SUPPORTED BY THE EVIDENCE AND SHOULD BE AFFIRMED

Appellants do not attack many of the findings and conclusions that support the Commission's determination. They do not question the findings of the Commission describing the nature and extent of unloading services performed by the carriers in New York and Philadelphia. They do not challenge the findings of the Commission as to the costs incurred by the carriers in performing those unloading services, nor do they deny that the loading charges approved by the Commission are substantially less than the costs incurred by the carriers in performing the unloading

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services.* They do not attack the Commission's findings that the unloading services benefit the shippers and consignees as well as the carriers. They do not question the Commission's conclusion that there is no proof that the team-track facilities at Philadelphia are inadequate to handle the fresh fruit and vegetable traffic at that point, or its further conclusion that there is no proof that any one desiring team-track delivery there has been denied such service. They do not attack the Commission's conclusion that it would not be feasible for the railroads to provide on the island of Manhattan team-track terminal service adequate to handle all of the traffic in fresh fruits and vegetables, and it is clear from appellants' arguments that they are not in fact interested in having team-track delivery for all this traffic. Nor do appellants question the Commission's conclusion that there is little likelihood that shippers would divert any substantial amount of such traffic from pier stations to team tracks as long as the shippers are able to obtain the present terminal services at costs that are not unduly burdensome to them or not unduly disproportionate as compared to total costs to them of a satisfactory substitute. They do not suggest that there is lack of evidentiary support for the Commission's reference to the possibility that if terminal costs are not kept within reasonable bounds the railroads may eventually be forced to substitute team-track delivery in Jersey City for all direct service to the island of Manhattan. And finally, appellants do not deny that the Commission, on the basis of its appraisal of the

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* At the rehearing by the Commission in 1951, appellants refused even to cross-examine witnesses who testified to the costs of the unloading service performed by the carriers at New York and Philadelphia, asserting that those costs were in their view irrelevant. See R. III-1246-1247.

facts, determined that the costs of the unloading services at the particular stations involved should be shared between the carriers and the shippers.

These matters, since they are not contested, may be laid aside and the discussion confined to appellants' principal objection to the validity of the Commission's order. This objection is, in substance, that it was error for the Commission to approve separate charges for unloading without making a full-dress investigation of the reasonableness of the line-haul rates. In support of this broad position the appellants make several subsidiary contentions: they assert that the line-haul rates must be deemed to include compensation for unloading because for many years the carriers made no separate unloading charge; that the charge approved by the Commission is not a charge for unloading but a charge for the delivery which is required of the carrier under the line-haul rates; and that since the Commission did not determine whether line-haul rates should be *pro tanto* reduced its order in this case requires the shippers to pay twice for the same services.

It is these contentions that we shall examine in the next two sections of this brief.

A. THE COMMISSION WAS NOT REQUIRED TO INVESTIGATE THE REASONABLENESS OF THE LINE-HAUL RATES AS A PREREQUISITE TO ITS APPROVAL OF THE UNLOADING CHARGES

In this case the Commission concluded that the unloading charges "are in substantially the same category as those for switching, transit, refrigeration and various other special services, for which separate charges are published"; that it was not convinced that adequate compensation for the unloading services "is or should be included in the line-haul rates"; and that the establishment of specific charges for unloading

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without reference to the levels of the line-haul rates was justified. R. I-23aa, 24q-24r.* These conclusions were fully supported by the substantial evidence before the Commission showing the special nature of the unloading services performed at the pier stations in Manhattan and at the produce terminal in Philadelphia, the cost of performing those services, the alternative services available to shippers, the benefits accruing to the shippers by reason of the unloading services, and also by the evidence showing that the level of the line-haul rates to Manhattan and Philadelphia is no higher than the rates to other points where shippers unload or charges are assessed for unloading.

As we have pointed out, this evidence for the most part is not controverted by appellants. Instead, to support their contention that the Commission erred, appellants rely almost altogether upon one circum-

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* Appellants argue that in its second report the Commission abandoned these conclusions and instead treated the charges as imposed on *delivery* and not *unloading*. This is a misreading of the Commission's reports. In its second report, the Commission did not abandon or modify the findings or conclusions stated in its first report. It regarded its second report as supplemental to the first, stating that "the facts stated in the prior report will be repeated herein only to the extent necessary to a clear understanding of the issues" (R. I-23b), and in the order entered on the second report the Commission incorporated by reference all of the findings and conclusions of the first report. R. I-25. The second report did not hold that the charges were charges for delivery. The findings in both reports show that the Commission regarded the act of unloading as separable from delivery and the charges as charges for unloading and not for delivery. See pp. 56-57, *infra*. The appellants' argument to the contrary rests solely on statements in which the Commission recognized that in the particular situation involved delivery followed unloading. The fact that delivery follows unloading does not mean that the charge imposed is a charge for delivery. See p. 57, *infra*.

stance, *i.e.*, that for many years the carriers had performed the unloading services at the pier stations on Manhattan Island and at the produce terminal in Philadelphia without imposing a separate charge. Appellants argue that this establishes that compensation for the unloading services is included in the line-haul rates and that accordingly no separate charge for that service can be imposed unless the Commission first determines whether the line-haul rates should be *pro tanto* reduced.*

The fact that the carriers have not imposed a separate unloading charge in the past does not establish either that the carriers' duty under the line-haul rates requires them to perform unloading without a separate charge or that compensation for the unloading services is presently included in the line-haul rates. In *Interstate Commerce Commission* v. *Stickney*, 215 U.S. 98, the carriers imposed a terminal charge of $2.00 for the delivery of carloads of livestock at the Union Stock Yards in Chicago. For many years prior to the imposition of this charge the carriers had made these deliveries under the line-haul rates. The

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* The appellant in No. 480 erroneously contends that the Commission found "that the line-haul rates included, prior to this proceeding, compensation for unloading" (appellant's brief, No. 480, p. 36). The Commission made no such finding, as the passages quoted in appellant's brief show. The Commission merely found that prior to November 1948 no separate charges in addition to the through rates were made for the unloading services at the pier stations in Manhattan and the produce terminal in Philadelphia. This is not a finding that compensation for the service before that time was included in the line-haul rates. On the contrary, the Commission expressly found that it was not convinced that compensation for the unloading service was included in the line-haul rates. R. I-24q.

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Commission, although finding that the terminal charge as such was reasonable, struck it down on the ground that the terminal charge taken together with the line-haul rates made the total rate to the shippers unreasonable.* This Court set aside the Commission's order on the ground that the carriers were entitled to make a separate terminal charge and that if the charge as such was reasonable it could not be attacked on the basis that the charge, together with the line-haul rate, resulted in a total charge that was unreasonably high, the Court saying that in those circumstances it was the line-haul rate and not the terminal charge that should be corrected.** In its opinion this Court said (215 U.S. at p. 105):

> "If the terminal charge be in and of itself just and reasonable it cannot be condemned or the carrier required to change it on the ground that it, taken with prior charges of transportation over the lines of the carrier or of connecting carriers, makes the total charge to the shipper unreasonable. That which must be corrected and condemned is not the just and reasonable terminal

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* At the time of the Commission's order, the line-haul rates were either at the same level they had been in the past or were higher than the level prevailing in the past. See Cattle Raisers' Association v. C. B. & Q. R. R. Co., 12 I.C.C. 507, 510-512 (1907).

** The arguments made in support of the Commission's order in that case included some of the same arguments that appellants urge here. Thus it was contended that the terminal charge merely increased the cost to the shipper of the same service, formerly performed under the line-haul rates, that the through rate already included compensation for the terminal service, and that to uphold the charge would be to permit the railroads to charge twice for the same service. See the summary of argument of counsel in 215 U. S. at pp. 99-102.

> charge, but those prior charges which must of themselves be unreasonable in order to make the aggregate of the charge from the point of shipment to that of delivery unreasonable and unjust."

Appellants assert that it cannot be assumed that the railroads in the past "gratuitously" performed the unloading service. This is beside the point. In the past the costs of the unloading service may have been recouped out of the general revenues of the carriers or, since the same rates applied to points both in Manhattan and in Philadelphia and elsewhere in Official Territory where no unloading services were performed, the costs may have been recouped out of rates paid by shippers who did not receive unloading services. The evidence offered by the carriers showed that the rates were not formulated or constructed to include compensation for such services, because the rates to points at which no unloading service was performed, or where a charge was made for unloading service, were the same as the rates to the pier stations in Manhattan and the produce terminal at Philadelphia. See pp. 46-50, *infra*. The appellants cannot overcome the probative force of this evidence merely by asserting that the carriers in the past must have received from some source revenue that covered the costs of the unloading services.*

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* Appellants cite Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 186 U.S. 320, to support the assertion that there is a "presumption" that the line-haul rates included adequate compensation for services rendered at the point of delivery. That case involved the same terminal charge at the Chicago stock yards which the Court passed upon in its later decision in Interstate Commerce Commission v. Stickney, 215 U.S. 98. In the earlier case, in discussing whether the change made by the carriers in their

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The consistent practice of the Commission in the past has permitted or required carriers to decrease or eliminate entirely a part of the total quantum of terminal services previously performed under the line-haul rates without making a complete investigation of the reasonableness of those rates. The most clearly analogous prior proceeding, of course, is that which arose in 1924 when the carriers in Official Territory cancelled the long-standing practice of free unloading of carload freight at many inland points. ***Loading and Unloading Carload Freight,*** 101 I.C.C. 394 (1925). The protestants made the same argument which they now urge here; the Commission's report states (p. 413) that the protestants—

> "particularly urge that the line-haul rates include loading and unloading, and that under the law respondents not only have to justify the charge

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tariffs was sufficient to separate or segregate the terminal charge, the Court remarked that the prior through rate " * * * in the absence of proof to the contrary, must be presumed to have provided in and of itself compensation for the services rendered in making delivery at the stock yards." In the instant case there was, of course, no such "absence of proof to the contrary". On the contrary, there was evidence that the level of the line-haul rates in the past did not depend upon whether the unloading service was performed.

Furthermore, the decision in Interstate Commerce Commission v. Chicago, B. & Q. R. Co., 186 U.S. 320, did not hold that because the carriers had imposed no separate unloading charge in the past the Commission was required to investigate the reasonableness of the line-haul rates if it wished to authorize a separate terminal charge for the future. On the contrary, as we have pointed out above, in the Stickney case the Court held that the same terminal charge, since it was in itself reasonable, could be imposed even though the level of the line-haul rates remained unchanged.

> for those services but the burden is upon them to show that the line-haul rates heretofore contemplating the loading and unloading services are reasonable when demanded by respondents for the road haul alone."

The Commission there, as in the present proceeding, denied that the carriers were obliged to demonstrate, or that the Commission was obliged to make a re-evaluation of, the continued reasonableness of the line-haul rates. It said (p. 413):

> "Many of the line-haul rates to and from these points have been prescribed or approved by us, and our reports do not indicate that we have given any consideration to the cost of unloading carload freight in arriving at such rates. The same line-haul rates are assesed on shipments to and from industrial sidings or outlying team tracks at those points although the loading and unloading is not performed by the carriers. The same rates, or the same bases of rates, apply to or from other points in the same group or for a similar distance, and the rates do not include loading or unloading. All of those facts indicate that the general measure of the rates to and from the points in question are not unreasonable for the line-haul alone, and warrant the conclusion that if the carriers justify the charge for the loading and unloading services, they have borne their burden of proof under the law."

The same argument was again made, and again rejected by the Commission in 1947. *Charges for Loading and Unloading Carload Freight,* 269 I.C.C. 25 (1947). At that time the protestants urged that since the existing unloading charges had been set by the Commission at less than the actual cost to the carriers of the unloading operations, there must be

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deemed to be some portion of the unloading charge included in the line-haul rate, and accordingly the increase in the unloading charges at issue in that proceeding could not be approved without a full reexamination of the reasonableness of the line-haul rate. The Commission again disagreed (p. 31):

> "The line-haul rates which apply are the same as those which apply on traffic where no loading or unloading service is performed; and those which apply on protestants' traffic also apply on traffic of other shippers and on traffic of forwarders which perform their own service. They apply on that traffic regardless of whether or not a loading or unloading service is performed. * * * While it is true that neither the present nor the proposed charges are completely compensatory in and of themselves, it does not necessarily follow that in determining the lawfulness thereof, lawfulness of the line-haul rates also, from which the carrier must recoup losses that result from performances of the loading or unloading services, must be established."

The contention was again rejected in 1953. *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953).

The termination of free unloading service is, of course, not essentially different than the termination of the free industrial switching service which is in issue in the *Ex parte 104* proceedings, and the same contention can be made that the Commission must reexamine the reasonableness of the line-haul rate before ordering the imposition of reasonable charges, or the termination of rebates, for such switching services. In the most recent of such cases, precisely that contention was made. *United States* v. *U. S. Smelting,*

Refining & Mining Co., 339 U.S. 186. The line-haul tariffs, it was there urged, had long specifically stated that the rate included certain terminal movements for weighing, sampling and the like, and that the requirement by the Commission that the industries bear the cost of such switching, absent a re-examination of the line-haul rates, "would require the appellee-smelters to pay twice for the same service". 339 U.S. at p. 197. The Court, however, stated (p. 198): "We think that the Commission has authority to exclude rate questions from this proceeding." *Interstate Commerce Commission* v. *Stickney,* 215 U.S. 98, 105, is to the same effect.

The same contention as now advanced by appellants has also been rejected by the Commission in connection with the imposition of charges for refrigeration. *Charges for Protective Service to Perishable Freight,* 241 I.C.C. 503 (1940). In that proceeding the shippers, like appellants here, insisted that since refrigeration had been provided in the past, new and separate charges for refrigeration could not be approved by the Commission without an investigation of the adequacy of the line-haul rates to compensate the carriers for the refrigeration service. The argument was rejected, Commissioner Eastman stating (241 I.C.C. at p. 515):

> "The question is whether, in order to effect a change in methods of charging which is clearly logical and desirable and the only practicable means of adjusting the charges fairly to the actual service furnished, it is necessary under the law to follow the procedure for which the protesting shippers contend and which would impose an intolerable burden upon all concerned in comparison with the results to be achieved. We believe that

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the law must take into consideration the necessities of a practical and reasonable administration of our regulatory duties and that the procedure for which the protesting shippers contend is not necessary in the circumstances."

In the present case, the Commission proceeded in precisely the same way as it has in past proceedings. In its last decision, it found, as of "major importance" that "the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading", and stated that accordingly it did not require "an extensive showing" with respect to the reasonableness of the line-haul rates. R. I-23z-23aa. In its earlier opinion in 1948, it had stated (R. I-24q):

> "Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates. In prescribing or approving rate adjustments for fresh fruits and vegetables, however, these terminal services have usually been considered in connection with the rates to widespread destination areas. The relative level of the rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading.
>
> "For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates."

It thus appears that in this case the Commission did not ignore the question of the relationship between the line-haul rates and the unloading services which were

at issue. It considered that relationship and decided that the evidence did not support the conclusion that the line-haul rates compensated the carriers for the unloading services. In appraising this evidence the Commission applied the same principles it has applied in the past to similar situations.

In its decision in *Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925), the Commission stated that the primary test for determining whether an unloading service is or is not included within the line-haul rates is the way in which the line-haul rates are constructed, and where they have been formulated without special reference to the unloading service, the Commission may properly conclude that they do not include that service.

In the present case, many of the rates on fresh fruits and vegetables to New York and Philadelphia had been prescribed or approved by the Commission, and it was thoroughly familiar with the general structure of the rates to Official Territory on such commodities.* The opinions of the Commission dealing

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* The reports of the Commission contain many decisions prescribing or approving rates on fresh fruits and vegetables from various parts of the United States to Official Territory. See, *e.g.,* Georgia Peach Growers Exch. v. A.G.S. R. R. Co., 139 I.C.C. 143 (1928) (peaches from Georgia and the Carolinas); Florida R.R. Commissioners v. A. & R. R. R. Co., 144 I.C.C. 603 (1928) (citrus fruit from Florida); Mississippi Valley Shippers Bur. v. Aberdeen & R. R. Co., 173 I.C.C. 616 (1931) (various vegetables from Mississippi); Florida Railroad Commrs. v. Aberdeen & R. R. Co., 177 I.C.C. 735 (1931) (various vegetables from Florida); California Growers' & Shippers' Protective League v. S. P. Co., 185 I.C.C. 299 (1932) (deciduous fruits from Pacific states); South Carolina Produce Assn. v. Aberdeen & R. R. Co., 186 I.C.C. 199 (1932) (vegetables from Carolinas); Southeastern Vegetable Case, 200

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with these rates indicate that it has not relied on the unloading service as a matter of rate-making importance in determining what the line-haul rates should be. The situation in that respect is analogous to the situation before the Commission in *Charges for Protective Service to Perishable Freight,* 241 I.C.C. 503 (1940). That case dealt with the validity of new and separate charges for refrigeration; the protestants cited, as appellants do here (brief for appellant in No. 480, pp. 39-44) earlier cases before the Commission in which, as the Commission described them (p. 511) "it was quite customary for the carriers, when line-haul rates on perishable traffic were under consideration, to lay stress of record upon the refrigeration service afforded, as a special service characteristic of the traffic and entitled to consideration". The occasional and ancient instances cited by appellants in which the

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I.C.C. 273 (1934) (vegetables from the South); Southwestern Vegetable Case, 200 I.C.C. 355 (1934), 209 I.C.C. 606 (1935) 214 I.C.C. 63 (1936) (vegetables and cantaloupes from the Southwest); Mississippi Vegetable Shippers Bureau, 200 I.C.C. 355, 378 (1934) (vegetables from Mississippi); Vegetables and Avocados, South to Official Territory, 269 I.C.C. 409 (1947) (vegetables and avocados from the South); Transcontinental Rates, Estimated Weights, Vegetables, 270 I.C.C. 665 (1948) (vegetables from Transcontinental Territory); Estimated Weights on Lettuce from the Southwest, 276 I.C.C. 647 (1949) (lettuce from Southwest); Texas Citrus & Veg. Growers & Shippers v. A., T. & S. F. Ry., 79 I.C.C. 671 (1950); 284 I.C.C. 206 (1952), sustained *sub nom.* B. & O. R. Co. v. United States, 345 U. S. 146 (1953) (fruits and vegetables from Southwest). Moreover, the Commission, having a knowledge of the actual as well as the prescribed or approved rates, was fully aware that in many cases competition with truck or water carriage had forced the rail carriers to establish reduced rates on traffic of this sort. The situation is described by the Commission in Official-Southern Divisions, 287 I.C.C. 497, 531, 534 (1953). See also B. & O. R. Co. v. United States, 345 U. S. 146, 149.

unloading services at New York and Philadelphia have been mentioned in proceedings before the Commission fall far short of the situation described by the Commission in the refrigeration case, but even there the Commission refused to ascribe any importance to such references, saying (241 I.C.C. at p. 515):

> "So far as the rates which we have prescribed are concerned, we know, for the reasons already stated, that in most cases there was no evidence before us on which we could have included compensation for any part of the refrigeration service, and that where evidence in regard to such service was submitted it was of such a character that its influence on our decision could only have been slight and imponderable. We also know that, since these rates were prescribed, conditions relating to the operating expenses, taxes, and other burdens of the carriers have materially changed. * * *"

Indeed, the evidence in the record as to the nature of the rate structure to Official Territory makes it apparent that the unloading service could not have been significant in the line-haul rates. The Commission itself points out (R. I-23aa, 24q) that the line-haul rates do not vary depending on whether or not an unloading service is provided. From many origins, the same rates apply to all points within wide geographical areas around both New York and Philadelphia. From the Pacific Coast states (Transcontinental Territory), for example, the identical rates on fresh fruits and vegetables apply not only to both New York and Philadelphia, but also to the whole of New England, almost all of New York, eastern Pennsylvania, New Jersey, Delaware, Maryland and most of Virginia and West Virginia. See Exhibit 4

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(not printed).* Yet at no stations in that entire area except New York and Philadelphia did the carriers do the unloading without a charge in addition to the line-haul rates. Similarly, the rates from Florida are the same to Wilmington and Camden as to Philadelphia, and the same to Newark and Trenton as to New York, and the rates from Texas are the same to Scranton and Camden as to Philadelphia and the same to Trenton and the Delmarva Peninsula as to New York. On various fruits and vegetables from other origin points in the large producing areas of the United States, the rates applicable to New York and to Philadelphia apply also to extensive areas, yet at only New York and Philadelphia of all the stations in those areas was unloading performed by the carriers without an additional charge. See Exhibits 5-12 (not printed).

Indeed, the point can be made even more graphically. The carriers operate many stations at New York and Philadelphia. The unloading charges challenged here are applicable only at the specified stations or locations at those terminals where the carriers undertake to provide an unloading service—to move the freight from inside the car to assigned locations on the platform of those stations. The request for such delivery is made either by the designation of the station at which the shipment is to be delivered, as at the pier stations on Manhattan Island, or by special instructions to the agent at the destination station, as at Philadelphia where the same station provides both a

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* Reference to this and other unprinted portions of the record before the Interstate Commerce Commission which are presently before the Court is made pursuant to stipulation of February 25, 1954. R. III-1552.

team-track and a platform delivery. Yet the same line-haul rates apply to all New York stations and to all Philadelphia stations, there being no difference in the amount of rate depending on whether an unloading service is rendered. Elimination of the free unloading service previously provided at these specified stations will tend to eliminate an inequitable situation in which some shippers pay an identical rate for less service than is received by others; reduction of the line-haul rate to the stations where the unloading service is provided would preserve the inequity.

The Commission's order, therefore, has not only followed its own well-established judicially approved rule, but it has adequate evidence to support its conclusions. The comment of the Court in *Barringer & Co.* v. *United States,* 319 U.S. 1, 9, is apt:

> "This is not to say that in every case where the differences in total transportation services rendered are such as would justify a greater charge to one than to another shipper, the difference in charge can at the carrier's option be made in the charge for an accessorial service such as the loading service here involved. But the decision whether the circumstances and conditions are such as to justify a difference in the accessorial charge, or rather to require that any adjustment be made in the line-haul charge, is one which the statute has left to the determination of the Commission, which Congress has entrusted with the power and duty of guarding against the prohibited favoritism."

Moreover, it should be remembered that the present reasonableness of the line-haul rate is not, under the Commission's order, put beyond examination in an appropriate proceeding. As the Court said in the

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U. S. Smelting case (339 U.S. at p. 198) in answering the same argument as is here advanced by appellants: "If the carrier makes a double or unreasonable charge, the industry may be heard upon the reasonableness of the rate. 49 U.S.C., §§ 9, 13, 15."

The appellants cite a number of decisions for the proposition that "a carrier should not be permitted to multiply its revenue by merely dividing its rates". Brief for appellant in No. 480, p. 64. The general proposition is not in dispute, but it has no application here. In each of the cases cited, it was found by the Commission that the services to be covered by a separate charge were included in the rate then being paid. For example, in *Unloading Lumber at New York Harbor,* 256 I.C.C. 463 (1943), the report of the Commission states (p. 468): "The present rates on lumber within official territory, and from other territories into official territory, include the services for which charges are here proposed." See also, to the same effect, *Lighterage and Storage Regulations at New York,* 35 I.C.C. 47 (1915); *Interstate Commerce Commission* v. *Chicago, B. & Q. R. Co.,* 186 U.S. 320. In *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673 (1943), the Commission based its disapproval of the additional charges, which included some charges for unloading, on the further fact that charges in the same amount for all ports would create discrimination because of the widely varied terminal services which the carriers supplied at the different ports. The Commission's report stated (p. 682):

> "The equalization of ports, brought about by the absorption of varying terminal costs out of line-haul rates, may be reasonable and nondiscriminatory * * *. It is quite a different matter for the carriers to establish a separate

terminal charge which ignores the wide disparities in the extent of the terminal services performed and the cost of those services, as between different ports, and different docks at the same port, and as between different commodities or classes."

Appellants make frequent reference in their brief to the early Commission decision in *Fruits and Vegetables to Duane St., New York,* 66 I.C.C. 135 (1922). In that case the Commission decided on the basis of the facts then before it that the carriers had failed to justify certain proposed terminal charges. The decision is not controlling on the quite different situation considered by the Commission in the instant case. There are several significant differences in the facts. In the first place, in the earlier case the carriers sought to justify the proposed terminal charges by cost studies that covered services rendered prior to arrival of the shipments at the pier station involved. In the second place, there is a substantial difference between a proposal to establish charges at a single point before such charges became general in Official Territory, and the present situation where the proposal is to extend a general tariff provision to the last two points in that territory which are exceptions to it. Again it is one thing to require the carriers to absorb the terminal service at New York when the cost of those services is low, and quite another to require them to do so when, as the record here shows, the costs have very greatly increased. R. I-23j, 23z, 24r.* Finally,

* The record shows the increase in costs from 1947 to 1949, but there had also been increases before 1947. The Annual Report of the Commission for that year states (p. 41): "Increased operating costs in recent years have fallen with particular severity on terminal operations." 61st Annual Report of the Interstate Com-

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to the extent that the Commission's report may indicate that it was, in 1922, applying a different principle to the consideration of charges for unloading, that early approach has certainly been qualified or overruled by the Commission's later decisions in *Loading and Unloading Carload Freight,* 101 I.C.C. 394 (1925), and *Charges for Loading and Unloading Carload Freight,* 269 I.C.C. 25 (1947). Insofar as the decision is urged as establishing that *in fact* the line-haul rates included a charge for unloading, that fact certainly does not justify a conclusion that the Commission was in error in concluding on the present record, that the present line-haul rate did *not* include a charge for the unloading service. The decision can only refer to the facts as of 1922, over 30 years ago, and many factors, including a radical increase in unloading costs, have since intervened. As the Court said in *Board of Trade* v. *United States,* 314 U.S. 534, 546:

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

Appellants also cite a number of cases in which carriers making delivery at New York have urged the additional expense to them of terminal service in support of their division claims against other carriers.

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merce Commission (G.P.O., 1947). The Commission has also noted that these increases have been particularly great at New York and Philadelphia. See Official-Southern Divisions, 287 I.C.C. 497, 542 (1953).

E.g., Erie R. R. Co. v. *Alabama & V. Ry. Co.*, 98 I.C.C. 268 (1925); *Atlantic Coast Line R. Co.* v. *Arcade & A.R. Corp.*, 194 I.C.C. 729 (1933). Obviously, the issues as to the propriety of the division of revenue among carriers have little relevancy to the issues as to whether charges to shippers are just and reasonable; the Commission has "frequently held that divisions have comparatively little probative value in determining the reasonableness of rates". *Florida R.R. Commissioners* v. *A. & R. R.R. Co.*, 144 I.C.C. 603, 621 (1928). Moreover, the divisions apply on all freight consigned to New York and Philadelphia, whether delivered on the piers, or at team tracks where no unloading expense is involved by the carriers (R. II-571, 574, 575), and even under the order of the Commission, the carriers at New York are still required to bear a substantial portion of the unloading costs at the pier stations. R. I-23bb. Finally, in a case decided by the Commission subsequent to its opinion in this proceeding, the Commission fixed the divisions of joint rates on fruits and vegetables from the South and Southwest and in so doing took into account the revenues that the eastern lines would receive under the approved unloading charges at New York and Philadelphia. *Official-Southern Divisions*, 287 I.C.C. 497, 539 (1953); *Official-Southwestern Divisions*, 287 I.C.C. 553, 586-587, 592 (1953).

One more fact should be stated. The loading charges here involved, in the five and a half years in which they have been in effect, have become thoroughly integrated into the entire rate pattern which the Commission has been constructing. In the *Divisions* cases last cited, they were specifically noted by the Commission as an item which reduced the terminal

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expenses of the carriers making deliveries in Philadelphia and New York. 287 I.C.C. 497, 539; 287 I.C.C. 553, 586, 592-593. In the last two general increases authorized by the Commission, it specifically noted the unloading charges and permitted no increases in the charges while allowing increases of various amounts in the line-haul rates. See *Increased Freight Rates, 1948,* 272 I.C.C. 695, 715 (1948); *Increased Freight Rates, 1951,* 280 I.C.C. 179, 191 (1951). It thus appears that in determining the present level of the line-haul rates and the divisions of those rates the Commission has acted on the basis that unloading charges are proper and will continue to be collected by the carriers.

B. THE COMMISSION'S ORDERS DO NOT RESULT IN A CHARGE FOR DELIVERY

Appellants also urge that at the Manhattan pier stations and at the Philadelphia perishable produce platforms unloading is necessary to enable the carriers to make delivery of the freight, and hence that the charges approved by the Commission are in fact charges for the delivery which is already paid for under the line-haul rate. This is essentially the same argument that has been dealt with in Point A, *supra, i.e.,* that the Commission is requiring shippers to make a double payment for the same service. However, since much of the argument in appellants' briefs is directed specifically to the question of delivery, a brief separate discussion of that question is appropriate.

There is no dispute that the transportation duty of the carriers under the line-haul rates covers delivery. But what constitutes proper delivery under the line-haul rates and whether delivery in certain circumstances may be the subject of a separate charge in

addition to the line-haul rate, are questions to be decided by the Commission on the facts of particular situations as they arise. *Los Angeles Switching Case,* 234 U.S. 294; *Swift & Co.* v. *United States,* 316 U.S. 216; *United States* v. *U. S. Smelting, Mining & Refining Co.,* 339 U.S. 186.

It should be remembered that in the instant case the unloading operation for which the Commission approved charges is separable in fact from delivery. The freight must first be removed from the car and placed on the station floor; only then is unloading completed. Delivery, however, has not yet begun. After the freight is on the station floor, and only then, is the freight identified, counted and checked, and the bills of lading or other papers marked to acknowledge the delivery to the person entitled to the freight. Actually, the two operations are performed by wholly different people. The Commission's finding on these facts is explicit (R. I-24h):

> "A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee."

The Commission's conclusion was based on a careful factual analysis of the operations at the pier stations (R. I-24c-24h), and cannot seriously be challenged. The charges authorized by the Commission are for this separable service of unloading and not for delivery.

It is not disputed that delivery upon a carrier's station platform cannot be provided without first removing the freight from the car and placing it on the platform ready for delivery. The Commission is

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wholly correct in stating (R. I-23g): "The pier floor is the first place where, after the freight has been unloaded, delivery can be taken."

But the fact that the unloading, for which the charge is made, precedes delivery does not mean, as appellants assert, that the charge is made for delivery or that the shippers are being required to pay for something covered by the line-haul rate. The duty of the carriers to make delivery, which is not in dispute, must not be allowed to obscure the further fact that when, as a preliminary to that delivery, a carrier performs additional services in excess of those which it normally provides on like traffic, it is entitled to assess additional charges to recover the cost of providing those special, additional services.*

The basic fallacy in appellants' argument lies in the fact that it refuses to recognize that it is the shippers or consignees, not the carriers, who determine whether

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* Much of appellants' argument is vitiated by their assumption that the word "delivery" has a fixed or absolute meaning and that it is always a synonym for the carriers' obligations under the line-haul rates. This is incorrect. The fact is that the word "delivery" has been used, both in this proceeding and in others, to refer broadly to the entire complex of terminal services performed by the carrier, rather than to the delivery which is contemplated by the line-haul rates. The Commission itself used the word in that sense, for example, in referring to the unloading charges here as "a charge, in addition to the line-haul rate, for making delivery at the New York piers." R. I-23m. "Delivery" in this broad sense, is of course *not* paid for by the shipper in the line-haul rate, and it is clear that additional charges for special services which form a part of that complex of "delivery" services are entirely proper. See, *e.g.*, Allowances for Stacking, 179 I.C.C. 780 (1931); New England Coal & Coke Co. v. N. & W. Ry. Co., 33 I.C.C. 276 (1915).

or not they wish to have the produce delivered after it has been unloaded, or delivered before it is unloaded. The situation at Philadelphia illustrates the matter in its simplest form. The perishable produce terminal of the Pennsylvania contains facilities for both team-track and platform delivery. A shipper or consignee receiving fresh fruits or vegetables at that station may request delivery at the team tracks and do the unloading himself; indeed, the Commission has found that even before the unloading charges first became effective in 1948 most shippers of fresh fruits and vegetables to Philadelphia did precisely that. R. I-24l. On the other hand, if the shipper or consignee desires to have the produce delivered to him at a platform location in the terminal—which requires that it be first unloaded—he may specify that. R. I-23r-23t. Stated simply, th Pennsylvania, at its perishable produce terminal, offers a special type of terminal service which has many advantages for a shipper or consignee (R. I-23s-23t, 23z) and for which, because it includes services which are not available generally for all shippers, it assesses an additional charge to reimburse it in part for the cost of those services. See *Wholesale Fruit & Produce Asso.* v. *A., T. & S. F. Ry. Co.*, 14 I.C.C. 410, 420 (1908); *New England Coal & Coke Co.* v. *N. & W. Ry. Co.*, 33 I.C.C. 276, 279 (1915). The additional charge is for additional services, not a double charge for the same service. Certainly it is not a charge for delivery as such.

The argument of appellants that because, at the perishable produce terminal platforms, the unloading precedes delivery it is therefore a part of it, is plainly unsound. Many accessorial services for which special

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charges are assessed precede delivery—pick-up and delivery service, storage and switching are examples. Indeed, at all terminals where unloading charges are now in effect—as they have been in most places for many years—and the carrier is asked to perform the unloading, the charge is imposed for a special service *before* delivery. All of these preliminary special services are performed in order to make the freight accessible to the receiver at the place where delivery is requested.*

At New York, as at Philadelphia, the shipper or consignee likewise has a choice between team-track delivery, where he may do his own unloading, or pier station delivery, where the unloading is done by the carriers. The pier stations, unlike the Philadelphia perishable produce terminals, do not have facilities for both platform delivery and team-track delivery, but carriers are not required to offer, and of course do not offer, all types of delivery facilities at each station. The Commission has, in other proceedings, held that the fact that the team tracks serving Manhattan Island are not located immediately adjacent to the piers, and that some of them are located in New Jersey, does not show that the present facilities are inadequate. *Palmer's Dock H. & P. Board of Trade* v. *Penn. R. R. Co.*, 9 I.C.C. 61, 66-67 (1901);

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* Further, even if the conclusion were correct that unloading is a part of delivery, that conclusion does not tend to show that the charges for unloading are unlawful. The unloading is necessary to provide a particular kind of delivery at a particular place and in order to provide that special delivery, not generally accorded to all shippers, the carriers incur additional costs and are entitled to recover those additional costs from those at whose request and for whose benefit the special form of delivery is made.

National Asso. Waste Material Dealers v. *D., L. & W. R.R. Co.,* 98 I.C.C. 606, 612 (1925).

The important fact is that the carriers do have team-track facilities not only on Manhattan Island but elsewhere in the metropolitan area, where the shipper may, if he wishes, take team-track delivery and do his own unloading. For example, there are various team-track facilities in or near Jersey City, to which the rates are the same as the rates to Manhattan, which are available for the delivery of New York traffic of this type. See pp. 48-50, *supra.* In point of fact, however, as at Philadelphia, a substantial number of shippers elected team-track delivery even before those charges became effective in 1948—in 1946, about 40 percent of all fruits and vegetables consigned to New York were unloaded by the consignees. The Commission states (R. I-241): "It is impossible to determine from the record the exact number of shipments unloaded by the consignees at New York proper, but the evidence indicates that the amount thereof is substantial."

As to New York, however, the contention is made, that if every shipper of fresh fruits and vegetables should specify team-track delivery, the team tracks on Manhattan Island—except those of the New York Central—would be inadequate to accommodate all of the freight. The hypothesis is no doubt accurate at Manhattan Island—although it is inaccurate at Philadelphia (R. I-23y)—but it furnishes no warrant for the conclusion that the carriers must therefore assume the entire cost of unloading at the pier stations. The argument rests upon the premise that what the shippers want is team-track delivery on Manhattan Island, and are driven to pier station delivery because of the

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limited team-track capacity at that point. That is a wholly false premise. The appellants are not really interested in or seeking team-track delivery.* The record is totally devoid of any evidence that anyone wanting Manhattan team-track delivery has ever been denied such facilities, but it does contain a considerable amount of evidence that the pier station delivery, with the attendant advantages of using the piers as display rooms and sales marts, is considered highly desirable and even essential by many shippers of fruits and vegetables. See, *e.g.*, R. II-973, 982.

The Commission concluded that the team-track facilities on Manhattan Island will be adequate for the needs of the traffic, since the advantages to shippers and consignees of platform delivery at the pier stations, even when they must assume a portion of the unloading costs, are enough to lead a very large number of them to request pier station, rather than team-track delivery. R. I-23z. There can be no possible justification for the position that the carriers must maintain expensive standby team-track facilities which the shippers do not want in order to justify a charge for an alternative service which the shippers prefer, even with the additional charge.

In this respect the situation here presented is analogous to the situation considered by the Commission

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* This is shown by the fact that the appellants make precisely the same arguments with respect to unloading at Philadelphia that they make with respect to unloading on Manhattan although it is established beyond question that there are adequate team tracks at Philadelphia to accommodate all the fresh fruit and vegetable traffic. What the appellants are seeking in both places is not team-track service but the unloading service and the other advantages which they gain from delivery at the pier stations and at the produce terminal.

in *Swift & Co.* v. *United States,* 316 U.S. 216. There certain shippers wished to consign livestock to the Union Stock Yards in Chicago because of the particular advantage to them in receiving the livestock at that point. This Court sustained the Commission in concluding that the unloading pens of the stock yard company were suitable points at which to terminate the transportation duty of the carriers to the consignees, notwithstanding the fact that the consignees were required by the stock yard company to pay a separate yardage charge on the livestock thus unloaded. The Court stated (316 U.S. at p. 227):

> "Some stock is and can be delivered at team tracks and some at industrial sidings. These facilities are inadequate for handling the entire volume of direct shipments. It does not appear, however, that the existence or adequacy of alternative facilities for delivery at other points is particularly important in the case, because the shipments involved are consigned to the packers at the Union Stock Yards by their own choice."

Similarly, here, when shippers or consignees do in fact elect pier station delivery they cannot be heard to object to an extra charge due to the extra cost of delivery at that station, simply because there are not enough team tracks on Manhattan Island to accommodate all shipments *if* all shippers elected that form of delivery. Moreover, the Court in the *Swift & Co.* case emphasized that in determining the carriers' obligation to make delivery, "the propriety of the yardage charges * * * was a question for decision by the Commission in the exercise of its judgment, and not for decision according to any fixed rule of law." (316 U.S. at p. 225).

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There is no doubt that the situation with respect to shipments consigned to the pier stations on Manhattan Island is unusual if not unique. Many former decisions of the Commission have recognized that fact. See, *e.g.*, *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 52 (1915); *Constructive and Off-Track Stations*, 156 I.C.C. 205, 222 (1929). But for precisely that reason it called for an exercise of the judgment of the Commission. The Commission has made a judgment, and stated its reasons (R. I-23z-23aa):

> "* * * Physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is a general community problem and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing difficulties if this congested area is to be served by railroad transportation. Adequate team tracks at respondents' other stations on Manhattan might constitute sufficient answer to protestants' contention. Although it seems that such existing team tracks could handle all of the fruit and vegetable traffic which now moves through the pier stations, there is little likelihood that the shippers would divert any substantial amount of this traffic from the pier stations as long as they are able to obtain the present terminal services at costs which are not unduly burdensome to them or unduly disproportionate as compared with total costs to them of a satisfactory substitute for pier deliveries. Respondents are under no obligation to provide an excessive amount of terminal service or a particular type of service for which there is no reasonable expectation that it will meet a public need. Moreover, it is conceivable that if terminal costs cannot be kept within reasonable bounds respondents might eventually be forced, as they

> have intimated, to undertake the establishment of team-track facilities in Jersey City within a reasonable trucking distance of lower Manhattan as a substitute for direct service to the latter area." *

We submit, therefore, that at New York, as well as at Philadelphia, the nature of the facilities maintained by the carriers does not deprive the Commission of power to enter its order approving the unloading charges, nor does it deprive that order of adequate justification.

C. THE ORDER OF THE COMMISSION FIXING THE SAME LEVEL OF CHARGES AT BOTH NEW YORK AND PHILADELPHIA IS SUPPORTED BY THE EVIDENCE

The Secretary of Agriculture, appellant in No. 480, assigns as a further objection to the Commission's order (brief, pp. 18-19, 77-82) that it approves the establishment of identical unloading charges at New York and Philadelphia, although the Commission found (R. I-23d, 24s) that the unloading costs are lower at Philadelphia. The report of the Commission states (R. I-23bb):

> "As indicated in the prior report, it is desirable that the charges for unloading at New York and Philadelphia be the same. The charges herein approved are for application at both points."

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* That the Commission fixed the level of the unloading charges substantially below the unloading costs to the carriers in order to avoid excessive movement of traffic away from the pier stations is clear from its report (R. I-23bb): "* * * it is probable that *continuance of the present charges* [*i.e.*, the 1948 charges] will cause sufficient diversion of the traffic under consideration to team-track delivery, to require the construction of additional team-track facilities at considerable expense." (Italics supplied.)

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The prior report had indicated that such a parity was "because of the long-standing competitive relation between the cities." R. I-24r. On matters such as this the Commission has of course very wide authority and discretion. *Atchison, T. & S. F. R. Co.* v. *United States,* 232 U.S. 199, 220-221; *United States* v. *Chicago Heights Trucking Co.,* 310 U.S. 344; *Ayrshire Corp.* v. *United States,* 335 U.S. 573, 593.

The evidence fully supports the Commission. Perhaps the most cogent evidence of the undesirability of creating a disparity between the two cities is that the appellants in No. 481, who represent many diverse groups, make no criticism of the order on this ground.* Indeed, the Commission found (R. I-23u):

> "Produce dealers in the Philadelphia market are in competition with like dealers at points such as Baltimore, Md., Pittsburgh, Pa., and New York, because these markets are accessible to certain buyers who normally procure their fruits and vegetables in Philadelphia."**

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* Counsel for the Port of New York Authority recognized the need for equal charges by stating during the hearing that if there was to be a charge for unloading he was opposed to any lower charge for unloading at Philadelphia than at New York. R. III-1020-1021.

** This finding is based on the testimony of a witness for the appellants who testified (R. III-1122): "An area of competition exists between Philadelphia and all of its surrounding major terminals, that is, that group of receivers who are midway between." The witness stated that 40 percent of the total volume of perishables moving to Philadelphia were moved thence to points ouside that city within a radius of 100 to 150 miles. R. III-1091. Within such an area there are of course many purchasers who could purchase their perishables as well from New York as from Philadelphia.

Apart from these findings of the Commission, two other matters should be noted. First, and perhaps more important, is the fact that at *neither* New York nor Philadelphia did the Commission permit the carriers to recover their entire costs. See Statement, *supra,* pp. 12, 15. At both points, shippers are still receiving, under the unloading charges fixed by the Commission and now in effect, a special service at *less* than its actual cost. What the Commission in fact has done, therefore, is to require the carriers to absorb a greater portion of the unloading cost at New York; it has not, by any averaging process, required shippers to Philadelphia to help pay the greater costs of unloading at New York. As the Commission stated in *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673, 682 (1943):

> "The equalization of ports, brought about by the absorption of varying terminal costs out of the line-haul rates, may be reasonable and nondiscriminatory * * *."

Second, the fact is that the order of the Commission does not *disturb* the relationship between New York and Philadelphia, but rather *preserves* it. Formerly the unloading was free at both points; now it is subject to identical charges. That these two points were, together, the *last* two points in Official Territory at which unloading was previously performed by the carriers with no charge in addition to the line-haul rate is itself persuasive evidence that a competitive relationship exists between the two points and that they should be treated alike.

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III

THE ORDER OF THE COMMISSION DOES NOT RESULT IN DISCRIMINATION OR UNDUE PREFERENCE IN VIOLATION OF EITHER SECTIONS 2 OR 3 OF THE ACT

None of the complaints filed in the court below asserted that the order of the Commission violated Sections 2 or 3 of the Act (see, *e.g.*, R. I-18-20, 122-123, 148-150), and in consequence the contention was not considered by the majority of that court.* Even if it is assumed, however, that the argument is available here (see *Montana Railway Co.* v. *Warren*, 137 U.S. 348, 351), it is without substance.

Section 2 of the Act proscribes "any special rate" which is greater or less than the charge to any person for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Section 3(1) of the Act similarly prohibits any carrier from subjecting "any particular description of traffic to any undue or unreasonable prejudice or disadvantage, in any respect whatsoever, * * *." The contention here is that these sections are violated because the carriers published, in the first instance, unloading charges only for fresh fruits and vegetables, which constitute the bulk of the traffic received at the Manhattan Island piers and the Philadelphia perishable produce platforms, and deferred publication of similar charges on other traffic, which is likewise unloaded at the stations by the carriers without charge in addition to the line-haul rates. R. I-24b.

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* It was, however, adverted to by the dissenting judge. R. I-205-206.

Questions under Sections 2 and 3(1) of the Act are peculiarly within the province of the Commission. In *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, the Court said (p. 304):

> "Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon application of all the facts and circumstances affecting the traffic."

In exercising that jurisdiction, the Commission has uniformly insisted upon "all the facts and circumstances", rather than merely the general statements of disparity of treatment such as are now contained in appellants' briefs. For example, in *Barrett Co.* v. *Atchison, T. & S. F. Ry. Co.,* 172 I.C.C. 319 (1931), the Commission said (p. 333):

> "While undue prejudice and preference may be established by a preponderance of evidence, the evidence must be such as to make reasonably clear how and where the prejudice and preference result from a rate maladjustment of which complaint is made. They may not be assumed or left to mere inference. General declarations as to competition or injury, unsupported by evidentiary facts, and a mere showing of a disparity of rates are not sufficient for predication of a finding of undue prejudice and preference."

Even more directly applicable here, in view of the argument made by appellant in No. 480 (brief, p. 82) that many perishable agricultural commodities other than fresh fruits and vegetables delivered at the Manhattan pier stations are not now assessed an unloading charge, is the decision of the Commission in *Fort*

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Smith & W. Ry. Co. v. *Atchison, T. & S.F. Ry. Co.*, 216 I.C.C. 411, 433 (1936):

> "Complainants claim also that the denial of the transit privilege on canned goods and dried fruits while the arrangement is accorded to several other highly competitive food products in the all-rail service results in undue prejudice to the former and undue preference to the latter. * * * Complainants have not shown the extent and effect of such competition. They have presented no evidence concerning the relative value of these commodities or the rates applicable thereon. Nothing is shown as to the volume of movement or transportation characteristics. The mere fact that a commodity competes with other specified commodities, without evidence as to the transportation characteristics of the alleged preferred commodities, is insufficient to support an allegation of undue prejudice."

See also, *e.g.*, *Kohler Co.* v. *Alton & S.R.*, 263 I.C.C. 667, 672 (1945); *Rockford Brick & Tile Co.* v. *Chicago & N. W. Ry. Co.*, 251 I.C.C. 235, 238 (1942); *J. G. Hoffstot* v. *Monongahela Ry. Co.*, 248 I.C.C. 248, 254 (1941); *Traffic Bureau, Lynchburg Cham. of Com.* v. *C. & O. Ry. Co.*, 234 I.C.C. 765, 768 (1939); *American Agricultural Chemical Co.* v. *Aberdeen & R. R. Co.*, 225 I.C.C. 610, 628 (1937). There are no suggestions in any opinion of this Court that the Commission must or should be satisfied with less evidence than it now requires; indeed, the decisions which recognize the Commission's exclusive responsibility in the field, by emphasizing the complexity of the facts and the importance of value judgments, underscore the necessity for a full factual basis for any finding of discrimination or undue prejudice. *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297, 304; *Barringer* v. *United*

States, 319 U.S. 1, 11; *Chesapeake & Ohio Ry. Co.* v. *United States,* 296 U.S. 187, 188; *Seaboard Air Line Ry. Co.* v. *United States,* 254 U.S. 57, 62.*

Appellants did not even attempt to make the showing required by the Commission's decisions. There was no evidence offered, for example, that consignees of other commodities which are also unloaded at the pier stations enjoyed the numerous and substantial benefits enjoyed by consignees of fresh fruits and vegetables in having the pier as a sales mart where they display and sell this merchandise. There was thus no showing of a "like and contemporaneous service", as required under Section 2. There was no showing that the other commodities which are unloaded by the carriers without charge constitute "a like kind of traffic" or that they are handled "under substantially similar circumstances and conditions." Nor was there any showing that the other commodities moved over the same lines or for the same distances. All of these matters are essential to a showing of a violation of Section 2.** Nor did appellants make the showing of competition required to establish a violation of

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* In the Barringer case the Court stated (319 U.S. at p. 10): "It [the Commission] has passed only on the question of discrimination or preference resulting from the remission of the loading charge. *In doing so it has, as § 2 contemplates, looked at all the relevant circumstances and conditions,* * * *." (Italics supplied.)

** On the question of like kinds of traffic see Traffic Association of St. Louis Coffee Importers v. Illinois Central R. R. Co., 28 I.C.C. 484, 487 (1913); California Citrus League v. Director General, 58 I.C.C. 373, 392 (1920). For the requirement that the movement must be over the same lines and for the same distance see R. C. Williams & Co., Inc. v. New York Central R. Co., 269 I.C.C. 297, 300 (1947); Tide Water Oil Co. v. Director General, 62 I.C.C. 226, 227 (1921); Wight v. United States, 167 U.S. 512, 518.

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Section 3. See *Tide Water Oil Co.* v. *Director General*, 62 I.C.C. 226, 227 (1921).

Appellants' failure to present evidence was not the result of lack of opportunity nor was it due to any misunderstanding of the quantum or nature of the proof required. The first report of the Commission in 1948, in rejecting the contention that Sections 2 or 3 of the Act would be violated by the unloading charges on fresh fruits and vegetables, expressly stated (R. I-24r): "Circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables." * Yet when the rehearing was granted, appellants made no effort to establish the similarity of circumstances and conditions necessary to support a finding of a violation of these sections. The inference, indeed, is warranted that such proof does not exist. In any event, the Commission was wholly correct in concluding, in its second report in 1952 (R. I-23bb) that, "The record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 or 3 of that act."

Another answer, which is equally dispositive of appellants' contention, is that the carriers had indicated as early as the first hearing in this proceeding that they were considering the publication of similar un-

* The brief for appellant in No. 480 relies (pp. 81-82) upon the finding of the Commission (R. I-23f) that in the "movement of freight" and the "unloading of such freight to the pier platform" the handling of fruits and vegetables and other freight is identical. The finding is, however, limited to the physical facts of car-floating and unloading, and does not in any way suggest that the shippers of other freight receive the many benefits to the shippers of fruits and vegetables arising from the use of the pier as a sales mart for such products.

loading charges on other traffic (R. I-24b), and that in fact in 1950 they did publish such charges to cover all freight unloaded by them at Philadelphia. R. I-322. These additional unloading charges at Philadelphia were also approved by the Commission. *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I.C.C. 481 (1953).

The Commission, therefore, was fully warranted in rejecting, on either or both grounds, the contention that its order sanctioned, in any way, a violation of Sections 2 or 3. If the point is properly before the Court, it is without merit.

IV

The decision of the Commission is not deficient on any procedural ground

In the court below, appellants urged several alleged violations of procedure or due process in connection with the proceedings before the Commission. In their briefs in this Court those charges are mentioned only incidentally, if at all, although some of them are reflected in the Assignments of Error. In any event, they are without substance.

1. Appellants urged below that they were given no opportunity to be heard specifically upon the reasonableness of the reduced rates approved by the Commission in its final report. R. I-23bb. The answer given by the court below is all that needs be said (R. I-214-215):

> "Having just completed a thorough investigation of the entire subject, during which plaintiffs were fully heard, it would have been a work of supererogation to conduct a further hearing upon these lower rates, the reasonableness of

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and justification for which was already shown by the evidence. It was clearly within the Commission's power not only to condemn the then existing rates as unreasonable, but at the same time and upon the evidence already taken to fix rates that would be just and reasonable. In this, there was no denial of due process to plaintiffs. Plaintiffs were fully heard upon the entire matter. The situation is the same in principle as where a plaintiff demands $1,000 of a defendant, the court finding that he is not entitled to $1,000 but that on the evidence he is entitled to $500, and awards that sum. In these circumstances the defendant could not complain of a denial of due process because he was not again heard on his liability for $500. Akron C. & Y. Ry. Co. v. United States, 22 Fed. (2) 199, 203."

2. The contention has also been made that the Commission erred in dismissing, by its order of December 15, 1952 (R. I-26-27), the complaints filed subsequent to the Commission's final report attacking the reasonableness of the unloading charges as finally approved. This is essentially the same argument as that just discussed, and the answer given by the court below is equally applicable. After motions to dismiss, and responses thereto, had been filed, the Commission entered an order reciting that the complaints "assail on substantially the same grounds the unloading charges approved in said report"; that "the circumstances and conditions with respect to the approved unloading charges have not materially changed since substantially the same issues were decided by the Commission"; and that "no reasonable grounds appear for further investigation of such charges or investigation of the matters in connection therewith". The refusal to order a further hearing was, in other words,

both sensible and proper. Section 13(1) of the Act provides:

> "If * * * there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper."

The Commission has taken similar action many times in the past. See, *e.g., Traugott Schmidt & Sons* v. *M.C.R.R. Co.*, 23 I.C.C. 684, 685 (1912); *Alabama Asphaltic Limestone Co.* v. *Akron & B.B. R. Co.*, 194 I.C.C. 273, 275 (1933). Indeed, even in the absence of such a provision, an administrative body has an almost unqualified discretion in determining whether a further hearing shall be granted. See *Halcston Drug Stores* v. *National Labor Relations Board*, 187 F. 2d 418, 421 (9th Cir. 1951); *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503, 514; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535. See also *United States* v. *Interstate Commerce Commission*, 294 U.S. 50, 60; *George Allison & Co.* v. *Interstate Commerce Commission*, 107 F. 2d 180, 182 (App. D.C. 1939).

3. The brief for appellants in No. 481 suggests (pp. 41-42) that the Commission failed to require the carriers to assume the burden of proof, citing Section 15(7) of the Act. That section provides:

> "At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, * * * the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *."

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Appellants' complaint, however, is not that the carriers failed to assume, and discharge, the burden of proving that the proposed unloading charges were reasonable. This they did. Appellants, rather, argue (brief in No. 481, p. 42) that the railroads could not justify the unloading charge "except by sustaining 'the burden of proof' of showing that their line-haul rates are inadequate". The contention, therefore, is no more than a different statement of the contention that the Commission was required to make a complete investigation of the reasonableness of the line-haul rates before approving the unloading charges, and the answer is the same as that already given in Point II, *supra.*

4. Finally, appellants rely in their briefs to a considerable extent on the reports of the Hearing Examiners and urge that the Court should consider their findings. There is no merit in the suggestion. The findings and conclusions of the Hearing Examiners are advisory; the only relevant decisions are the reports of the Commission itself. See *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U.S. 266, 285-286; *National Labor Relations Board* v. *M. E. Blatt Co.*, 143 F. 2d 268, 272-273 (3rd Cir. 1944); *Inter-City Transp. Co.* v. *United States*, 89 F. Supp. 441, 445 (D.N.J. 1948); *C. E. Hall & Sons, Inc.* v. *United States*, 88 F. Supp. 596, 600-601 (D. Mass. 1950).

CONCLUSION

Wherefore, the judgment of the court below should be affirmed.

Respectfully submitted,

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APRIL 20, 1954.

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No. 431

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, ET AL., APPELLANTS,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

STATEMENT AS TO JURISDICTION

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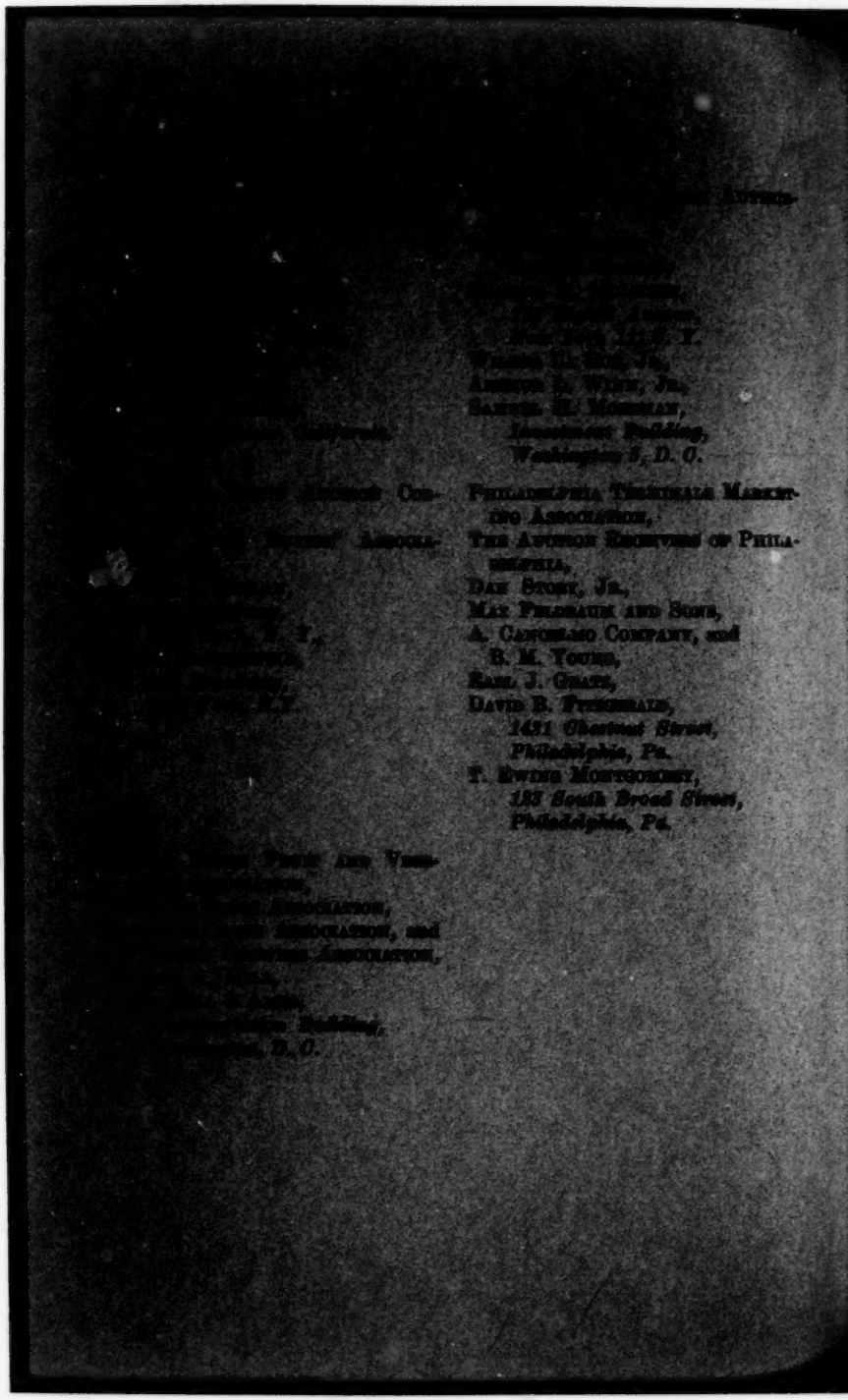

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 481

FLORIDA CITRUS COMMISSION, GROWERS AND SHIPPERS LEAGUE OF FLORIDA, CHASE AND COMPANY, ET. AL., *Appellants,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE & OHIO RAILROAD COMPANY, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

STATEMENT AS TO JURISDICTION

Florida Citrus Commission, Growers and Shippers League of Florida, Chase and Company, Nevins Fruit Company, and Dr. P. Phillips Cooperative, as Plaintiffs, and The City of New York, The Port of New York Authority, California Citrus League, California Grape and Tree Fruit League, Philadelphia Terminals Marketing Association, The Auction Receivers of Philadelphia, Dan Storey, Jr., Max Feldbaum and Sons, A. Cancelmo Company, B. M.

Young, New York Fruit Auction Corporation, United Fruit Buyers' Association Inc., United Fresh Fruit and Vegetable Association, Idaho Shippers Association Inc., National Onion Association, and Western Growers Association, as Intervening Plaintiffs, submit this statement in compliance with Rule 2 of the Rules of the Supreme Court of the United States.

1. Basis of Jurisdiction

This appeal is from the final judgment of a Three-Judge District Court dismissing the complaint which sought to enjoin, annul and set aside orders of the Interstate Commerce Commission.

(a) Statutory Provisions.

The jurisdiction of the Supreme Court to review the final judgment of the District Court of the Southern District of Florida by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). See Appendix A.

(b) Date of Judgment.

The Final Judgment of the District Court was entered on August 31, 1953.

(c) Date of Application for Appeal.

The application for appeal herein was duly presented to the District Judge on October 28th, 1953.

(d) Cases Sustaining Jurisdiction.

The jurisdiction of the Supreme Court to review, on appeal, the final judgment of the District Court, is sustained by many cases including the following:

> Louisville & Nashville Railroad Company et al. v. United States of America, et al., 242 U. S. 60, 61 L. ed. 152, 37 S. Ct. 61.

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North Carolina v. United States, 325 U. S. 507, 89 L. ed. 1760, 65 S. Ct. 1260.

United States v. United States Smelting, Refining & Mining Company, 339 U. S. 186, 94 L. ed. 750, 70 S. Ct. 537.

2. Nature of Case

This case involves the validity of unloading charges on carlot shipments of fresh fruits and vegetables delivered by the railroads at New York, N. Y., and Philadelphia, Pa.

As stated in the opinion below by District Judge De Vane, "The record in this case discloses it is the desire of the carriers affected to have the same unloading practices in effect at Philadelphia that are in effect at New York, and I will, therefore, confine this dissent to the situation at New York." The basic principles involved relate to both New York and Philadelphia, and, for brevity, this statement will give details only as to New York.

Since the advent of rail transportation, there had never been any separate charges for unloading carlot shipments of fresh fruits and vegetables at New York, N. Y., or at Philadelphia, Pa., until November 1, 1948. In 1947, for the first time, the terminal or delivering rail carriers filed tariffs with the Interstate Commerce Commission publishing new charges for unloading at those two destinations. The unloading charges were to accrue to the delivering carriers, and the originating and intermediate carriers did not join in publishing the new additional unloading charges. No unloading charges on any other commodities at those destinations were proposed. Upon protests and requests for suspension filed by the plaintiffs and others, the Interstate Commerce Commission suspended the tariffs and entered upon an investigation concerning the lawfulness of the proposed unloading charges. Testimony of the parties was taken by an Examiner, oral argument of counsel was heard by Division 3 of the Commission on October 3, 1947,

an additional oral argument was heard by the full Commission on May 5, 1948, and on October 4, 1948, the Report of the Commission was issued in that proceeding known as Investigation and Suspension Docket No. 5500, Unloading Charges on Fruits and Vegetables at New York and Philadelphia. The report of October 4, 1948, is published in 272 I. C. C. beginning at page 648. Thereby, the Commission concluded that "the schedules under investigation are just and reasonable." The unloading charges thus approved by the Commission went into effect on November 1, 1948, pursuant to said report, and were $1.50 per net ton on citrus fruits and vegetables (fresh or green, not cold pack or frozen), $1.75 on fresh fruits other than citrus, and $2.00 per net ton on melons (including cantaloupes), and vegetables fresh or green, not cold pack or frozen, when top icing or body icing is used, except that the November 1, 1948 charges were the original amounts increased by 30% to $1.95, $2.38 and $2.60 respectively, reflecting the general increases of October 6, 1947, under Ex Parte No. 166, Increased Freight Rates 1947, 269 ICC 33 and 270 ICC 81, 93 and 403.

Many petitions for rehearing and for reconsideration were filed, and finally by its order of June 9, 1949, the Commission reopened the proceeding for rehearing. Additional testimony was taken before the Examiner in September 1949, briefs were filed, and in May 1950 a proposed report of the Examiners was served, which recommended that the Commission find that the unloading charges are unjust and unreasonable. Additional oral argument was heard by the Commission on July 24, 1950. On October 10th the Commission issued a Notice stating: "upon further consideration of the record in the above entitled proceeding, it appears that the record is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing."

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At the further hearing, additional testimony was presented before the Examiner. After briefs, the second report on further hearing was issued by the Examiner, (in August 1951), again recommending that the Commission should find that the unloading charges were not shown to be just and reasonable, and that they are also in violation of section 3(1) of the Act. Exceptions thereto were filed by the railroad respondents, to which the plaintiffs (as protestants) replied. Further oral argument was heard by the Commission on September 26, 1951. On May 7, 1952, the "Report of the Commission on Rehearing and Further Hearing" was issued, 286 I. C. C. 119. The May 7th Report found "that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable." The tariff schedules were ordered cancelled. However, the report further stated that the cancellation of the tariff and the discontinuance of the proceeding would be "without prejudice to the establishment of charges in conformity with the views expressed herein." Such views were: (286 ICC 141) "Upon consideration of these and other circumstances of record we conclude that the shippers should not be forced to pay more than $1.05, $1.35, and $1.65 per ton in lieu of the charges of $1.95, $2.28, and $2.60, respectively, now in effect."

The order of the Commission dated May 7, 1952, in conformity with the report, required the railroads on or before July 3, 1952 to cancel the tariffs naming the unloading charges (first effective November 1, 1948) and discontinuing the proceeding. Thereafter, the charges were cancelled. However, the railroads filed new tariffs effective July 3, 1952, stating new charges (lower than the cancelled charges) in the amounts to which the Commission referred in its report—"without prejudice to the establishment of charges in conformity with the views expressed herein."

Two formal complaints were filed with the Commission by Florida Citrus Commission et al. against the railroads, one being Docket No. 31105 attacking the unloading charges at New York, N. Y., and the other being Docket No. 31106 attacking the unloading charges at Philadelphia, Pa. Both complaints similarly alleged that the new unloading charges were unjust and unreasonable in violation of section 1 of the Interstate Commerce Act because extortionate in that they represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line-haul rates. The railroad defendants therein moved to dismiss the complaints, and without any hearing or taking of testimony (but after replies by complainants to the railroads' motions to dismiss) the Commission entered its order of December 15, 1952, dismissing the complaints. Such order recited that the complaints "assail on substantially the same grounds the unloading charges approved in said report (of May 7, 1952 in I. & S. No. 5500) and published by the defendants."

On March 3, 1953, the complaint in the case at bar was filed in the District Court for the Southern District of Florida, seeking to annul and set aside the order of May 7, 1952, in I. & S. Docket No. 5500 insofar as it approved and authorized the establishment of unloading charges aforesaid, and to annul and set aside the order of December 15, 1952, dismissing the complaints in Dockets Nos. 31105 and 31106.

There is no all-rail line into Manhattan for the delivery of freight, except that of the New York Central. Because of the geographical location of New York, therefore, freight consigned to that point must be moved thereto by car floats or lighters across the Hudson River from the New Jersey side (except only traffic routed over the New York Central). Fruits and vegetables from Florida, California and Texas

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(the principal producing areas of citrus fruits and winter vegetables) are delivered at New York pier station terminals of the Pennsylvania Railroad and Erie Railroad (a very few being delivered at the pier station of the Baltimore and Ohio Railroad). Carloads of fruits and vegetables arriving at the New Jersey rail terminals, consigned to New York, are moved onto car floats equipped with tracks, and transported by tugs across the Hudson River. Nearly all of them are placed alongside the piers equipped for handling of such traffic, viz: the fruit and vegetable pier station terminals, where the freight is unloaded by the carriers and placed on the pier platform for delivery to the consignee.

The pier station terminals are used not only for delivery of fruits and vegetables, but also for delivery of shipments of other commodities. All shipments are unloaded by the carriers from the cars (the cars remaining on the car floats) onto the pier floor. No unloading charges are assessed nor have any been published to apply on any shipments except fruits and vegetables.

"So expeditious is the unloading service that it permits of the use of the same platform space for unloading and stacking freight two and sometimes three times each night on which unloading is performed." 286 ICC 124, 125. "There are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purposes of inspection, but they are not permitted to take delivery of their freight from that facility. The pier floor is the first place where, after the freight has been unloaded, delivery can be taken."

"It would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York. The high cost of land on

Manhattan Island and the time required for handling cars across float bridges during periods of peak volume of traffic, would render team-track delivery impracticable." (286 ICC 130.)

Originally, the method of delivery at New York, that is the unloading by the carriers onto the pier floor before the shipment was available for receipt by the consignee, was established by the carriers for their own convenience and because of the lack of team-track facilities on Manhattan to make a team-track delivery. The freight rate, or line-haul transportation charges, has always included and paid for the transportation to and delivery by the railroads on the pier station floor.

Never, before November 1, 1948, had any unloading charges (in addition to the line-haul freight charges) been assessed on fruits and vegetables delivered at New York and Philadelphia. The unloading charges which went into effect on November 1, 1948 (pursuant to the Commission's report of October 4, 1948, in I. & S. Docket No. 5500, 272 ICC 648) were ordered cancelled by the Order of May 7, 1952 (report in 286 ICC 119), because the Commission there found that they were "not shown to be just and reasonable."

The new unloading charges of July 3, 1953 (which the Commission in its report of May 7, 1952 referred to: "without prejudice to the establishment of charges in conformity with the views expressed herein") are in effect solely because of the Order of May 7, 1952 and the orders of December 15, 1952, dismissing the complaints in Dockets Nos. 31105 and 31106.

Yet, the Commission has never made a finding that the unloading service is one beyond the point at which the line-haul or carrier service ends. On the contrary, the fact is and the finding of the Commission in the report of October

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4, 1948 (272 ICC 648) was: "Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor" (272 ICC 654, 655). Again, in the report of May 7, 1952 (286 ICC 119), it was specifically found that: "Respondents do not accord the consignees the option of performing the unloading" (286 ICC 123), and "the pier floor is the first place where, after the freight has been unloaded, delivery can be taken" (286 ICC 125).

3. Rulings of Three-Judge District Court

The majority opinion, the dissenting opinion of one Judge, and the final judgment of the District Court dismissing the complaint seeking to enjoin, annul and set aside the orders of the Interstate Commerce Commission, is appended hereto as Appendix B.*

The opinion of Circuit Judge Louie W. Strum (concurred in by District Judge William J. Barker) concluded that "The Commission has clearly acted within its statutory authority; its proceedings have been conducted consistently with due process; its findings are adequate and supported by substantial evidence."

The dissenting opinion of District Judge Dozier A. DeVane concluded that the unloading charges were unjust and unreasonable, unjustly discriminatory and unduly preferential, and that the Commission's order was illegal and should be set aside.

The majority opinion includes the following statements:

> "Substantially all carload shipments of fresh fruits and vegetables destined to New York City from the South and West are brought to the Jersey side of the Hudson River, and the freight cars, with their cargoes

* (Clerk's Note.—The judgment and opinion are printed as an Appendix to the Jurisdictional Statement in No. 480 and is not reprinted here.)

intact, are then ferried across the river on car floats. There are two methods of delivery on the New York side. One is to switch the railroad cars from the car floats to team tracks located on land in lower Manhattan, where the consignees unload the railroad cars and place the cargo directly onto trucks. There is no separate charge for these deliveries.

"By the other method, with which we are here concerned, the railroad cars are not switched to land tracks, but remain on the car floats which are placed alongside unloading piers where the carriers unload the cars, placing the contents on the floor of the pier station, where they are picked up by the consignees. The consignees are not allowed to unload the freight cars themselves, as they do on the team tracks, as it is physically impossible to place the consignee's trucks alongside the car floats. The carriers therefore unload the cars, the consignees having access to shipments only after they have been unloaded and placed on the floor of the pier stations. Approximately 75% of the total traffic is handled in this manner, as the team tracks can accommodate only about 25% of the traffic, and it is not feasible to expand them.

"* * * No delivery charges are imposed for other types of commodities unloaded at the pier stations in like manner as fresh fruits and vegetables. Prior to November 1, 1948, the carriers also unloaded fresh fruits and vegetables at pier stations without additional charges.

* * * * * * *

"It is not essential that the Commission first review in detail the line haul rates before allowing the unloading charges under consideration. What the Commission is really deciding here is, not the adequacy or inadequacy of line haul rates to cover the unloading service, but where the carrier's line haul service ends, and whether unloading is a justifiable additional service, of value to the consignee, for which he should pay at least a part of the cost. * * *"

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4. Questions Involved Are Substantial

There have been two reports by the Commission, two proposed reports by Examiners of the Commission, and the decision of the District Court.

The first report of the Commission, October 4, 1948, 272 ICC 648, concluded that the tariffs publishing the unloading charges were "just and reasonable." Six commissioners concurred in that report, one did not participate in the disposition of the proceeding, and four commissioners dissented. However, the report of the majority specifically found (272 ICC 654, 655):

> "A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor. It is clearly indicated that it is impracticable for the shippers to perform the actual unloading operations."

In May, 1950, the Report on Rehearing proposed by Russell M. Brown and M. J. Walsh, Examiners, recommended that "on rehearing the Commission should find that the charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia, are unjust and unreasonable." There were specific findings of fact therein as follows:

> "There is no question with respect to the applicability of the line-haul rates from the various points of origin to New York. The principal question for determination is what constitutes delivery of the freight by respondent to the consignee or receivers, and the time when and the particular location at which it is

> concluded. Delivery of carload freight consists of the carrier either placing the car on a team track or siding where it can be unloaded by the consignee, or where the consignee is not permitted to perform the unloading, as in this proceeding, in unloading the freight from the cars on the floats and placing it on the floor of the pier. Here, and here only, does the transportation obligation of the carrier end. That obligation is not fulfilled until the freight is placed in a location conveniently accessible to the consignee. This method of delivery of fresh fruits and vegetables, has, for more than 50 years, been included in the line-haul rates from the various origins to New York piers on such traffic. And it must be so included because the transportation service is not completed until delivery has been made. Section 1(3) of the act defines transportation to include, among other things, all services in connection with delivery of the property transported."

Subsequent to the above proposed report, oral argument was heard by the full Commission on July 24, 1950. But no report was issued. Instead, the Commission's Notice of October 10, 1950, was issued:

> "Upon further consideration of the record in the above-entitled proceeding, it appears that the record is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing."

At that point, the tariff should have been ordered to be cancelled, pursuant to section 15(7) of the Interstate Commerce Act.

In May, 1951, the Second Report on Further Hearing proposed by M. J. Walsh, Examiner, recommended that "upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also

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in violation of section 3(1) of the act." Specific findings of fact therein included the following:

"As stated, transportation includes delivery of the property to the consignee. Delivery may be accomplished by placing the car on a team track or siding customarily used for that purpose within convenient reach of the consignee at the particular station or facility to which the traffic is billed and to which the rate charged applies, or, as in the instant proceeding, where the car cannot be placed at a convenient point at the particular billed destination at which the consignee may accept delivery and perform the unloading, of the carrier unloading the freight and placing it at a particular location on the pier or station platform where delivery can be made to the consignee. Prior to November 1, 1948, the latter method of delivery of fruits and vegetables to the consignees at the several pier stations in New York and at certain stations in Philadelphia had been voluntarily maintained and performed by respondents for a period approximating 50 years. Respondents do not propose to discontinue these stations as regular and complete terminal facilities.

"The unloading of the freight by respondents at their New York pier stations was for the purpose of making simple delivery of the property to the consignees. Because of the fact that the consignees were denied access to the cars on the carfloats for the purpose of accepting delivery and of unloading the freight, delivery of the freight to the consignees at those pier stations could not be accomplished in any other manner. The unloading, which necessarily preceded the delivery of the freight to the consignee, was essential to that purpose, and therefore was included in the transportation of the property and the rate applicable thereto. The unloading of the freight by the carrier onto the pier platform is due to the physical inability of the carrier to make delivery of the freight to the consignee at billed destination, without performing such unloading. Such inability is clearly a carrier disability for which con-

signees should not be subjected to additional unloading charges. In the case of team-track delivery the car is placed on a team track and the consignee's truck is backed up to the car door. This cannot be done at pier stations because, as respondents admit, it is necessary to refuse consignees access to the carfloats for delivery of their freight. It is admitted by respondents that because of this disability the freight is not actually delivered to the consignee until it is placed on the pier floor. Delivery under the line-haul rates is not completed until the freight is placed in a location accessible to the consignee.

* * * * * * *

"The pier stations at New York are complete terminal facilities to which through rates on fruits and vegetables are specifically named in respondents' tariffs. Those rates cover the entire transportation of the traffic consisting of line-haul and terminal operations, including unloading of the freight in order to make simple delivery to the consignee.

"Delivery of freight to the consignee must be made at a reasonably convenient and accessible point. Delivery of fruits and vegetables specifically billed to certain New York pier stations for consignees in Manhattan cannot properly be made at Jersey City or other locations intermediate to Newark, N. J., because these latter points are not the destinations to which the traffic is billed.

"The preponderance of the volume of fruits and vegetables destined to New York is handled by the Erie, and the Pennsylvania. * * *

"Nor can it be successfully argued that the through rates in effect prior to November 1, 1948, did not include the charges for the unloading of the freight by respondents, because respondents have continued to perform such unloading without charge in respect of other commodities at the identical New York pier stations at which charges are collected for unloading fruits and vegetables. For instance, canned fruit juices originating at points in Florida are unloaded with-

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out additional charge, other than the line-haul rate, at the same New York piers at which charges are collected for unloading fruits and vegetables. As there is keen competition between fresh fruits and fruit juices in household consumption, the assailed unloading charges are unduly prejudicial to fresh fruits and unduly preferential of fruit juices in violation of section 3(1) of the act. * * *''

In the final report of May 7, 1952, 286 ICC 119, the Commission concluded "that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, and the schedules naming the assailed unloading charges will be ordered canceled and the proceeding discontinued." However, such conclusion that the charges be canceled was stated to be "without prejudice to the establishment of charges in conformity with the views expressed herein," viz: unloading charges in the amounts thereafter published to become effective on July 3, 1952, and which were assailed in the complaints in Dockets Nos. 31105 and 31106. One commissioner did not participate in the disposition of the proceeding under the report of May 7, 1952, one commissioner dissented (286 ICC 142-145); and three commissioners joined in the special concurrence that they fully agreed "with this report to the extent that it reverses the prior report, in which I dissented," and stating further that they "went along" with "the additional ultimate findings in this present report only because they afford some immediate relief to shippers in that the unloading charges here approved are substantially lower than the proposed charges which have been applied on this traffic since November 1, 1948, pursuant to the findings in the prior report."

It is important to note that nowhere in the report of May 7, 1952, is there any finding of fact that the unloading service is something additional to the line-haul transporta-

tion, that it is not a necessary part of delivery required under the line-haul rate, or that the point at which line-haul transportation has terminated is reached prior to the unloading. On the contrary, the specific findings of fact are made that:

> "Respondents do not accord the consignees the option of performing the unloading." (286 ICC 123.)
>
> "There are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purposes of inspection, but they are not permitted to take delivery of their freight from that facility. The pier floor is the first place where, after the freight had been unloaded, delivery can be taken." (286 ICC 125.)

The chief purpose of the interstate commerce act has been to secure uniformity of treatment to all and to suppress unjust discriminations and undue preferences. A multitude of decisions of the Supreme Court have emphasized and applied this basic principle,—e.g. *Kansas City Southern R. Co.* v. *C. H. Albers Commission Co.*, 223 U. S. 573, 32 S. Ct. 316, 56 L. ed. 556.

Throughout the United States the "line-haul carload rate comprehend(ed)(s) receipt and delivery". An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a side track delivery, which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not ben given." See *Los Angeles Switching Case, Interstate Commerce Commission* v. *Atchison, T. & S. F. R. Co.*, 234 U. S. 294, 58 L. Ed. 1319.

In the more recent decision of *United States* v. *United*

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States Smelting, R. & M. Co., 339 U. S. 186, 94 L. Ed. 750, 70 S. Ct. 537, in the opinion by Mr. Justice Minton it is said:

> "The Commission undertook its general investigation, Ex parte 104, in the interest of establishing a uniform and equal service for shippers. The Commission concluded that carrier obligation for transportation service ends customarily when delivery is made at a convenient point on the siding inside or outside a consignee's plant. This delivery is such as may be accomplished in one continuous movement without 'interruption' occasioned for the convenience of the industry, and is only the equivalent of team track or simple placement switching. In the Commission's view as developed in Ex Parte 104, such a convenient delivery point marks the beginning and end of what is termed 'line-haul' transportation, and is the extent of the service which may be performed under the line-haul rate."

We do not question the right of the Commission to make findings of fact to determine the point at which the line-haul transportation ends. "Delivery to Point X is the equivalent of team track and simple placement service—the service other shippers receive under a line-haul rate." (339 US 195.) In the case at bar, I. & S. No. 5500, the Commission has found that "Point X" is the pier station floor, after unloading by the carriers. Until the shipment reaches Point X which is the pier station floor, there is no delivery and the service under the line-haul rate is not complete until that point is reached. Indeed, such finding of fact is the same as in many other proceedings before the Commission, such as (for California fruits and vegetables) *Erie Railroad Co.* v. *Alabama & Vicksburg Railway Co.*, decided April 30, 1925, 98 ICC 268, 272:

> "At Duane Street the Erie unloads the contents of the car, sorts the fruit and vegetables according to variety, quality, and size, and piles the packages in

> the space set aside on the pier for each particular consignee. At that point the consignee takes delivery."

And (for Florida fruits and vegetables), Allowances for Stacking Fresh Fruits and Vegetables at New York, N. Y., decided December 19, 1931, 179 ICC 780, 784:

> "* * * respondent undertakes to make delivery in spaces assigned to the consignees on the piers, and its stevedores stack the packages in those spaces. It appears from this record that at that point respondent has fulfilled its legal obligation as to delivery."

Having determined the facts as to when delivery is accomplished, and having made no determination that unloading at these destinations is a service additional to the line-haul transportation, it was the plain duty of the Commission to cancel all unloading charges. There was no finding, and indeed no showing, that the aggregate of the unloading charges and the line-haul charges would be just and reasonable and otherwise lawful. Yet, the Interstate Commerce Commission failed to apply the plain standards of the Interstate Commerce Act to the facts as found, and instead acted arbitrarily and contrary to the Act in adopting standards not authorized by the Act and announced conclusions not warranted by its findings of fact.

Not only are the plaintiffs seriously aggrieved by the orders of the Commission and the final judgment of the District Court dismissing their complaint, but also the questions presented by this appeal are substantial and are of considerable public importance.

Respectfully submitted,

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APPENDIX "A"

28 United States Code, sec. 1253:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

28 United States Code, sec. 2101(b)

> "Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

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Nos. 480-481

FILED
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HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

FLORIDA CITRUS COMMISSION, *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*

SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*

On Appeal From the United States District Court for the Southern District of Florida.

BRIEF OF APPELLANTS, OTHER THAN THE SECRETARY OF AGRICULTURE, IN OPPOSITION TO MOTIONS TO AFFIRM FILED BY INTERSTATE COMMERCE COMMISSION AND OTHER APPELLEES.

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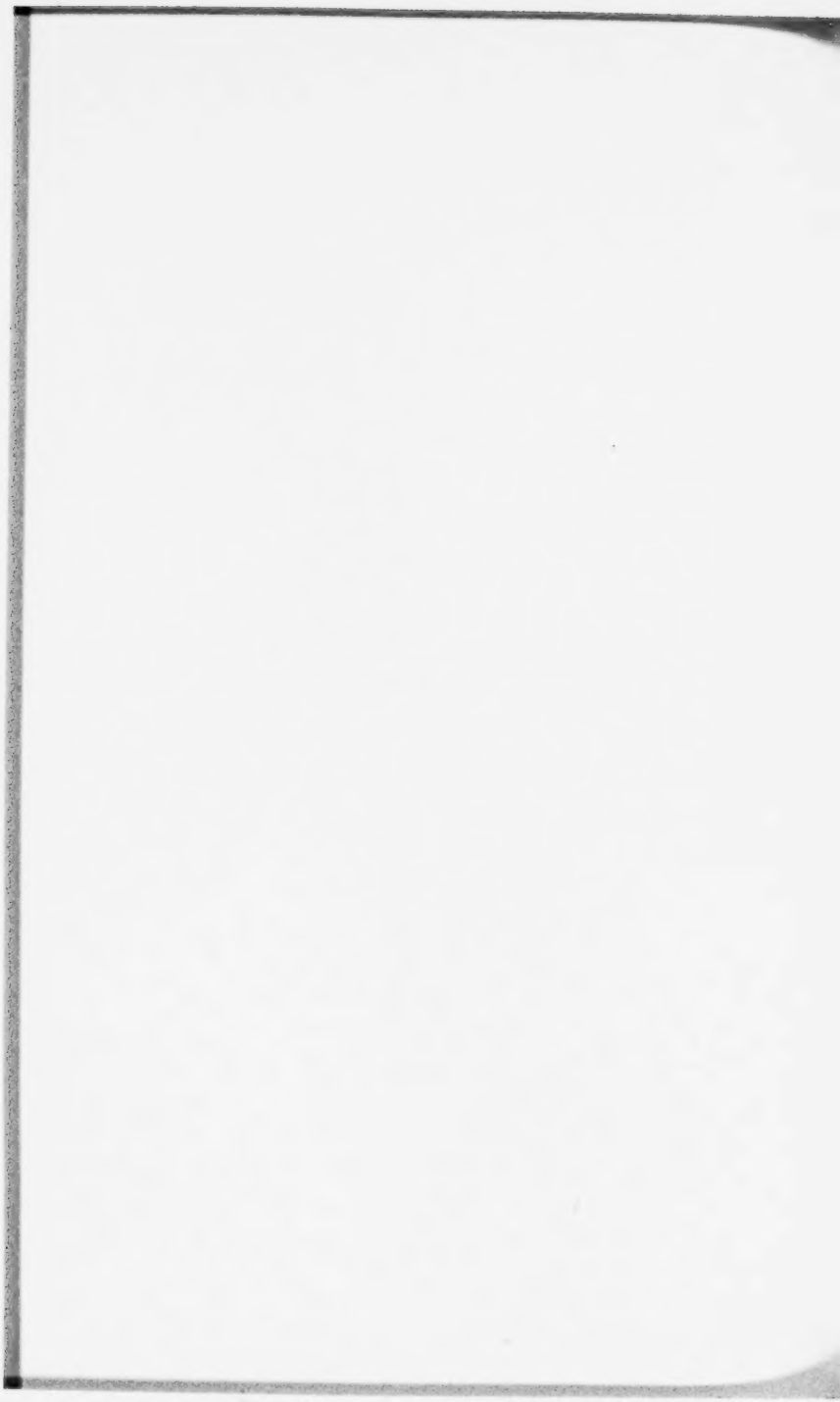

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FLORIDA CITRUS COMMISSION, *et al.*, *Appellants*,

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SECRETARY OF AGRICULTURE OF THE UNITED STATES, *Appellant*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al.*

On Appeal From the United States District Court for the Southern District of Florida.

BRIEF.

Preliminary Statement.

This is a reply under authority of Rule 7 (3) to a motion to affirm filed by appellee, Interstate Commerce Commission, received November 12, 1953, and to a similar motion to affirm filed by appellees, intervening defendants below,

The Baltimore & Ohio Railroad Company, Erie Railroad, The New York Central Railroad Company, The Pennsylvania Railroad Company, and Reading Company, also received November 12, 1953.

The motions and Jurisdictional Statements describe the proceedings in the court below and before the Interstate Commerce Commission. The report of the Commission under review is entitled *Unloading Charges on Fresh Fruits and Vegetables at New York and Philadelphia*, 286 I. C. C. 119.* The decision of the District Court below is reproduced as Appendix B of the Appellants' Jurisdictional Statement (*Florida Citrus Commission, et al.* v. *United States of America, et al.*, 114 F. Supp. 420).

Statement of Additional Facts.

The motions do not adequately state the facts involved. Important additional facts are, as recited in the Commission's reports, as follows:

For over 50 years, since "the latter part of the nineteenth century," the railroads serving New York, N. Y., "have concentrated their [fresh] fruit and vegetable deliveries" at pier stations voluntarily established and maintained by them on Manhattan Island. (286 I. C. C., p. 122) "A witness on behalf of the Erie stated that pier-station delivery on Manhattan Island is the most efficient method which that carrier has been able to organize. So efficient is the operation that the Erie has handled in 1 day, at piers 20 and 21, as many as 367 cars of fruits and vegetables." (286 I. C. C., p. 126) The Commission found: "The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform, for delivery to the consignee." (286 I. C. C., p. 130) "The record indicates that the unloading [by the railroads at the piers] is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these com-

* There was a prior report of the Commission, 272 I. C. C. 648.

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modities be unloaded and delivered to consignees in the short space of time available." (286 I. C. C., p. 124)

The railroads do not provide, and it is not now possible without the expenditure of approximately $24,000,000 for them to provide, team tracks (conventionally used for the delivery of carload freight) for delivery of the enormous volume of fresh fruits and vegetables consigned for delivery on Manhattan. Over 100,000 carloads are handled annually to the New York area (286 I. C. C., p. 125) and approximately 75 percent are delivered at the Manhattan pier stations. (286 I. C. C., p. 122) The existing team tracks on Manhattan are "heavily used for non-perishable freight." (286 I. C. C., p. 124) "The record established, however, that only a relatively small part of the local volume of such [fruit and vegetable] traffic can be accommodated on the existing team tracks in Manhattan." (286 I. C. C., p. 131) "On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track deliveries, and that the 'difference in costs resulting from the fact that pier delivery does not require any investment in team-track facilities' disfavors the investment that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs, incident to operation of such expanded facilities." (286 I. C. C., p. 133)

The unloading of the cars of fruits and vegetables at the pier stations is performed by the railroads prior to delivery of the freight to the consignees and the unloading by the railroads is essential in order that they may make the freight accessible to the consignee and accomplish delivery. "There are no physical means by which consignees' trucks can reach the car floats. Consignees have, however, access to the cars on the car float for the purposes of inspection,

but they are not permitted to take delivery of their freight from that facility. The pier floor is the first place where, after the freight has been unloaded, delivery can be taken." (286 I. C. C., p. 125) "Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor." (272 I. C. C., pp. 654-655) "After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away." (286 I. C. C., p. 127) "Respondents do not accord the consignees the option of performing the unloading. Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery." (286 I. C. C., p. 123) The railroad proposal is to assess "a charge, in addition to the line-haul rate, for making delivery at New York piers." (286 I. C. C. 129)

The line-haul rates of the railroads have always covered the delivery of the fruit and vegetable traffic to consignees at the Manhattan pier stations, including the unloading of cars in connection therewith, and no charge in addition to the line-haul rates was made therefor until November 1, 1948, following the Commission's original decision herein authorizing such charges. "No charges such as those under consideration have applied on this traffic in the past." (286 I. C. C., p. 120) "Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal service, including unloading, could not have been ignored in determining line-haul rates." (272 I. C. C., p. 662)

The line-haul rates of the railroads to New York, N. Y., have always covered, and continue to cover today, delivery of all other kinds of freight to consignees at the Manhattan pier stations, including the unloading of cars in connection therewith, without separate or additional charge. "At the present time, these carriers utilize approximately 35 city-

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owned piers for the handling of freight of all descriptions. As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are carfloated and unloaded." (286 I. C. C., p. 123) "The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from or loaded into cars on car floats. Freight of all kinds may be shipped from and to these piers, except that the Pennsylvania produce terminal (piers 27 and 28) is limited to the receipt and delivery of perishable freight. But even these piers, in addition to the handling of fruits and vegetables, are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish, oysters, flower bulbs, and raw silk. All freight, other than fruits and vegetables, is unloaded by the rail carriers at their pier stations without charge therefor in addition to the line-haul rates." (286 I. C. C., p. 125)

The Questions Presented Are Substantial.

The motions to affirm are not sustainable unless it be shown, as provided in par. 4 of Rule 7, that "the questions on which decision of the cause depends are so unsubstantial as not to need further argument."

The decision of the court below sustaining the assailed orders of the Commission was rendered by two judges (Circuit Judge Louie W. Strum and District Judge William J. Barker) with one judge dissenting (District Judge Dozier A. DeVane) because in his opinion the Commission's orders were invalid and should be set aside.

The Commission found decision of the matter attended with unusual legal difficulty. It issued two reports and reached substantially different decisions in each, and advanced different reasons and grounds of decision in each. The second report, following two further hearings, states

the reasons and grounds for the Commission's final decision under the heading "General discussion and conclusions." (286 I. C. C., pp. 139-142) In this statement the Commission does not adopt or repeat certain of the principal grounds advanced in the original decision (272 I. C. C., at pages 662-663) but abandons them and plainly states in its final report the only grounds of that final decision. In fact, the original report and order thereunder were superseded and cancelled, and some of the grounds originally advanced were flatly reversed in the final report, such as the views as to the weight to be given the benefit derived by the railroads from the concentration of the traffic at the pier stations and as to the effect of the charges on the volume of traffic. The special attention of the Court is called to the fact that the motions to affirm place primary reliance upon grounds of decision quoted from the Commission's first report (notably from page 662 thereof) which were abandoned by the Commission in reaching its final decision. A similar error is found in the opinion of the majority of the court below. In its last report (286 I. C. C. 119, at page 142) the Commission specifically found that "the schedules naming the assailed unloading charges " (approved in the first report, 272 I. C. C. 648) "will be ordered cancelled" and that "the ultimate finding in the prior report is modified accordingly."

The Commission's first report, approving the full amount of the extra charges proposed by the railroads, was concurred in by six commissioners, with four commissioners dissenting, and one not participating. (272 I. C. C. 648, p. 663) In the second report the charges approved by the majority in the first report were found "not shown to be just and reasonable" and such charges were ordered cancelled (286 I. C. C., p. 142); but the Commission authorized lowered extra charges because of the majority view that "the cost of unloading should be borne partly by the shippers and partly by the respondents." (296 I. C. C., p. 140) The second report was reached, after two oral arguments,

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with one commissioner dissenting, one not participating, and with three commissioners joining in a special concurrence that they fully agreed "with this report to the extent that it reverses the prior report," from which they had dissented, and stating further that they "go along" with "the additional ultimate findings in this present report only because they afford some immediate relief to shippers in that unloading charges here approved are substantially lower than the proposed charges which have been applied on this traffic since November 1, 1948, pursuant to the findings in the prior report." (286 I. C. C., p. 142)

After the first further hearing the two hearing examiners had recommended that the extra charges in addition to the line-haul rates be found to be unjust and unreasonable in their entirety. The same conclusion was recommended by the examiner after the second further hearing. The difference between the conclusions of the examiners and the conclusion of the majority of the Commission is not a matter of fact but one of law.* This is stated by Commissioner Knudson in his dissent to the final report:

> "In my opinion, the report of the majority is not based upon the provisions of the Interstate Commerce Act, which it is the duty of this Commission to administer and enforce. The facts in this proceeding are clear. They were fully stated in the reports of the examiners and have been reproduced almost verbatim in the majority report. Instead, however, of applying the law to those facts the majority, in my opinion, has resorted to expediency and compromise." (286 I. C. C., pp. 142-143)

This appeal presents substantial questions of general and fundamental importance in the administration of the Interstate Commerce Act. The importance of this particular case can not be questioned. The charges originally approved by the Commission placed an additional burden of

* The reports of of the examiners are appended to the complaint as Appendix H and Appendix I.

approximately $2,000,000 a year on producers, shippers and receivers of fresh fruits and vegetables as to New York alone. (286 I. C. C., p. 129) At the lowered charges finally authorized, this additional burden is well in excess of $1,000,000 annually. The additional burden on shipments to Philadelphia amounts to several hundred thousand dollars annually. (286 I. C. C., p. 137)

A number of fundamentally important questions of law are presented by the appeal,* among the more important of which are the following:

1. May the Commission disregard the universal obligation of the railroads under their line-haul rates to make delivery of freight to consignees and in disregard thereof authorize an extra charge in addition to the line-haul rates for such delivery without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation?

2. Where the railroads have chosen not to provide team-track terminal facilities, which are customarily provided as public terminals for the delivery of carload freight, but have chosen in lieu thereof to employ pier stations, are the railroads discharged from their obligation to make delivery under their line-haul rates?

3. Where the railroads have for more than 50 years made delivery of fruit and vegetable traffic at their pier stations in New York under their line-haul rates (including performance of unloading of cars which is essential to make the freight accessible to consignees and accomplish delivery), is the Commission not duty-bound by the provisions of Section 15(7) of the Interstate Commerce Act to require railroads proposing an additional charge for delivery to sustain "the burden of proof" of showing that their line-haul rates (a)

* As indicated in the Assignment of Errors accompanying the appeal.

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do not cover delivery or (b) are inadequate to cover such service; and in the absence of such a showing, and Commission findings that such showing has been made, is the Commission not required to find the additional charge unjustified and order it cancelled?

4. Was the Commission's action arbitrary in authorizing a charge in addition to the line-haul rates for the delivery of fruit and vegetable traffic at the railroad pier stations when the railroads make delivery of all other kinds of carload freight at these stations at their line-haul rates without extra charge, the Commission having found that the physical method of handling, including unloading of cars, is identical as to all traffic?

5. Did the Commission act arbitrarily and contrary to the Interstate Commerce Act in authorizing unloading charges at New York and Philadelphia on fruits and vegetables in addition to the line-haul rates, when no such charges are assessed at any other point except where the consignee elects to request carrier unloading as a special additional service beyond delivery?

ARGUMENT.

Under American custom and practice it has long been established as a matter of law that the line-haul rates of the railroads include delivery of the freight to the consignee. This was succinctly stated by this Court in *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402, at p. 409, as follows:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur-tracks owned by an industry."

This fundamental rule of law was stated in historical terms by the Commission in *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I.C.C. 310, at p. 314, in the following language:

> "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery."

In *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U. S. 294, the Commission's ruling in the cited case was approved. In the present case the Commission disregarded this fundamental rule of law and authorized the railroads to make an extra charge in addition to the line-haul rates for the making of delivery without making the essential determinations which are a prerequisite to any such additional charge, namely, that the particular line-haul rates involved (a) do not cover delivery or (b) that the line-haul rates are inadequate to compensate the railroads for the delivery service. The Commission considered the so-called unloading charge without regard to the fact that it is a charge for a service which is, as shown by the Commission's own findings, no more than an essential part of the delivery service, universally a service compensated for by the line-haul rates and for over 50 years covered by the particular line-haul rates here involved. The Commission's final report (286 I. C. C. 119) and particularly the section thereof headed "General discussion and conclusions," in which the Commission fully and plainly states the reasons for its final decision, will be read in vain for any determination or finding that the unloading service is a service in addition to, or outside of, the delivery service which the railroads are obligated to perform under their line-haul rates. On the contrary, the Commission's findings make plain that the charges under consideration are "for making delivery" (286 I. C. C., p. 129) and that delivery of the traffic at the pier stations cannot be accomplished by the railroads without unloading of the cars

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by the railroads. (286 I. C. C., pp. 123, 125, 127; 272 I. C. C., pp. 654-655) The Commission's report makes clear that the charge involved is in reality not a charge for unloading but *a charge for delivery.**

The case of the shippers and receivers of the fruit and vegetable traffic rests on the simple and self-evident proposition that the railroads *should not be permitted to charge twice for the same service.* The Commission, in failing to determine the scope of the line-haul rates or their adequacy to compensate the railroads for the delivery service involved, has failed to make the inquiry essential to prevent the railroads from making a duplicate charge for a service already fully paid for in the line-haul rates.

What we do find in the "General discussion and conclusions" (286 I. C. C., pp. 139-142) is that it is not considered feasible for the railroads to provide at New York team-track terminal facilities, which are customarily provided as public terminals for the delivery of carload freight, and that the use of pier stations for the handling of such traffic "is of benefit to both shippers (including consignees) and carriers." The Commission then concludes "that the cost of unloading should be borne partly by the shippers and partly by the respondents." (pp. 139-140) The use of all transportation and terminal facilities is of benefit to both shippers and carriers. The shipper gets his goods transported to the place desired and the carriers benefit from the patronage of their facilities. The question here is not whether the shippers benefit from the use of the pier stations for the delivery of their freight but whether they have paid, and are paying, for such use and for such delivery in the line-haul rates. If the line-haul rates fully compensate the railroads for such use and for such delivery, the rail-

* "Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight and placing it on the pier floor where the consignees can accept delivery." (286 I. C. C., p. 123) "Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, for making delivery at New York piers." (286 I. C. C., p. 129)

roads are not entitled to an extra and duplicate charge however beneficial pier station delivery may be to the shipper.

The Commission's discussion concerning the evidence as to team tracks on Manhattan, appearing in the second paragraph of its "General discussion and conclusions" (286 I. C. C., p. 140), plainly discloses the fundamental error of the Commission in failing to recognize, as held by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U. S. 294, that where team-track delivery is not provided under the line-haul rates shippers are entitled to an equivalent substitute service without additional charge. The Commission excuses the failure of the railroads to provide team tracks, but fails to recognize the obligation of the railroads under their line-haul rates to provide an equivalent substitute delivery service. In this discussion the Commission states that the railroads are under no obligation "to provide an excessive amount of terminal service", but not having determined the *quantum* of terminal service compensated for in the line-haul rates, or whether such line-haul rates include or do not include delivery, or whether such line-haul rates are adequate or inadequate to compensate for the delivery service performed, the Commission's statement as to "an excessive amount of terminal service" is without any support in the findings and is a pure assumption.

The Commission states that for the reasons just discussed the line-haul rates may be given only slight attention, saying "the propriety of the separate unloading charges may be determined without an extensive showing with respect to the reasonableness of the line-haul rates. The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect." (286 I. C. C., p. 140) The complete failure of the Commission to give effect to the obligation of the railroads to make delivery under their

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line-haul rates is demonstrated by this minimizing of the importance of the line-haul rates and the reference to other communities where shippers unload or charges are assessed for unloading, completely disregarding the fact that unloading charges elsewhere are assessed only when an unloading service is requested by the shipper as a service *additional to delivery.* At such other communities the railroads provide team-track terminal facilities at which they make delivery to consignees *at their line-haul rates* and provide such consignees with an opportunity to unload their freight. At these other communities the railroads fully discharge their obligation to make delivery under their line-haul rates. But at New York the shipper in paying the line-haul rates pays for team-track delivery of his freight, or an equivalent delivery service, but does not receive it. The following language of the Commission, disapproving an extra railroad charge for spur-track delivery, sustained by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.,* 234 U. S. 294, applies equally well to the present case:

> "After a most exhaustive inquiry we can not find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery.
>
> "An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a sidetrack delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done." *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.,* 18 I. C. C. 310, 318.

In sustaining the Commission's decision there, this Court said:

> "We cannot regard the act to regulate commerce as justifying an increased or extra charge for a substantially similar service . . ." (p. 314)

In the present case the Commission failed to determine the *quantum* of terminal service to which the shipper is entitled under the line-haul rates; nor did it determine that the delivery service performed at the pier stations, for which the extra charge is assessed, is in excess of the amount of service to which the shipper is entitled under the line-haul rate.

From the foregoing it will be seen that in the present case the Commission failed to perform its duty of determining where line-haul transportation ends. The Court is familiar with the many terminal cases in which such findings have been required and have been made.* The issues in the present case required similar determinations and findings by the Commission. In the absence of such determinations the Commission could not validly approve an additional charge for a service customarily paid for by the line-haul rate and which is and has long been paid for by the line-haul rates here involved.

The error of the majority in the court below rests upon crediting the Commission with having made determinations and findings which were not made. The majority opinion below rests on the erroneous views that the Commission "found that unloading is an additional service, wholly distinct from delivery"; "that this method of unloading saves the payment of switching charges by the consignee"; that "the Commission found that the line-haul service terminated when the cars reached the pier station"; and that

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* *E. g., United States* v. *American S. & T. Plate Co.*, 301 U. S. 402; *United States* v. *United States Smelting, R. & M. Co.*, 339 U. S. 186. See also *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, in which an order of the Commission was held invalid because of the absence of essential findings "as to what constitutes complete delivery or where transportation ends." (p. 201)

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the Commission found "that unloading by the carrier is a desirable and justifiable accessorial service." No such determinations or findings were made by the Commission in its final report. A reading of the grounds of decision in the final report under the heading "General discussion and conclusions" discloses that none of these grounds is advanced by the Commission as the basis of its decision. Wholly different grounds are given. The error of the majority below grows out of the recital by the Court of certain findings made by a majority of the Commission in the Commission's original report (272 I. C. C. 648 at p. 662), which were abandoned by the Commission upon reconsideration and after two further hearings. The Commission's grounds of decision upon the "amplified record" are fully stated in its final report under the heading "General discussion and conclusions". (286 I. C. C., pp. 139-140) These findings and conclusions in the original report were reversed following the two further hearings and the charges originally approved were found unjust and unreasonable. We have earlier herein pointed out that the motions to affirm fall into the same error in placing primary reliance upon the conclusions in the Commission's original report which were abandoned and reversed by the Commission after further hearings.

CONCLUSION.

In its motion to affirm, the Commission states: "The Court has many times held, that 'the Commission's determination of the point in time and place at which a carrier's transportation service begins or ends is an administrative finding which, if supported by evidence, is conclusive on the court.'" We do not wish for any one to believe that we are attempting to contravene that principle. On the contrary, we are seeking to enforce it. We are asking this Court to compel the Commission to make a "determination of the point in time and place at which the carrier's transportation service" ends under its line-haul rates and a determination

of the services compensated for by such line-haul rates. In the cases reviewed by this Court in *United States* v. *United Smelting, R. & M. Co.*, 339 U. S. 186, and *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, the Commission performed its required function and made such determinations. It failed to do so in the present case and its orders should be invalidated as was the order reviewed by this Court in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193, which was unsupported by essential findings "as to what constitutes complete delivery or where transportation ends." (p. 201)

The questions involved in this appeal are important to the great citrus and vegetable producing areas of the United States and to the receivers and consumers of these important agricultural commodities. They are of equal importance to all shippers by railroad. The principles involved are applicable to all railroad rates on all traffic. If the Commission may approve extra charges for services compensated for by the line-haul rates, without determining the service covered by and compensated for by the line-haul rates, without determining whether an additional or merely substitute service is involved, and without requiring the railroads to sustain their statutory burden of proof under Section 15(7) of the Interstate Commerce Act, then any part of the transportation service heretofore and now comprehended within the line-haul rates may be made the subject of new, additional and duplicate charges, contrary to the policy of the Act.

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For the foregoing reasons, we submit that the questions presented by the appeal are substantial and that the motions to affirm should be denied.

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No. 481

IN THE

Supreme Court of the United States

October Term, 1953

FLORIDA CITRUS COMMISSION, *et al., Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al., Appellees.*

Appeal From The United States District Court For The Southern District of Florida

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BRIEF FOR THE APPELLANTS

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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the three-judge statutory District Court (R. 204, 208) is reported at 114 F. Supp. 420.

JURISDICTION

This is an appeal from a decision of a three-judge statutory District Court dismissing a complaint seeking to have orders of the Interstate Commerce Commission enjoined,

annulled and set aside. The final judgment of the District Court was entered August 31, 1953 (R. 203) and the petition for appeal was presented to the District Judge and allowed on October 28, 1953. (R. 220) The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by 28 U.S.C. Supp. V, Sections 1253 and 2101(b).

QUESTIONS PRESENTED

1. May the Interstate Commerce Commission disregard the universal obligation of the railroads under their line-haul rates to make delivery of freight to consignees and in disregard thereof authorize an extra charge in addition to the line-haul rates for such delivery without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation?

2. Where the railroads have chosen, as at New York, N. Y., not to provide team-track terminal facilities, which are customarily provided as public terminals for the delivery of carload freight, but have chosen in lieu thereof to employ pier stations, are the railroads discharged from their obligation to make delivery under their line-haul rates?

3. Where the railroads have for more than 50 years made delivery of fruit and vegetable traffic at their pier stations in New York under their line-haul rates (including performance of unloading of cars which is essential to make the freight accessible to consignees and accomplish delivery), is the Commission not duty-bound by the provisions of Section 15(7) of the Interstate Commerce Act to require railroads proposing an additional charge for delivery to sustain "the burden of proof" of showing that their line-haul rates (a) do not cover delivery or (b) are inadequate to cover such service; and in the absence of such a showing, and Commission findings that

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such showing has been made, is the Commission not required to find the additional charge unjustified and order it canceled?

4. Was the Commission's action arbitrary in authorizing a charge in addition to the line-haul rates for the delivery of fruit and vegetable traffic at the railroad pier stations when the railroads make delivery of all other kinds of carload freight at these stations at their line-haul rates without extra charge, the Commission having found that the physical method of handling, including unloading of cars, is identical as to all traffic?

5. Did the Commission act arbitrarily and contrary to the Interstate Commerce Act in authorizing unloading charges at New York and Philadelphia on fruits and vegetables in addition to the line-haul rates, when no such charges are assessed at any other point except where the consignee elects to request carrier unloading as a special additional service beyond delivery?

STATUTE INVOLVED

Sections 1(3)(a), 1(5), 2, 3(1), 6(1)(7), 15(6), 15(7), and 15a(2), as amended, of the Interstate Commerce Act are set forth in Appendix A hereto.

STATEMENT

For over 50 years, since "the latter part of the nineteenth century," the railroads serving New York, N. Y., "have concentrated their [fresh] fruit and vegetable deliveries" at pier stations voluntarily established and maintained by them on Manhattan Island. (R. 23e, 286 I.C.C., p. 122)* At Philadelphia deliveries were concentrated at

* The quoted material is from the report of the Interstate Commerce Commission here under review, *Unloading Charges on Fresh Fruits and Vegetables at New York and Philadelphia*, 286 I.C.C. 119, or from a prior report in the same proceeding, 272 I.C.C. 648. (R. 24)

the produce terminal station of the Pennsylvania Railroad. (R. 23r, 286 I.C.C., p. 134) "Through rates apply on fresh fruits and vegetables, in carloads, from points in the various producing areas throughout the country to stations in New York and Philadelphia." (R. 23b, 286 I.C.C., p. 120)

In making deliveries of the fresh fruit and vegetable traffic at the pier stations in New York and at the produce terminals in Philadelphia, the railroads unload the cars and move the freight to the places in their stations where the freight is delivered to the consignees. Prior to November 1, 1948, "there were no separate charges in addition to the through rates, for unloading fruits, vegetables, or other descriptions of traffic at the stations specified. The charges which became effective on that date apply only on fresh fruits and vegetables" and not on other traffic. (R. 23c, 286 I.C.C., p. 121) "No charges such as those under consideration have applied on this traffic in the past." (R. 23b, 286 I.C.C., p. 120)

Effective November 1, 1948, for the first time the railroads provided charges in addition to their line-haul rates to New York and Philadelphia for the unloading and delivery of fresh fruits and vegetables, in carloads, at the pier stations in New York and at the railroad produce terminals in Philadelphia. The railroads deny to the consignees any opportunity to unload their freight at these stations and insist upon performing the unloading themselves. The new charge assessed in addition to the line-haul rates covers unloading and delivery of the freight. "*Under their proposal the line-haul rate will apply only to the New York piers, with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery.*" (R. 23e, 286 I.C.C., p. 123) "Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River *while assessing a charge, in addi-*

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tion to the line-haul rate, for making delivery at New York piers." (R. 23m, 286 I.C.C., p. 129) At Philadelphia the consignee is denied delivery at the produce terminal unless he orders the freight unloaded by the carrier and pays the so-called "unloading" charge in addition to the line-haul rate. (R. 23s, 286 I.C.C., p. 134)

The shippers and receivers and public bodies protesting against the proposed charge contended that it represented a charge for a delivery service which has been and is included in the line-haul rate, such service having been performed without charge in addition to the line-haul rates for more than 50 years and being a service which the carriers are customarily required to perform under their line-haul rates. "On behalf of the city [of New York], it is argued that the unloading service at the piers is an integral part of the movement of the traffic from origin to ultimate destination, for which the charge is included in the line-haul rate, and that for this service, which has been performed by the carriers without extra charge, for more than 50 years, no additional charge is warranted." (R. 23m, 286 I.C.C., p. 129)

The charge in addition to the line-haul rates was made effective after the first report of the Commission in I. & S. Docket 5500, *Unloading Charges, Fruits and Vegetables, N. Y. and Phila.* 272 I.C.C. 648, decided October 4, 1948. (R. 24) Following reopening and two further hearings, the Commission in the further and final report here under review (286 I.C.C., p. 119, decided May 7, 1952; R. 23) found the charges originally approved by it and made effective by the railroads to be "not shown to be just and reasonable" and ordered the charges canceled "without prejudice to the establishment of charges in conformity with the views expressed herein." In its final report the Commission authorized and approved the establishment by the railroads of charges in addition to their line-haul rates for the unloading and delivery service on a substantially lower level than those originally authorized. The lower extra

charges were established by the railroads at New York effective July 3, 1952, and at Philadelphia August 1, 1952. (R. 31, 37) Complaints were filed by plaintiffs and intervening plaintiffs against these charges shortly thereafter. These complaints were dismissed by the Commission upon motion without hearing on the ground that the complaints assailed charges approved by the Commission in its report of May 7, 1952, *Unloading Charges on Fruits and Vegetables, N. Y. and Phila.*, 286 I.C.C. 119. (R. 26)

The Commission Proceedings.

By tariffs filed to become effective June 1, 1947 the railroads proposed charges to be assessed in addition to their line-haul rates for unloading the fruit and vegetable traffic and making delivery at New York and Philadelphia. (R. 24a, 272 I.C.C., p. 648; R. 23a, 286 I.C.C., p. 123). Upon protests of "numerous shippers and shipper organizations, State commissioners, The Port of New York Authority, and other interests" the operation of the tariffs was suspended and the Commission instituted an investigation into the lawfulness of the proposed charges. (R. 24a, 272 I.C.C., p. 649) Following hearing and two oral arguments the Commission issued its first report dated October 4, 1948, *Unloading Charges, Fruits and Vegetables, N. Y. and Phila.*, 272 I.C.C. 648. (R. 24, *et seq.*) In this report the Commission, with four Commissioners dissenting, found "that the schedules under investigation are just and reasonable. An order will be entered vacating the order of suspension and discontinuing this proceeding." (R. 24r, 272 I.C.C., p. 663) Unloading charges were thereupon established by the railroads in uniform amounts at New York and Philadelphia, effective November 1, 1948, in the following amounts:

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	Per Net Ton
Citrus fruits	$1.95
Fresh fruits (other than citrus)	2.28
Melons (including cantaloupes)	2.60
Vegetables, fresh or green, not coldpack or frozen	1.95
Vegetables, fresh or green, not coldpack or frozen, when top icing or body icing is used	2.60

(R. 23b, 286 I.C.C., p. 120)

These charges approximated "the claimed average costs of unloading the several groups of commodities." (R. 23c, 286 I.C.C., p. 121) The amounts above shown, made effective November 1, 1948, were 30 percent greater than the railroads originally proposed, the increase being in conformity with a general increase in all railroad rates and charges authorized by the Commission as of October 6, 1947. (R. 23b, 286 I.C.C., p. 120)

"Upon petitions for reopening and reconsideration by the Florida Railroad and Public Utilities Commission, the California Citrus League, The Port of New York Authority, the Secretary of Agriculture, the Philadelphia Terminals Marketing Association, and others, the proceeding was reopened for rehearing" (R. 23a, 286 I.C.C., pp. 119-120) by order dated June 9, 1949. (R. 292) A rehearing was had following which the two hearing examiners issued a proposed report recommending that the Commission find the "charges assailed for unloading fresh fruits and vegetables, in carloads, at New York and Philadelphia are unjust and unreasonable, and that the findings in the prior report herein should be reversed. The schedules naming the unloading charges assailed should be ordered canceled and the proceeding discontinued." (R. 80)

On July 24, 1950 the Commission heard oral argument on the report of the examiners and exceptions filed by respondent railroads thereto. No report or decision was is-

sued at that time; but on October 10, 1950, a "Notice" was issued "By the Commission," reading (R. 293):

> "Upon further consideration of the record in the above-entitled proceeding, it appears that the record is deficient in respect of certain evidence which seems to be important, and the proceeding will be assigned for further hearing.
>
> "At this further hearing, in addition to other evidence which they may deem appropriate, respondent railroads will be expected to present evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team tracks on Manhattan Island and Jersey City, N. J. Among other things, such evidence should show the difference in, and cost of, switching services required on cars accorded team-track delivery and any difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities. Also, to the extent that differences in costs exist at Philadelphia, as between carloads which are unloaded by respondents and those unloaded by shippers, respondents should submit similar evidence to show the amount of such differences. Protestants may also submit such further evidence as they deem appropriate.
>
> "The above-entitled proceeding will be assigned for further hearing at times and places hereafter to be announced."

Protestants, including certain of plaintiffs and intervening plaintiffs, filed with the Commission following issuance of said "Notice," petitions and motions for entry of order requiring cancellation of the tariffs. (R. 296-299, 311) The petitions and motions were denied by the Commission by order dated November 16, 1950. (R. 16, 179)

Further hearing was held in June, 1951, at which additional evidence was presented and in August, 1951, the examiner issued a "Second Report on Further Hearing" and recommended (R. 115-116):

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"Upon further hearing the Commission should find that the charges under consideration, for the unloading of fruits and vegetables at New York and Philadelphia, are not shown to be just and reasonable, and that they are also in violation of Section 3(1) of the Act. The ultimate finding in the prior report should be reversed. The schedules naming these unloading charges should be ordered cancelled and the proceeding discontinued."

The fourth oral argument was heard by the Commission on September 26, 1951. Under date of May 7, 1952, the Commission issued its "Report of the Commission on Rehearing and Further Hearing," *Unloading Charges, Fruits and Vegetables, N. Y. and Phila.*, 286 I.C.C. 119. (R. 23) In this report the Commission, with Commissioners Splawn, Aitchison and Lee "concurring specially" and Commissioner Knudson dissenting, made the following ultimate finding (R. 23bb-23cc, 286 I.C.C., p. 142):

"Upon rehearing and further hearing, we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, and the schedules naming the assailed unloading charges will be ordered canceled and the proceeding discontinued without prejudice to the establishment of charges in conformity with the views expressed herein. The ultimate finding in the prior report is modified accordingly."

Issued with the report was order bearing the same date, May 7, 1952 (R. 25), which (1) required the railroads to cancel their established tariffs providing the unloading charges under investigation; (2) authorized and approved the establishment by the railroads of the lower charges stated by the Commission in its report; and (3) discontinued the proceeding. The said order of May 7, 1952 incorporated the report of May 7, 1952 and the prior report (R. 24, 272 I.C.C. 648), these reports being "referred to

and made parts hereof'' by the terms of said order. Under the terms of the said order and the reports incorporated therein, the Commission authorized and approved the ''establishment'' by the railroads at New York and Philadelphia of so-called unloading charges to be assessed in addition to the line-haul rates in the following amounts (R. 23bb, 286 I.C.C., p. 141):

	Per Net Ton
Citrus fruits	$1.05
Fresh fruits (other than citrus)	1.35
Melons (including cantaloupes)	1.65
Vegetables, fresh or green, not cold pack or frozen	1.05
Vegetables, fresh or green, not coldpack or frozen, when top icing or body icing is used	1.65

The above charges were established by the railroads, in lieu of their former charges, at New York effective July 3, 1952 and at Philadelphia effective August 1, 1952. (R. 31, 37)

Under date of September 16, 1952 certain of plaintiffs and intervening plaintiffs filed with the Commission a complaint assailing the unloading charges made effective *at New York, N. Y.*, on July 3, 1952, as ''unjust and unreasonable in violation of Section 1'' of the Interstate Commerce Act.* (R. 28) The City of New York and the Secretary of Agriculture intervened. (R. 1551) A similar complaint was filed with the Commission on September 23, 1952 making substantially the same allegations concerning the unloading charges at *Philadelphia, Pa.*, by most of the same

* Complainants were Florida Citrus Commission, Growers and Shippers League of Florida, California Citrus League, California Grape and Tree Fruit League, United Fresh Fruit and Vegetable Association, and The Port of New York Authority. The complaint was designated Docket No. 31105.

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complainants.* (R. 35) By identical motions the defendant railroads moved the Commission to dismiss these complaints on the ground that the charges assailed had been specifically authorized and approved by the Commission in its report of May 7, 1952. (R. 1541-1546) These motions were granted and the complaints were dismissed by order dated December 15, 1952. In this order the Commission recited that the unloading charges assailed were those "stated in the findings" in the report of May 7, 1952 and that such charges had been "*approved in said report.*" It also recited "that the circumstances and conditions with respect to the *approved* unloading charges have not materially changed since substantially the same issues were decided by the Commission." (R. 26)

Orders Sought to be Annulled.

The Court is asked to enjoin, suspend, set aside and annul two orders of the Commission, namely:

First, that portion of the order of May 7, 1952 authorizing and approving the establishment and maintenance by the railroads at New York, N. Y., and Philadelphia, Pa., of unloading charges on shipments of fruits and vegetables in addition to their line-haul rates, issued in I. & S. Docket 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia* (R. 25); and

Second, the order of December 15, 1952 ratifying and reaffirming the authorization and approval of the said unloading charges, issued in, and dismissing without hearing the complaints in, Docket 31105, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio R. Co., et al.*, and Docket 31106, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio R. Co., et al.* (R. 26)

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* The complainants were the same except that The Port of New York Authority was not a party and the following two additional complainants were added: Philadelphia Terminals Marketing Association and Auction Receivers of Philadelphia. This second complaint was designated Docket No. 31106.

The Commission Findings.

The report of the Commission under review (R. 23, 286 I.C.C. 119) states that "the conditions governing *delivery of the traffic* under consideration at New York and Philadelphia are somewhat dissimilar" and states the facts as to terminal delivery at the two places separately. (R. 23d, 286 I.C.C., p. 122) (Italics supplied) In reaching its conclusion the Commission gave predominant consideration to the situation at New York, merely noting as to Philadelphia that "it is desirable that the charges for unloading at New York and Philadelphia be the same. The charges herein approved are for application at both points." (R. 23bb, 286 I.C.C., p. 141) In our statement we shall likewise state the facts as to terminal delivery separately for New York and Philadelphia and shall deal primarily with the situation at New York.

Delivery at New York. At New York the railroads do not provide team tracks, conventionally used for the delivery of carload freight, adequate for the delivery of the tremendous volume of fresh fruits and vegetables transported to that point. The annual rail movement to the New York area approximates 100,000 carloads. (R. 23h, 286 I.C.C., p. 125) "Approximately 75 percent of the fresh fruits and vegetables consigned to the New York market is delivered at the pier stations of the Pennsylvania, Erie, Baltimore & Ohio, and New York Central" located on the Hudson River on the lower west side of Manhattan Island. (R. 23e, 286 I.C.C., p. 122) "The remainder of the deliveries is made to chain-store warehouses or to team tracks and sidings in other parts of the city. *The railroads established their delivery terminals on the waterfront indicated during the latter part of the nineteenth century and have concentrated their fruit and vegetable deliveries in this area.*" (R. 23e, 286 I.C.C., p. 122) "These piers are adjacent to Washington Market, the largest fruit and vegetable market in New York and the primary market for the entire

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metropolitan area. The principal consuming population served by the New York wholesale market lies east of the Hudson River, where 80 percent of the volume of fruits and vegetables delivered to that market is distributed. The wholesale market is in the lower part of Manhattan Island. The considerations which led to that location have been justified by the growth of facilities in that area to receive, sell, and store perishable commodities." (R. 23e, 286 I.C.C., p. 123) (Italics supplied)

"Because of the geographical location of New York, freight consigned to that point must be moved thereto either by car floats or lighters across the Hudson River from the New Jersey side, except, as stated, traffic routed over the New York Central.* The rails of the other respondents serving that point, as regards freight traffic, terminate at points on the west bank of the Hudson River in the vicinity of Jersey City, N. J. Carloads of fruits and vegetables arriving at these rail terminals, consigned to New York, are moved onto car floats equipped with tracks, and transported by tugs across the Hudson River, either to certain piers equipped for the handling of such traffic, where the freight is unloaded by the carriers and placed on the pier platform for delivery to the consignee, or to certain locations equipped with float bridges over which the cars are moved from the car floats to rails extending therefrom to certain team tracks, private sidings, or warehouses, where delivery is completed and the freight ordi-

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*"Only one of the respondents, the New York Central, has an all-rail line into Manhattan for the delivery of freight. The line enters New York from the north and extends south over the west side of the city to a point not far from the wholesale market area. The line has limited capacity and could not handle expeditiously the volume of fruits and vegetables delivered to the New York market even if its facilities were opened to other carriers. In fact many of the cars of fresh fruits and vegetables delivered by that carrier for trading in the wholesale market are moved by car float to its pier station (piers 16 and 17) in the vicinity of Barclay Street." (R. 23f, 286 I.C.C., p. 124)

narily unloaded by the consignee." (R. 23f-23g, 286 I.C.C., p. 124)

The pier stations at New York "have no team track facilities on which cars can be placed" for unloading by the consignee. "Respondents do not accord the consignees the option of performing the unloading" at the piers. (R. 23f-23e, 286 I.C.C., p. 123) "After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away." (R. 23k, 286 I.C.C., p. 127) "There are no physical means by which consignees' trucks can reach the car floats." Consignees "are not permitted to take delivery of their freight from that facility. *The pier floor is the first place where, after the freight has been unloaded, delivery can be taken.* At the original hearing the railroads offered to permit consignees to unload their freight from the car float. After the prior decision in this proceeding, the California Fruit Growers Exchange requested the railroads to permit the consignees, as a whole, to perform the unloading at the piers. The request was denied." (R. 23g-23h, 286 I.C.C., p. 125) (Italics supplied.)

"In taking pier station delivery, the fruit and vegetable trade has the advantage of displaying the entire contents of the car, thus affording the buyer the benefit of a thorough examination of the freight; of using the pier facilities as a sales' mart; and of occupying auction-room facilities without special charge therefor." (R. 23h, 286 I.C.C., p. 125)

Charges for display, sorting, stacking, or other services after delivery, are not involved in this case. In its original report the Commission said (R. 24i, 272 I.C.C., p. 655):

> "Services not contemplated as part of those for which the unloading charges are proposed, include sorting of the packages according to brand, grade, and size. Although usually performed by representatives of the consignee, the entire load in the first instance may be stacked by railroad labor or by agents of the carriers

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and then resorted and restacked either by rail or consignee employees; or the rail employees, when previously advised by the consignee, may sort the packages as they are taken from the trucks. For this resorting and restacking service, when performed by the railroads or their designated agents, a charge is made pursuant to appropriate tariff authority. See *Allowances for Stacking,* 179 I.C.C. 780."

Delivery of the fruit and vegetable traffic at the pier stations in New York is the most efficient and economical method of delivery for the railroads. The Commission found:

> "The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee." (R. 23n, 286 I.C.C., p. 130)

"The record indicates that the unloading is performed with a high degree of efficiency and with the utmost dispatch. In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available. When the cars are unloaded they are immediately returned empty to the New Jersey side, and other car floats are placed at the piers for unloading. So expeditious is the unloading service that it permits of the use of the same platform space for unloading and stacking freight two and sometimes three times each night on which loading is performed." (R. 23g, 286 I.C.C., pp. 124-125) "*A witness on behalf of the Erie stated that pier-station delivery on Manhattan Island is the most efficient method which that carrier has been able to organize.* So efficient is the operation that the Erie has handled in one day, at piers 20 and 21, as many as 367 cars of fruits and vegetables. It never handles less than 50 cars a day. This method of delivery has been utilized by the Erie for more than 60 years." (R. 23i, 286 I.C.C., p. 126) (Italics supplied)

The railroads do not provide, and it is not now possible without the expenditure of approximately $24,000,000 for them to provide, team tracks (conventionally provided for the delivery of carload freight) for delivery of the enormous volume of fresh fruits and vegetables consigned for delivery on Manhattan. The existing team tracks on Manhattan "are heavily used for nonperishable freight." (R. 23f, 286 I.C.C., p. 124) In its "Notice" of October 10, 1950 issued after rehearing and specifying evidence to be furnished at a further hearing, the Commission had called upon the railroads to supply "evidence to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team-tracks on Manhattan Island and in Jersey City, N. J." (R. 293) The hearing examiner found that the "respondents have failed to respond in any substantial way to the terms of that notice." (R. 95) The Commission found: "The respondents have not shown what investment would be required for the construction in Manhattan of team tracks necessary to accommodate delivery of the fruit and vegetable traffic. * * * Respondents assume that as to both piers and team tracks the existing facilities are adequate to accommodate the entire volume of fruit and vegetable traffic destined for Manhattan delivery. *The record establishes, however, that only a relatively small part of the total volume of such traffic can be accommodated on the existing team tracks in Manhattan.*" (R. 23o, 286 I.C.C., p. 131) (Italics supplied.)

A study comparing the costs to the railroads of delivering the fruit and vegetable traffic at the pier stations on Manhattan with the costs of providing adequate team tracks and making deliveries thereon was presented by protestants. This evidence showed that for the two railroads handling all but a small part of the traffic at the Manhattan pier stations, the Pennsylvania and the Erie, the cost of construction of the required additional team-track facilities would be $12,212,000 and $11,884,000, respec-

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tively, a total of $24,096,000. (R. 23q, 286 I.C.C., p. 133) The Commission found:

> "On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track deliveries, and that the 'difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities' disfavors the investments that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs, incident to operation of such expanded facilities." (R. 23r, 286 I.C.C., p. 133)

The Commission also found that deliveries on team tracks would require "more car detention and more switching" than does pier delivery. (R. 23i, 286 I.C.C., p. 126) It found further that "The record shows that it would be impracticable, if not impossible, to expand rail facilities on Manhattan to the extent necessary to accord team-track delivery on the volume of fruits and vegetables consigned to New York. The high cost of land on Manhattan Island and the time required for handling cars across float bridges during periods of peak volume of traffic, would render team-track delivery impracticable." (R. 23n, 286 I.C.C., p. 130)

Pier Delivery of Other Traffic. At New York the railroads make delivery of all other kinds of carload freight at their pier stations at their line-haul rates without extra charge. The Commission found that the physical method of handling and delivery, including unloading of cars, is identical as to all traffic.

"Utilization of pier stations by the carriers serving Manhattan Island is not confined to those at which fresh fruits and vegetables are handled. At the present time, these carriers utilize approximately 35 city-owned piers for the handling of freight of all descriptions. As regards the

movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are car-floated and unloaded." (R. 23e-23f, 286 I.C.C., p. 123)

"The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from and loaded into cars on car floats. Freight of all kinds may be shipped from and to these piers, except that the Pennsylvania produce terminal (piers 27 and 28) is limited to the receipt and delivery of perishable freight. But even these piers, in addition to the handling of fruits and vegetables, are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish, oysters, flower bulbs, and raw silk. All freight, other than fruits and vegetables, is unloaded by the rail carriers at their pier stations without charge therefor in addition to the line-haul rates." (R. 23h, 286 I.C.C., p. 125)

"Consideration is, however, being given by respondents to the establishment of unloading charges on traffic other than fresh fruits and vegetables, but as yet no definite conclusion in respect of such action has been reached." (R. 23c, I.C.C., p. 121)

Delivery at Philadelphia. Prior to 1927 deliveries of fruits and vegetables at Philadelphia were made at piers on the Delaware River. "At the piers unloading, similar to the present operations at New York piers, was performed by the carriers without charge therefor other than the line-haul rate. In fact, delivery could not be accomplished without first unloading the freight. In 1927, the Pennsylvania and the Baltimore & Ohio constructed separate and competitive produce terminals, either of which was then capable of accommodating the needs of the fruit trade at that point, and at both of which unloading under the line-haul rate, as previously performed at the piers, was continued." (R. 23r, 286 I.C.C., pp. 133-134)

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"Since 1927 and prior to November 1, 1948, approximately 95 percent of the fruits and vegetables consigned to Philadelphia, other than for chain stores, has been handled at the Pennsylvania produce terminal." This terminal consists of two platforms, designated "A" and "B", where the carrier unloads the cars and makes delivery of the freight to the consignee on the platforms. In addition to the tracks serving the platforms, the Pennsylvania has team tracks at this terminal on which cars of fruits and vegetables are delivered. "The consignees perform the unloading when the cars are spotted on the team tracks, or at other stations of the Pennsylvania." (R. 23r-23s, 286 I.C.C., p. 134)

"Since November 1, 1948, when the charges assailed became effective, the carloading operation at Philadelphia has not changed, except that the Pennsylvania now charges for that service and also refuses the consignees the privilege of unloading their own freight on the platforms if they elect to do so. At present, cars will not be placed for unloading at the platforms unless unloading by the carrier is ordered by the consignee." (R. 23s, 286 I.C.C., p. 134)

Delivery of the freight at the platforms is not accomplished until after the freight has been unloaded from the cars by the carrier and placed on the platform and made available to the receiver. (R. 23s, 286 I.C.C., pp. 134, 135) This method of unloading and delivery "had been performed by the carriers prior to November 1, 1948, without charge therefor other than the line-haul rate. Since the unloading charges became effective, 63 percent of the commodities originally unloaded, sorted, sold, and delivered on the terminal platform is now unloaded on team tracks by consignees." (R. 23t, 286 I.C.C., p. 135)

After the unloading charges became effective the Philadelphia consignees requested the Pennsylvania Railroad to allow them to unload their freight at the produce terminal platforms, but this request was refused. (R. 23v, 286 I.C.C., p. 137)

The Commission recites different costs of unloading and delivery of the traffic at Philadelphia presented by the carriers and by a protestant (R. 23o-23p, 286 I.C.C., pp. 131, 138), but makes no finding except that "Unloading operations are less expensive at Philadelphia than at New York." (R. 23d, 286 I.C.C., p. 122)

The Commission found the team-track facilities of the railroads at Philadelphia adequate to accommodate the fresh fruit and vegetable traffic. (R. 23y, 286 I.C.C., p. 139)

SPECIFICATION OF ERRORS

The District Court erred:

1. In failing to hold that the Commission disregarded the obligation of the railroads under their line-haul rates to make delivery and erroneously authorized at New York, N. Y., and Philadelphia, Pa., an extra charge in addition to the line-haul rates for delivery of fruits and vegetables without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation.

2. In failing to hold that where railroads have voluntarily established and for over 50 years have maintained pier stations for the delivery of fruit and vegetable traffic under their line-haul rates to New York, N. Y., delivery at such stations necessarily involving unloading of the cars by the railroads, the Commission is duty-bound by Section 15(7) of the Interstate Commerce Act to require railroads proposing an additional charge for delivery service at the piers to sustain "the burden of proof" of showing that their line-haul rates (a) do not include delivery or (b) are inadequate to cover such service; and no such showing or findings having been made here the Commission was duty-bound to find the additional charge unjustified and to order it canceled.

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3. In failing to hold that the Commission acted arbitrarily and contrary to the Interstate Commerce Act in authorizing a charge in addition to the line-haul rates for the delivery of fruit and vegetable traffic at the railroad pier stations when the railroads make delivery of all other kinds of carload freight at these stations at their line-haul rates without extra charge, the Commission having found that the physical method of handling and delivery, including unloading of cars, is identical as to all traffic.

4. In failing to hold that the Commission acted arbitrarily and contrary to the Interstate Commerce Act in authorizing unloading charges at New York, N. Y., and Philadelphia, Pa., on fruits and vegetables in addition to the line-haul rates when such charges are not assessed at any other point except where the consignee elects to request carrier unloading as a special additional service beyond delivery.

5. In concluding that the Commission found "that unloading is an additional service, wholly distinct from delivery," and that the Commission found that unloading by the carrier "is a desirable and justifiable accessorial service."

6. In concluding that the Commission found "this method of unloading saves the payment of switching charges by the consignee."

7. In dismissing the complaint and in failing to enjoin, set aside and annul that portion of the order of the Commission dated May 7, 1952 authorizing and approving the establishment and maintenance by the railroads at New York, N. Y., and Philadelphia, Pa., of unloading charges on shipments of fruits and vegetables, in carloads, in addition to their line-haul rates (issued in I. & S. Docket 5500), and the order of the Commission dated December 15, 1952, ratifying and reaffirming such authorization and approval and dismissing without hearing the complaints in Dockets Nos. 31105 and 31106.

ARGUMENT

SUMMARY OF ARGUMENT

Under American custom and practice it has long been established as a matter of law that the line-haul rates of the railroads include delivery of the freight to the consignee. This was succinctly stated by this Court in *United States* v. *American S. & T. Plate Co.*, 301 U. S. 402, 409, as follows:

> "It is conceded that the line-haul rate covers delivery. Such rates are usually made to or from an area, sometimes designated a 'switching district' or 'switching limits.' Within that area the carrier holds itself out as agreeing to deliver freight in its freight depot or at team tracks or on sidings or spur tracks owned by an industry."

This fundamental rule of law was stated in historical terms by the Commission in *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I.C.C. 310, 314, in the following language:

> "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery."

In the present case the Commission authorized and approved for the first time the establishment by the railroads of a separate charge for delivery, in addition to their line-haul rates, on carload shipments of fresh fruits and vegetables from origins throughout the United States to New York, N. Y., and Philadelphia, Pa., without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation. The additional charge is termed an "unloading" charge but the Commission's findings make inescabably clear that the charge in-

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volved is *a charge for delivery.* In its final report the Commission states (R. 23e, 286 I.C.C., p. 123):

> "Respondents [the railroads] do not accord the consignee the option of performing the unloading. Under their proposal the line-haul rate will apply only to the New York piers, *with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery.*" (Italics supplied)

The report also states (R. 23m, 286 I.C.C., p. 129):

> "Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, *for making delivery* at New York piers." (Italics supplied)

For over 50 years the railroads "have concentrated their fruit and vegetable deliveries" at pier stations voluntarily established and maintained by them on the lower west side of Manhattan Island. (R. 23e, 286 I.C.C., p. 122) Of these pier deliveries 90 percent are made by the Erie Railroad and the Pennsylvania Railroad. (R. 23q-23r, 286 I.C.C., p. 133) At these pier stations the railroads refuse to allow the consignees to unload the cars, although requested to do so, and insist on performing the unloading themselves. *"The pier floor is the first place where, after the freight has been unloaded, delivery can be taken."* (R. 23g, 286 I.C.C., p. 125) "After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away." (R. 23k, 286 I.C.C., p. 127) (Italics supplied)

The present method of unloading the cars of fruits and vegetables and making delivery on the piers "has been in effect for many years without substantial change." (R. 24f, 272 I.C.C., p. 652) *"This method of delivery* has been utilized by the Erie for more than 60 years." (R. 23i, 286 I.C.C., p. 126) (Italics supplied)

During this half-century the unloading and delivery service was performed at the line-haul rates. No charge in addition to the line-haul rates was made for this service until November 1, 1948, after the Commission's approval of the additional charge in its first report in the proceeding under review. (R. 23b, 286 I.C.C., pp. 120, 121)

The use of their pier stations for the delivery of the fruit and vegetable traffic at New York is the most economical method of delivery for the railroads. The Commission found (R. 23n, 286 I.C.C., p. 130):

> "The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee."

The Commission's report further states:

> "A witness on behalf of the Erie stated that pier-station delivery on Manhattan Island is the most efficient method which that carrier has been able to organize. So efficient is the operation that the Erie has handled in 1 day, at piers 20 and 21, as many as 367 cars of fruits and vegetables." (R 23i, 286 I.C.C., p. 126)

> "In no other manner could these commodities be unloaded and delivered to consignees in the short space of time available." (R. 23g, 286 I.C.C., p. 124)

The railroads do not provide, and it is not now possible without the expenditure of approximately $24,000,000 for them to provide, team tracks (conventionally used for the delivery of carload freight) for delivery of the enormous volume of fresh fruits and vegetables consigned for delivery on Manhattan. The existing team tracks on Manhattan are "heavily used for non-perishable freight." (R. 23f, 286 I.C.C., p. 124). The Commission found (R. 23o, 286 I.C.C., p. 131):

> "The record establishes, however, that only a relatively small part of the total volume of such [fruit and

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vegetable] traffic can be accommodated on the existing team tracks in Manhattan."

For the two railroads handling 90 percent of the traffic delivered at the piers, the Erie and the Pennsylvania, the cost of providing team-track facilities for the fruit and vegetable traffic would be $24,096,000. (R. 23q, 286 I.C.C., p. 133). The Commission states that *such team tracks would not be as desirable for handling the traffic as the present method* (R. 23n, 286 I.C.C., p. 130):

> "The high cost of land on Manhattan Island and the time required for handling cars across float bridges during periods of peak volume of traffic, would render team-track delivery impracticable."

The Commission also found that even disregarding the added expense of operations in connection with such team-track facilities, the costs to the railroads of making delivery at their pier stations, including unloading of the cars, is less than would be the costs of delivering the traffic on expanded team tracks (R. 23r, 286 I.C.C., p. 133):

> "On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondent handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track deliveries, and that the 'difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities' disfavors the investments that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs, incident to the operation of such expanded facilities."

Section 15(7) of the Interstate Commerce Act places upon railroads "the burden of proof" of showing that a change in rates, charges, or practices "is just and reason-

able." The charge here proposed being for a delivery service heretofore and customarily compensated for in the line-haul rate, could not be justified except upon a showing that the line-haul rates are inadequate to compensate the carriers for performing their customary obligation. No such finding or determination was made by the Commission and on the record before it could not have been made. The railroads presented no such evidence and, in fact, took the position that the line-haul rates are irrelevant. Following rehearing and further hearing the examiner states in his report (R. 100):

> "In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant."

The Commission, having found and determined that the charges in issue are *for delivery*, a service covered by the line-haul rates, and being unable to find (because of absence of evidence from the railroads) that the line-haul rates are inadequate to compensate the carriers for performing their customary service, was required by Section 15(7) of the Act to hold that the railroads had not borne the statutory "burden of proof" of justifying the charges and to order the charges canceled. In authorizing and approving such charges the Commission acted invalidly and the portions of its orders of May 7, 1952 and December 15, 1952 authorizing and approving the charges should be enjoined, set aside and annulled.

The two Commission Reports.

In its original report, with four Commissioners dissenting and one not participating, the Commission had approved the establishment of the proposed separate unloading charge in addition to the line-haul rates in the full amount of the expense claimed by the railroads for performing the unloading service. This conclusion had been

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reached by the majority on the basis that the charge should be considered *independent of the line-haul rates.* The original report states:

> "The establishment of specific charges for unloading at New York and Philadelphia, without reference to the levels of the line-haul rates is justified. Such charges are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published." (R. 24q-24r, 272 I.C.C., p. 662)

> "Admittedly, respondents have deprived substantial benefits from the concentration of traffic at their New York and Philadelphia produce terminals and from the line-haul revenue received by them from this traffic, but these factors are in no sense controlling in the determination of the issues now before us." (R. 24r, 272 I.C.C., pp. 662-663)

In its final report the Commission set aside the original conclusions and condemned as "not shown to be just and reasonable" the charges originally approved. Such charges, which had become effective following the original report, were required to be canceled. The Commission abandoned and reversed the conclusion in the first report that the charge for unloading was to be considered accessorial to line-haul transportation and in the same category as other "special services for which separate charges are published." The findings in the final report, reached upon an "amplified record" and following rehearing and further hearing, are that the charge is *for making delivery.* These findings are quoted above.* De-

* Even in the original report the Commission had found: "A reasonable and proper conclusion as to when the unloading ceases and other operations begin, is that the unloading has been concluded when the produce is ready and available for actual delivery to the consignee. The shippers are not permitted access to the cars, and their trucks can come onto the pier floor only at specified times. Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor." (R. 24h-24i, 272 I.C.C., pp. 654-655)

spite these findings, the Commission authorized and approved the establishment of somewhat lower charges to be assessed in addition to the line-haul rates without having determined or found that the line-haul rates (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation of making delivery.

The reasons and grounds for the Commission's final decision are plainly and fully stated under the heading "General discussion and conclusions" in the final report. (R. 23y-23cc, 286 I.C.C., pp. 139-142). Although the hearing examiners following the rehearing and further hearing had bottomed their reports upon the legal obligation of the railroads to make delivery under their line-haul rates and had recommended condemnation of any additional charge because of the absence of proof by the railroads concerning their line-haul rates, the Commission in its discussion disregards and ignores the obligation of the railroads to make delivery under their line-haul rates.* Avoiding any recognition of the legal duty of the railroads under their line-haul rates to make delivery, the Commission states that due to the "topography" of the New York area "the present method of handling shipments through pier stations is of benefit to both shippers (including consignees) and carriers." Upon this basis the Commission concluded "that the cost of unloading should be borne partly by the shippers and partly by respondents." (R. 23z, 286 I.C.C., pp. 139-140)

The use of transportation and terminal facilities is always of benefit to both shippers and carriers. The shipper gets his goods transported to the place desired and the carrier benefits from the patronage of its facilities. The question here is not whether the shippers benefit from the use of the pier stations for the delivery of their freight but

* The two reports of the hearing examiners are included in the record at pages 51 *et seq.* and 81 *et seq.* Their discussion as to the obligation of the railroads to make delivery under their line-haul rates appears at R. 68-71, 112-113.

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whether they have paid, and are paying, for such use and for such delivery in the line-haul rates. If the line-haul rates fully compensate the railroads for such use and for such delivery, the railroads are not entitled to an extra and duplicate charge however beneficial pier station delivery may be to the shipper.

The Commission observes that it is not considered feasible for the railroads to provide at New York team-track terminal facilities adequate to handle the traffic. (R. 23z, 286 I.C.C., pp. 139, 140) This is, of course, no justification for not performing delivery under the line-haul rates to New York, N. Y. It was held by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U. S. 294, that where team-track delivery is not provided under the line-haul rates shippers are entitled to an equivalent substitute delivery service without additional charge. This Court there said (p. 314):

> "We cannot regard the act to regulate commerce as justifying an increased or extra charge for a substantially similar service . . ."

The Commission excuses the failure of the railroads to provide team tracks, but fails to apply the legal principle that the railroads are obligated under their line-haul rates to make delivery, either at team tracks or to provide an equivalent substitute delivery service. The mere general statement by the Commission that the railroads are under no obligation "to provide an excessive amount of terminal service", cannot and does not excuse the failure of the railroads to make delivery, even though team tracks be not provided therefor. There is no finding by the Commission that the method of delivery at the pier stations, including unloading, constitutes "an excessive amount of terminal service;" nor indeed could there be such a conclusion in the light of the Commission's positive findings that the service at the piers is for the purpose of "making delivery" and therefore merely a substitute for team-track delivery.

This is particularly true when considered in the light of the Commission's other findings that the pier station delivery, including unloading, is more economical for the railroads than the team-track delivery would be and avoids heavy capital investments in team-track facilities.

The Commission states that in view of its conclusion on the grounds just discussed the line-haul rates may be given only slight attention and "the propriety of the separate unloading charges may be determined without an extensive showing with respect to the reasonableness of the line-haul rates. The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect." (R. 23aa, 286 I.C.C., p. 140) The failure of the Commission to give effect to the obligation of the railroads to make delivery under their line-haul rates is conclusively demonstrated by this minimizing of the line-haul rates. The reference to other communities where shippers unload or charges are assessed for unloading, completely disregards the fact that unloading charges are assessed elsewhere only when an unloading service is requested by the shipper as a service *additional to delivery.* At these other communities the railroads provide terminal delivery facilities at which consignees are given an opportunity to unload their freight.* At these other communities delivery is made under the line-haul rates. An additional charge for unloading at these other communities is assessed only where the consignee chooses to request the railroads to perform that service in addition to making delivery.

Upon analysis it is seen that the Commission refused to apply the law to the facts found by them and stated in their

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* "The Pennsylvania publishes specific charges for unloading carloads of fresh fruits and vegetables at Baltimore, Pittsburgh and Chicago. The consignees are, however, permitted to perform such unloading at these points." (R. 23w, 286 I.C.C., p. 137) See also dissenting opinion of Commissioner Knudson. (R. 23ff, 286 I.C.C., p. 145)

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final report. This view was expressed by Commissioner Knudson in his dissent, as follows (R. 23cc-23dd, 286 I.C.C., pp. 142-143):

> "In my opinion, the report of the majority is not based upon the provisions of the Interstate Commerce Act, which it is the duty of this Commission to administer and enforce. The facts in this proceeding are clear. They were fully stated in the reports of the examiners and have been reproduced almost verbatim in the majority report. Instead, however, of applying the law to those facts the majority, in my opinion, has resorted to expediency and compromise."

In reaching its conclusion the Commission gave predominant consideration to the situation at New York, merely noting as to Philadelphia that "it is desirable that the charges for unloading at New York and Philadelphia be the same. The charges herein approved are for application at both points." (R. 23bb, 286 I.C.C., p. 141)

The Commission Erred in Disregarding the Obligation of the Railroads to Make Delivery Under Their Line-Haul Rates.

It is fundamental in the transportation law of the United States that a railroad must make delivery under its line-haul rates. The only possible justification for Commission approval of an extra charge for delivery in addition to the line-haul rates would be a determination by the Commission that the line-haul rates in question (a) do not include delivery (a remote possibility but conceivable on basis of special facts and custom in a particular situation) or that the line-haul rates in question (b) are inadequate to compensate the railroads for performing their customary obligation. In the latter case it would be necessary for the Commission not only to determine that the line-haul rates are inadequate but that they are inadequate at least in the amount of the additional charge proposed to be assessed.

In the absence of such a showing the railroads may not legally impose a charge in addition to the line-haul rates

for delivery. "It is conceded that the line-haul rate covers delivery." *United States* v. *American S. & T. Plate Co.*, 301 U.S. 402, 409. Section 6(1) of the Interstate Commerce Act provides that carriers subject to the Act shall publish their rates in tariff schedules and shall state "separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require." This provision as to separate terminal charges has reference to terminal charges accessorial in character beyond the service covered by the line-haul rate. Terminal delivery has always been included within the service which the carrier is obligated to perform under its line-haul rate. "The American railroad rate has always been recognized as covering the full service which the carrier gives—in furnishing the car, a proper place at which to load it, the conveyance of that loaded car, and its terminal delivery." *Associated Jobbers of Los Angeles* v. *A., T. & S. F. Ry. Co.*, 18 I.C.C. 310, 314 (1910). In this early and leading case, known as the *Los Angeles Switching case*, the Commission dealt specifically with the language of Section 6 and the obligation of the railroads under their line-haul rates and said (p. 315):

> "The rate, which it is required shall be published, is a complete rate, which includes not only a charge for hauling, but the charge for the use of the terminals at both ends of the line.
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> "The provisions of the act to regulate commerce were enacted with respect to the American method of stating rates, and when it is provided in section 6 that the schedules, which shall be published and filed with the Commission, 'shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed,' it was not intended that the carriers should be required to separately state what are known in the English law as station terminals—that is to say, that they shall state separately the hauling charge between the stations and the charge for the use of the terminal at both ends of

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> the line. The terminal charges referred to in section 6, and which *must* be expressly set forth in the carrier's tariff, are those for other services at the terminal which the carrier may furnish, such as storage, elevation, switching, and cartage. This construction of the act is borne out fully by its history and has been formally accepted by railroad counsel in advising the carriers. The railroads recognize their duty to make delivery under the flat rate stated in their tariffs, and such delivery is made upon industry tracks, which are part of the carrier's terminals, without additional charge."

In many cases through the years the Commission has enforced the obligation of the railroads to make delivery under their line-haul rates, the *Associated Jobbers case*, sustained by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U.S. 294, being a leading case bearing a close analogy to the present case. In that early proceeding the railroads serving Los Angeles had proposed a separate charge to be added to their line-haul rates when cars were delivered to the consignee on a private siding or spur. The line-haul rates to Los Angeles covered delivery to that city when made on the public team tracks of the railroads. The railroads contended that deliveries of the cars on the private siding were of great convenience to the receivers and that an extra charge was warranted. The Commission found that such private sidings were also of great convenience and benefit to the railroads in saving capital investments in terminal facilities and in permitting economical operation. The delivery on private siding was found to be *a mere substitute for delivery by the railroads at their own team tracks.* In the present case the railroad pier stations in Manhattan are likewise a mere substitute for conventional team-track delivery and allow the railroads to avoid heavy capital expenditures in team-track facilities and allow more economical operations than would be possible if carrier team tracks were provided at which the consignees could unload their own freight. In the *Asso-*

ciated Jobbers case, in disapproving the extra charge for delivery on private sidings, the Commission said (pp. 317, 318):

> "The service here under consideration, however, is a delivery service and nothing more; the delivery being made at one of the carrier's tracks which is removed at a greater or less distance from its public yards. Spur-track delivery is a substitute service, a service which costs the industry for the installation of the track and the use of its property as a railway terminal. It is a service over the carrier's own rails to a point where it yields possession of the property transported and which involves no greater expense than would team-track delivery. It relieves the carrier's team tracks and sheds, necessitating less outlay for expense of yards in a crowded city, promotes the speedy release of equipment, and vastly aids in conducting a commerce which is greater than the carrier's own facilities could freely, adequately, and economically handle.
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> "After a most exhaustive inquiry we cannot find, taking this service as a whole in the same way that it is treated by the carriers, that the service is more expensive to the carrier than if all cars were given team-track delivery.
>
> "An additional charge may be made when an additional service is given. But the service here given is not additional to that for which the rate pays. If the shipper pays for team-track delivery and does not receive it, but asks instead and is given a side-track delivery which costs the carrier no more, he may not be compelled to pay an additional charge upon the assumption that he has received a terminal team-track service which has not been given. A carrier may not so construct its rates as to compel an extra charge for like service, and this, in our judgment, the defendants at Los Angeles have done."

This language might well be applied to the situation here involved at New York. Admittedly the line-haul rate "pays

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for team-track delivery" and the receiver at New York "does not receive it", and the railroads are unable to make team-track delivery in New York, N. Y. They have, instead of providing team tracks, established and maintained for over half a century their pier stations which the Commission's report and findings show to be more convenient and less expensive for them to operate than team tracks would be.

The Commission's decision and order in the *Associated Jobbers case* was upheld in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U.S. 294 (1914), the decision resting on the findings that the private sidings in Los Angeles "constituted part of the carrier's terminals, and that under the conditions there existing, the receipt and delivery of goods on these spurs was a like service as compared with the receipt and delivery of goods at team tracks and freight sheds . . ." (234 U.S., p. 311) The Court ruled (p. 314):

> "We cannot regard the act to regulate commerce as justifying an increased or extra charge for a substantially similar service . . . "

The obligation of the railroads to make delivery under their line-haul rates has been repeatedly enforced by the Commission in considering proposed separate terminal charges at New York. In *Unloading Lumber at New York Harbor*, 256 I.C.C. 463, 468 (1943), the Commission said:

> "The unloading here considered is required in order to make delivery at respondent's lighterage stations in New York Harbor . . . The nature and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul service. It follows that respondents may not now segregate a component of that service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable. Compare *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61. As such a showing was

> not made respondents have not met the requirements of the statute in that respect and accordingly have not sustained their burden as to the reasonableness of the proposed charge."

The same rule was applied by the Commission in *Fruits and Vegetables to Duane St., N. Y.*, 66 I.C.C. 135 (1922), involving *the same pier stations* and the *same traffic* as are here involved. The railroad had there proposed a separate terminal charge to cover terminal services, including unloading, to be added to the line-haul rates. The Commission found the proposed charges not justified, saying (p. 139):

> "The services for which the proposed terminal charges are published are all incidental to the efficient delivery of fruits and vegetables at Duane Street. They are performed on all that traffic and in no sense are special services comparable with refrigeration, reconsignment, or switching. *Respondent makes no showing as to the adequacy of the compensation now received by the carriers for the through service on this traffic.*" (Italics supplied)

In former cases where the railroads have sought to establish a separate charge for any terminal service previously included in the line-haul rate the Commission has required a showing that the compensation under the line-haul rate is inadequate or that the resulting total charges are reasonable for the total service performed. In *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47 (1915), the Commission said (p. 61):

> "The assessment of any charge for terminal handling, the service having heretofore been performed under the freight rate, would have the effect of increasing that rate; and a proper justification of such an increase would involve consideration both of the line-haul and the terminal service to be performed under the increased rate. There is no evidence to warrant any finding upon the adequacy of the compensation now received by the carriers for their complete service.
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"The Commission strongly favors the analysis of service and rates as an aid to their measurement and comparison. But it holds that, where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through service."

The same ruling was made in *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673 (1943), where a separate charge for terminal services, including unloading, was found not shown to be just and reasonable:

"We have frequently approved the separation of certain charges for accessorial services from the line-haul rates. *But this has only been upon a clear show that the resulting separate charges for each portion of the total services were just and reasonable.* In a number of these instances, the inclusion of certain services in the line-haul rates was for the benefit of particular shippers, and the extra cost entailed was not considered when the level of the line-haul rates was determined. *Here, however, the entire body of these export and import rates has been established and maintained and adjusted over a long period of time in contemplation of the performance by respondents of these terminal services as a part of the through transportation to and from the docks.* Their proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services." (Italics supplied)

In the present case the Commission disregarded the obligation of the railroads to make delivery under their line-haul rates and refused to give effect to that legal obliga-

tion. Although the Commission specifically found that the service in question is a delivery service, no determination or finding was made that the line-haul rates involved do not include such delivery. On the record and in the light of the Commission's other findings such a conclusion was impossible. Likewise, there was no determination or finding by the Commission that the line-haul rates are inadequate to compensate the railroads fully for the transportation, including performance of the delivery service involved. In its original report herein the Commission stated (R. 24, 272 I.C.C., p. 662):

> "Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that the terminal services, including unloading, could not have been ignored in determining the line-haul rates."

The unloading and delivery service having been performed on the fruit and vegetable traffic under the line-haul rates for half a century, these services had become established as an integral part of the services covered by the line-haul rates. This Court has recognized that long-established custom and practice at a particular terminal may establish particular services, different than elsewhere, as covered by the line-haul rate. This was pointed out in *Atchison, T. & S. F. R. Co.* v. *United States*, 295 U. S. 193 (1935) involving the delivery of livestock at Chicago. It was at that time the general practice throughout the country for receivers of livestock to unload cars of livestock. This is the case at present on general carload freight throughout the country where cars are delivered to receivers prior to unloading on public team tracks or private sidings. But at Chicago, in connection with livestock, as at New York and Philadelphia in connection with the fresh fruit and vegetable traffic, the railroads had performed the unloading service because of special terminal conditions. After referring to the general practice throughout the country, this Court said (p. 199):

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"But the practice has long been otherwise at the Chicago Union Stock Yards. For more than 50 years prior to 1917 the carriers without any additional charge to shippers or consignees unloaded livestock into pens provided by the Yards Company."

Based on this fact the Court ruled (p. 200):

"Long continued practice and special conditions made unloading at these Yards a transportation service to be performed by the carriers."

With the unloading and delivery service here involved so plainly covered by the line-haul rates, both because of the general obligation of the railroads to make delivery under their line-haul rates and also because of the long-established custom and practice at the terminals here involved, the Commission obviously erred in approving an additional charge in the absence of a determination and finding that the line-haul rates provide inadequate compensation for the service performed. No such determination or finding was made or could have been made by the Commission on the present record because of the failure of the railroads to submit evidence concerning the adequacy of their line-haul rates. In both logic and law, evidence showing the inadequacy of the line-haul rates to compensate the railroads for the service performed was essential to the valid approval of the extra charges. Likewise, findings by the Commission that such a showing had been made were essential to the validity of the Commission's orders under review. In the absence of both findings and evidence the Commission's orders were unlawfully made and are invalid.

The Railroads Did Not Attempt to Show the Line-Haul Rates To Be Inadequate to Cover Delivery, and In Fact Contended That the Line-Haul Rates Are Irrelevant.

The absence of any finding in the Commission decision concerning the inadequacy of the line-haul rates to cover delivery merely reflects the fact that the railroads made no

attempt to make such a showing and presented no evidence for this purpose. It was the position of the railroads throughout the proceedings before the Commission that the line-haul rates were irrelevant. Following rehearing and further hearing the examiner states in his report (R. 100):

> "In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant."

The railroads steadfastly maintained (1) that the line-haul rates were not in issue, (2) that the unloading charge should be judged without regard to the line-haul rates, and (3) "that the obligation to effect a delivery is irrelevant to the issues in this proceeding." The following is quoted from the exceptions filed by respondent railroads to the proposed report of the examiners following rehearing (R. 347):

> "Further, respondents submit that they have here shown that the legal and factual conclusions on which the proposed report relies in reaching its ultimate conclusion are erroneous and that it should have found that the level of the line-haul rates is not in issue here, that the reasonableness of the unloading charges is dependent on the facts and circumstances relating to those charges alone without regard to the line-haul rates, that the obligation to effect a delivery is irrelevant to the issues in this proceeding and that protestants' contentions are not supported either by the evidence in this case or by the previous decisions of the Commission."

Even when the shippers presented certain exhibits relating to the line-haul rates, counsel speaking for all of the railroads parties to the case, objected on the ground that the line-haul rates were not in issue and that information concerning them was immaterial. (R. 896, 965-966) The following is from the transcript of hearing before the Commission (R. 896):

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"Mr. Miller: Mr. Examiner, I object to pages 13 and 21 of the exhibit. First, on the ground that the references there, as I understand them, are in large part references to the reasonableness of the line-haul charges, which I think are wholly immaterial in this case. * * * With respect to pages 22 through 30, I understand that information is submitted on the issue of the line-haul charge, and I therefore object to that as immaterial.

"Exam. Brown: I don't understand the last objection.

"Mr. Miller: As I understand these pages of the exhibit, they go to the reasonableness of the line-haul charges, and that that is their only purpose in this proceeding. I think that issue is not in issue here.

"Exam. Brown: That is a rather argumentative question, whether line-haul rates, although concededly not in issue, it is possible that they might play a considerable part in the determination of the issue.

"Mr. Hoffman: Is counsel making that statement which he has just made in behalf of all carriers?

"Mr. Miller: Yes.

"Exam. Brown: All carriers other than those represented by counsel?

"Mr. Smith: No, sir. I subscribe to what Counsel Miller has stated for the record.

"Mr. Miller: You mean all carriers parties to this proceeding?

"Mr. Hoffman: Yes.

"Mr. Miller: Oh, yes. Definitely."

The hearing examiner made it clear that evidence concerning the line-haul rates "might play a considerable part in the determination of the issue," but the respondent railroads presented no evidence concerning the reasonableness of those rates or the inadequacy of those rates to cover performance of the unloading and delivery service. The record will, therefore, be searched in vain for any evidence

as to the amount included in the line-haul rates to cover the unloading and delivery service or the adequacy or inadequacy of the line-haul rates for the total service performed. Information as to the compensatory character of the line-haul rates is, of course, peculiarly within the knowledge of the railroads and is not a subject on which the shippers or receivers could be expected to have the best evidence.

Section 15(7) of the Interstate Commerce Act provides:

> "At any hearing involving a change in rate, fare, charge, or classification, or any rule, regulation, or practice, . . . the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable . . ."

It is appellants' position that the railroads could not in law justify the assessment of an extra charge in addition to their line-haul rates for the unloading and delivery service except by sustaining "the burden of proof" of showing that their line-haul rates are inadequate to compensate them for the performance of their customary obligation. The hearing examiners, following the rehearing and further hearing, recognized the legal obligation of the railroads to make delivery under their line-haul rates. (See reports of examiners, R. 66-69) Because of the failure of the railroads to make any showing as to the inadequacy of the line-haul rates, the examiners felt legally compelled to conclude that the burden of proof required by Section 15(7) had not be sustained. (R. 80) The report of the examiners following the first rehearing states:

> "It is not sufficient to consider the matter solely in the light of the unloading charges as such. Determination of whether the terminal carriers are receiving adequate revenues from the traffic as a whole is necessary. All of these respondents receive a line-haul on this traffic and derive substantial revenues therefrom. And if these revenues are not sufficient to compensate for the

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line-haul transportation and for services such as unloading, the matter should be brought to the Commission's attention in an appropriate manner."

"The burden of proof that the assailed charges are just and reasonable is upon respondents under the provisions of section 15(7) of the act. This burden has not been met. The Commission should find that the assailed unloading charges are unjust and unreasonable". (R. 80)

The report of the examiner following the second further hearing states:

"The compensation for the unloading of the fruits and vegetables performed by the respondents for more than 50 years was included in the line-haul rates. The addition of a charge for this unloading service performed before delivery requires clear and convincing proof that the practice of unloading without an added charge is unfair to the respondents because of the inadequacy of the line-haul rates for the total services rendered. Following like expressions in prior proceedings referred to herein, it would appear that it is not sufficient to consider only the cost of the unloading service. The impracticability of unloading by the consignees and the adequacy of the revenues from the traffic as a whole are necessary considerations. All of the respondents receive a line-haul on this traffic and derive substantial revenues therefrom. * * *

"The burden of proving that the addition to the line-haul rates of separate charges for the unloading services performed by the respondents is just and reasonable and not otherwise unlawful was and is upon the respondents, under the provisions of section 15(7) of the act. This burden has not been met." (R. 115)

The Court should understand that the railroads have readily available to them means for increasing their compensation without assessing a separate charge for unloading and delivery in addition to their line-haul rates. The Commission gives as the fundamental cause of the carriers' action in proposing the extra charge the fact that "in re-

cent years, the cost thereof [the unloading and delivery service] substantially increased." (R. 23z, 286 I.C.C., pp. 139-140)

The general increase in railroad expenses in recent years has been recognized by the Commission in authorizing very substantial increases in the line-haul rates of the railroads. In its final report herein (R. 23b) the Commission makes reference to a 30 percent increase effective October 6, 1947, which was authorized generally in all railroad rates and charges. *Increased Freight Rates, 1947*, 269 I.C.C. 33; 270 I.C.C. 81; 270 I.C.C. 93; 270 I.C.C. 403. Subsequently, a further increase of approximately 10 percent was authorized in *Increased Freight Rates, 1948*, 272 I.C.C. 695; 276 I.C.C. 9; 279 I.C.C. 303. A still further increase of 15 percent was authorized in *Increased Freight Rates, 1951*, 280 I.C.C. 179; 281 I.C.C. 557; 284 I.C.C. 589; 289 I.C.C. 395. These increases which have been authorized and made effective since 1947 constitute an aggregate increase of 64 percent. Some limitation was provided in these decisions as to the maximum increases which might be made in the line-haul rates on fresh fruits and vegetables but the aggregate increases in the line-haul rates on carload shipments of these commodities closely approach the maximum increases stated.

In addition to the increases in revenue which the railroads have received by these increases in their line-haul rates, the carriers making delivery of the fruit and vegetable traffic also have available possible adjustments and increases in their divisions of the line-haul rates. Section 15(6) of the Interstate Commerce Act grants to each carrier participating in joint rates the right to obtain an increase in its division of the through line-haul rates if the present divisions are inadequate fairly to compensate it for the services performed. Proceedings under this section for an increase in the division on the fruit and vegetable traffic were brought by the Erie Railroad and increased divisions were granted by the Commission in *Erie*

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RR. Co. v. *A. & V. Ry. Co.*, 98 I.C.C. 268. That case involved the transcontinental rates on fresh fruits and vegetables to New York, and included the Duane Street pier station of that railroad involved in the present case. The Commission granted an increase in the special terminal factor received by the Erie to cover its terminal services, including unloading.* In *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Corp.*, 194 I.C.C. 729, the Commission fixed divisions of the line-haul rates applying to New York and Philadelphia on citrus fruits from Florida, including the divisions of the delivering railroads. In that decision the Commission specifically considered the fact that the delivering carriers unloaded the traffic at their New York and Philadelphia stations. (194 I.C.C., p. 746) If the delivering carriers are dissatisfied with their present divisions and feel that they are being inadequately compensated for the unloading and delivery service which they are performing under the line-haul rates, they may bring such proceedings under Section 15(6) at any time. Certainly a problem of inadequate divisions should not be permitted to result in duplicate charges to shippers and consignees who have already paid once for all the service they receive.

The Commission Acted Arbitrarily In Approving a Discriminatory Treatment of the Fruit and Vegetable Traffic.

We learn from the terminal cases, *e.g.*, *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402; *United States* v. *United Smelting, R. & M. Co.*, 339 U.S. 186, the following fundamentals concerning the terminal services to which shippers are entitled under the line-haul rates on carload traffic:

1. They are entitled to delivery. "It is conceded that the line-haul rate covers delivery." (301 U.S. 402, p. 409)

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* "At Duane Street the Erie unloads the contents of the car. * * *" (98 I.C.C., p. 272)

2. They are entitled to "uniform and equal" and "equivalent" delivery service to avoid "unlawful preferential service." (339 U.S. 186, pp. 189, 197)
3. Such "equal" service has been standardized as the equivalent of team-track delivery. (339 U.S. 186, p. 197)

In the present case the Commission disregarded all of these fundamentals. We have shown above the Commission's disregard both of the obligation of the railroads to make delivery under their line-haul rates and also of their obligation to provide team-track delivery or an equivalent delivery service. The present chapter is directed to the discrimination against the fruit and vegetable traffic and the preference of other traffic which the Commission has arbitrarily authorized and approved.

The denial to the fruit and vegetable traffic of delivery at the line-haul rates constitutes a fundamental discrimination when all other traffic is accorded this service at the line-haul rates. Likewise, the denial to the fruit and vegetable traffic of team-track delivery or of an equivalent delivery service when all other traffic receives this *quantum* of delivery service under the line-haul rates constitutes a fundamental discrimination.

The discrimination which the Commission has authorized is brightly spotlighted at the Manhattan pier stations. The charge for delivery in addition to the line-haul rates is not applied on any other traffic delivered at these stations. (R. 23e, 286 I.C.C., p. 121) Thirty-five railroad pier stations are maintained and operated on Manhattan for the handling of carload freight "of all descriptions." (R. 23f, 286 I.C.C., p. 123) The Commission found that the physical method of handling and delivery, including unloading, is identical as to all traffic:

> "As regards the movement of freight, other than the fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner

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in which fruits and vegetables are carfloated and unloaded." (R. 23f, 286 I.C.C., p. 123)

Even the particular pier stations utilized for the delivery of the fruit and vegetable traffic are "open generally for the receipt and delivery of carload freight in packages." The Commission found (R. 23h, 286 I.C.C., p. 125):

> "The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and delivery of carload freight in packages. All such freight is unloaded from and loaded into cars on car floats. Freight of all kinds may be shipped from and to these piers, except that the Pennsylvania produce terminal (piers 27 and 28) is limited to the receipt and delivery of perishable freight. But even these piers, in addition to the handling of fruits and vegetables, are open to the handling of butter, butter substitutes, cheese, eggs, dressed poultry, fresh meats, fish, oysters, flower bulbs, and raw silk. All freight, other than fruits and vegetables, is unloaded by the rail carriers at their pier stations without charge therefor in addition to the line-haul rates."

Thus the Commission has approved an unjustifiable discrimination against the fruit and vegetable traffic. The railroads did not attempt to distinguish between the fruit and vegetable traffic and traffic generally in a way to justify this discrimination and the Commission findings are that no distinguishing justification exists. This would appear to be plainly a discrimination forbidden both under Section 2 and Section 3(1) of the Interstate Commerce Act. The hearing examiner in his report following the second further hearing recommended that the Commission find the charges on fruits and vegetables not shown to be "just and reasonable" and "also in violation of Section 3(1) of the Act." He stated that a finding under Section 2 was not necessary. (R. 115)

Section 3(1) of the Act prescribes equality of treatment of commodities by making unlawful the unreasonable preference of "any particular description of traffic" or the

subjection of "any particular description of traffic" to any "unreasonable prejudice or disadvantage in any respect whatsoever." Clearly the railroads are subjecting the fruit and vegetable traffic to unreasonable prejudice and disadvantage in assessing a charge in addition to the line-haul rates for the unloading and delivery service when all other kinds of traffic handled at their 35 Manhattan pier stations, including the same pier stations that are used for the handling and delivery of fruits and vegetables, are accorded the identical service at the line-haul rates. See *United States* v. *Baltimore and Ohio R. Co.*, 333 U.S. 169.

Section 2 prohibits the charging or demanding of a greater compensation "for any service rendered" than is charged others for doing "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions." Here the service has been found by the Commission to be "identical" and is performed at the same stations, but an extra charge is assessed against the fruit and vegetable traffic whereas no charge in addition to the line-haul rates is assessed on other perishables or on any other traffic.

It was stated in the Commission's original report, decided in 1948, that the railroads were giving "consideration" "to the establishment of unloading charges on traffic other than fruits and vegetables but that no definite conclusion has been reached." (R. 24b, 272 I.C.C., p. 649). This statement is repeated in the final report dated May 7, 1952. (R. 23c, 286 I.C.C., p. 121) We submit that such "consideration" is no defense to the prohibitions of the statute. The statute forbids the discrimination. The expressed willingness on the part of the railroads to give consideration to removing the discrimination does not annul or suspend the statutory requirement of equal treatment.

Another aspect of the discriminatory treatment of the fruit and vegetable traffic should be pointed out. This relates to the fact that the Commission authorized an additional charge at New York and Philadelphia for "unload-

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ing" although no such charge is assessed at any other community except when an unloading service is requested by the shipper as a service *additional to delivery.* At the pier stations in New York and the produce terminals in Philadelphia the consignees are denied an opportunity to unload cars of fruits and vegetables. The railroads insist upon performing the unloading themselves. The consignees at New York and Philadelphia are denied delivery at the piers and produce terminals until the railroads, by their own election and for their own benefit, have unloaded the cars.

At other communities the railroads make delivery under their line-haul rates on team tracks or at produce terminals without any unloading charge unless the consignee requests such service in addition to delivery. The Commission states:

> "The Pennsylvania publishes specific charges for unloading carloads of fresh fruits and vegetables at Baltimore, Pittsburgh and Chicago. The consignees are, however, permitted to perform such unloading at these points. The protestants at Philadelphia call attention to the fact that all shipments of fruits and vegetables consigned to those markets are unloaded by the consignees, except when they request the carrier to perform that service. When thus requested, the carrier performs the service and collects the charges therefor." (R. 23w, 286 I.C.C., 137)

This difference in the nature of the "unloading" charge at New York and Philadelphia compared with the charge for unloading elsewhere was emphasized by Commissioner Knudson in his dissenting opinion. (R. 23ff-23gg, 286 I.C.C., p. 145)

It is clear, therefore, that in imposing an additional charge for a compulsory "unloading" at New York and Philadelphia these communities are subjected to charges not assessed elsewhere. The Commission acted arbitrarily in authorizing such discriminatory treatment.

The Commission's Final Report Reversed and Abandoned the Grounds of Decision in the Original Report.

In its reports, the original dated October 4, 1948 (R. 24, 272 I.C.C. 648) and the final dated May 7, 1952 (R. 23, 286 I.C.C. 119), the Commission reached substantially different conclusions and advanced different reasons and grounds of decision. The original decision was concurred in by six Commissioners, with four Commissioners dissenting, and one not participating. (R. 24s, 272 I.C.C., p. 663) In this report the majority had approved as "just and reasonable" the "unloading" charge in addition to the line-haul rates in the full amount proposed by the railroads. The final decision was reached upon an "amplified" record after rehearing and further hearing with one Commissioner dissenting, one not participating, and with three Commissioners joining in a special concurrence that they fully agreed "with this report to the extent that it *reverses the prior report,*" from which they had dissented, and stating further that they "*go along*" with "the additional ultimate findings in this present report only because they afford some immediate relief to shippers in that unloading charges here approved are substantially lower than the proposed charges which have been applied on this traffic since November 1, 1948, pursuant to the findings in the prior report." (R. 24cc, 286 I.C.C., 142) (Italics supplied)

In the final report the Commission set aside the original conclusions and condemned as "not shown to be just and reasonable" the charges originally approved. Such charges, which had been made effective by the railroads following the original report, were required to be canceled.

The reasons and grounds for the Commission's final decision, authorizing substantially lower "unloading" charges, are fully and plainly stated in its final report under the heading "General discussion and conclusions." (R. 23y-23cc, 286 I.C.C., pp. 139-142) We have in our Summary of Argmument, under the subheading "The Two

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Commission Reports" (pp. 26-27, *ante*), compared the grounds of decision in the two reports and shown that in its final decision the Commission reversed and abandoned the reasons and grounds of decision of the majority in the first report. We shall not repeat that discussion here but shall supplement it.

The foundation and keystone of the Commission's original decision was the conclusion of the majority that the "unloading" service was *an accessorial service.* On this fundamental premise the majority had ruled that disregard of the "benefits" derived by the railroads from their line-haul rates and from the use of the pier stations in New York was "justified", such matters not being "controlling". (R. 24q-24r, 272 I.C.C., pp. 662-663) Following two further hearings, the Commission in its final report reversed the earlier ruling that the "unloading" service is accessorial. The ruling is not repeated and the findings in the final report are that the service in question is *a delivery service.* Had the Commission adhered to the original first premise, the entire cost of the unloading service should, in logic, have been assessed against the shippers in addition to the line-haul rates. The abandonment and reversal of the original ruling is most clearly shown by the disapproval in the final report of the charges originally authorized. In the final report the Commission expressly states in justification of its final decision that "benefits accrue to respondents from the use of pier deliveries." (R. 23bb, 286 I.C.C., p. 141) Because of these "benefits" to the railroads and the non-accessorial character of the service, the Commission in its final report concluded "that the cost of unloading should be borne partly by the shippers and partly by the respondents." (R. 23z, 286 I.C.C., p. 140)

In conjunction with its original and erroneous holding that the service in question was accessorial, the Commission made the following statement (R. 24q, 272 I.C.C., p. 662):

> "For the purposes of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates."

This statement immediately preceded in the same paragraph the Commission's original ruling that the service in question was accessorial in character. This statement concerning the line-haul rates is not to be found in the Commission's final report made on an "amplified" record following two further hearings. This view concerning the line-haul rates was obviously abandoned and reversed in reaching the final decision. In its final decision the Commission painstakingly set forth under the heading "General discussion and conclusions" the grounds and reasons for the final decision. That the statement concerning the line-haul rates found in the original report was without any basis in the evidence is readily shown by the fact that the railroads submitted no evidence concerning their line-haul rates or their inadequacy to compensate for performance of the unloading and delivery service. This subject is discussed in a separate chapter. The examiner in his report following the rehearing and further hearing stated (R. 100):

> "In the instant proceeding, respondents not only failed to prove that the through charges are reasonable, but have taken the position that the reasonableness of the line-haul rates is irrelevant."

The reversal of the grounds of decisions given in the first report is further shown by comparing the treatment there of the matter of team-track delivery in New York with the treatment accorded this subject in the final report. After reciting in the original report the claim of the protestants that "pier delivery is substituted for team-track delivery", the Commission stated that no studies of comparative costs have been made, but:

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"In any event it is not appropriate to consider these matters as affecting the costs, as such, of unloading at the piers." (R. 24o, 272 I.C.C., p. 660)

Following the oral argument on rehearing the Commission deemed this subject so important that instead of deciding the case the Commission issued a special "Notice" stating "the record is deficient in respect of certain evidence which seems to be important" and calling upon the railroads to produce at a further hearing evidence "to show the difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team tracks on Manhattan Island and Jersey City, N. J." (R. 293) Evidence on this subject is described at length in the final report. (R. 23o-23r, 286 I.C.C., pp. 131-133)

The statement and conclusions found in the Commission's original report which were abandoned and reversed in the final decision constituted errors which had been forcefully brought to the Commission's attention in the many petitions for reopening and reconsideration filed by numerous parties. These petitions, filed in December, 1948, are listed at R. 292-293. Three of these petitions are included in the printed record. (R. 225, 241, 262) From these representative petitions it will be seen that errors of law had been committed by the Commission in its original report (1) in considering the unloading and delivery service as "accessorial"; (2) in failing to require the railroads to justify the added charge for delivery in the light of the compensation received by them under their line-haul rates; (3) in failing to recognize the pier station delivery in New York as a mere substitute delivery service more economical to perform than team-track delivery; and (4) that the unloading service is merely a part of the delivery service which the railroads are required to perform under their line-haul rates. (R. 225, 229, 230, 232, 235, 238, 245, 247-

249, 252, 253-254, 264-268). It was on basis of these petitions showing the errors in the original report that the Commission acted to reopen the proceeding for rehearing. (R. 292-293)

The Commission's Final Report Plainly Shows the Erroneous Basis of the Decision.

In the Summary of Argument, under the subheading "The Two Commission Reports" (pp. 27-31, *ante*), we discussed the grounds of the Commission's final decision which are fully and plainly set forth in the final report under the heading "General discussion and conclusions". (R. 23y-23cc, 286 I.C.C., pp. 139-142) We there showed that the reasons and grounds given are erroneous as a matter of law. We shall avoid repetition and merely summarize below the fundamental errors in the grounds advanced by the Commission for its final decision. They are:

1. Although the issue was squarely presented, the Commission ignored and disregarded the obligation of the railroads to make delivery under their line-haul rates.

2. Without determining or finding that the line-haul rates in issue (a) do not include delivery or (b) are inadequate to compensate the railroads for performing their customary obligation, the Commission authorized and approved the establishment of an extra charge in addition to the line-haul rates for the performance of the delivery service.

3. The Commission found "that the cost of unloading should be borne partly by the shippers and partly by the respondents" because "the present method of handling shipments through the pier stations is of benefit to both shippers (including consignees) and carriers." This ground, constituting the primary basis of the Commission's final decision, ignores the fundamental fact that the use of transportation and terminal facilities is always of benefit to both shippers and carriers. The shipper gets his goods

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transported to the place desired and the carrier benefits from the patronage of its facilities. The question here is not whether the shippers benefit but whether they have paid for the service and for the use of the terminal facilities. If the line-haul rates fully compensate the railroads for such use and for such delivery, the railroads are not entitled to an extra and duplicate charge however beneficial pier station delivery may be to the shipper.

4. The Commission excuses the failure of the railroads to provide team-track delivery facilities on Manhattan Island but ignores the obligation of the railroads where team-track delivery is not provided to provide an equivalent substitute delivery service under their line-haul rates, as held by this Court in *Interstate Com. Com.* v. *Atchison, T. & S. F. Ry. Co.*, 234 U.S. 294.

5. The Commission excuses the failure of the railroads to provide team tracks, but fails to apply the legal principle that the railroads are obligated under their line-haul rates to make delivery, either at team tracks or to provide an equivalent substitute delivery service. The mere general statement by the Commission that the railroads are under no obligation "to provide an excessive amount of terminal service," cannot and does not excuse the failure of the railroads to make delivery, even though team tracks be not provided therefor. There is no finding by the Commission that the method of delivery at the pier stations, including unloading, constitutes "an excessive amount of terminal service;" nor indeed could there be such a conclusion in the light of the Commission's positive findings that the service at the piers is for the purpose of "making delivery" and therefore merely a substitute for team-track delivery. This is particularly true when considered in the light of the Commission's other findings that the pier station delivery, including unloading, is more economical for the railroads than the team-track delivery would be and avoids heavy capital investments in team-track facilities.

6. Based on the grounds above referred to, the Commission erroneously states that the line-haul rates may be given only slight attention and that "the propriety of the separate unloading charge may be determined without an extensive showing with respect to the reasonableness of the line-haul rates." Its only statement concerning the line-haul rates is as follows: "The showing that the level of the rates to New York and Philadelphia is no higher than the rates to other consuming points where shippers unload or charges are assessed for unloading is of major importance in this respect." This reference to other communities where shippers unload or charges are assessed for unloading pointedly discloses the failure and refusal of the Commission to give effect to the obligation of the railroads to make delivery under their line-haul rates. At these other communities the railroads provide terminal delivery facilities at which the consignees are given an opportunity to unload their freight. At these other communities delivery is made under the line-haul rates. An additional charge for unloading is assessed only where the consignee chooses to request the railroads to perform that service *in addition to making delivery.*

The following supplementary comments should be made concerning the grounds of decision stated by the Commission in its final report under the heading "General discussion and conclusions":

The Commission states: "The respondents have been willing to perform the unloading without a separate charge until, in recent years, the cost thereof substantially increased." (R. 23z, 286 I.C.C., pp. 139-140) Increased expenses are no justification for excusing the railroads from performing their legal obligations under their line-haul rates. The carriers' line-haul rates have been increased 60 percent or more since 1947 to compensate the railroads for their increased expenses in performing transportation thereunder. In its final report herein the Commission makes reference to a 30 percent increase effective October

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6, 1947, which was authorized generally in all railroad rates and charges. (R. 23b, 286 I.C.C., p. 120) This increase was authorized in *Increased Freight Rates, 1947,* 269 I.C.C. 33; 270 I.C.C. 81; 270 I.C.C. 93; 270 I.C.C. 403. A further increase of approximately 10 percent was authorized in *Increased Freight Rates, 1948,* 272 I.C.C. 695; 276 I.C.C. 9; 279 I.C.C. 303. A still further increase of 15 percent was authorized in *Increased Freight Rates, 1951,* 280 I.C.C. 179; 281 I.C.C. 557; 284 I.C.C. 589; 289 I.C.C. 395. These increases constitute an aggregate increase of 64 percent. Some limitation was provided in these decisions as to the maximum increases which might be made in the line-haul rates on fresh fruits and vegetables but the aggregate increases in the line-haul rates on these commodities closely approach the maximum increases stated.

In addition to increases in revenue from increased line-haul rates, the carriers making delivery of the fruit and vegetable traffic also have available possible adjustments and increases in their divisions of such line-haul rates. Section 15(6) of the Act grants to each carrier participating in joint rates an adequate remedy for increasing its compensation if the present divisions are deemed inadequate fairly to compensate it for the services performed. Increased divisions on the fruit and vegetable traffic delivered at New York were obtained by the Erie Railroad in *Erie R. R. Co.* v. *A. & V. Ry. Co.,* 98 I.C.C. 268. Thus, if the delivering railroads are dissatisfied with their present divisions and feel that they are being inadequately compensated for the unloading and delivery service which they are performing under the line-haul rates, they may bring such proceedings under Section 15(6) at any time

The Commission states: "Physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is a general community problem and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing difficulties if this

congested area is to be served by railroad transportation." (R. 23z, 286 I.C.C., p. 140) This is wholly beside the point. The shippers and receivers do not ask, and are not entitled to ask, for railroad rates which do not reasonably and adequately compensate the railroads for the delivery of freight in New York. The line-haul rates to New York, N. Y. have covered the unloading and delivery service for a great many years. The reasonableness of these line-haul rates for the services so long performed under them must be presumed to be reasonable and "their reasonableness is presumed to continue in the absence of a showing to the contrary." *Swift & Co.* v. *United States*, 343 U.S. 373, 383. Appellants merely contend that they *should not be charged twice for the same service.* In view of the presumed reasonableness of the line-haul rates for the services performed thereunder for 50 years, they are being charged twice for the same service unless it can be shown that the line-haul rates are inadequate fairly to compensate the railroads for these services. The railroads in failing to submit any evidence concerning their line-haul rates, wholly failed to show that the presumption of reasonableness should be overturned.

The Commission states "it is probable that continuance of the present charges will cause sufficient diversion of the traffic under consideration to team-track delivery, to require the construction of additional team-track facilities at considerable expense." (R. 23bb, 286 I.C.C., p. 141) Shippers are entitled under the line-haul rates to team-track delivery or an equivalent substitute delivery service. The fact that the shippers may divert their shipments from the pier stations and demand the team-track delivery to which they are plainly entitled cannot possibly excuse or justify the assessment of an additional delivery charge where the carriers have chosen to employ a substitute method of delivery. This is particularly true here where the method of delivery substituted by the railroads is more economical for them and avoids heavy capital investments in team-track facilities.

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Ignoring and disregarding throughout its "General discussion and conclusions" the legal obligation of the railroads to make delivery under their line-haul rates, the Commission does not cite or discuss the leading Commission cases in which this obligation has been enforced. These cases are cited by Commissioner Knudson in his dissenting opinion. (R. 23ff, 286 I.C.C., p. 144) Some of them are discussed herein at pages 32-37, *ante*. In lieu thereof, the Commission relies upon *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25, which the Commission terms "the most pertinent of any of the cases cited." (R. 23aa, 286 I.C.C., p. 140-141) The citation of this case and primary reliance upon it merely illustrates further the Commission's failure and refusal to enforce in the present case the obligation of the railroads to make delivery under their line-haul rates. The cited case does not relate to a delivery service or an "unloading and delivery service". It relates to a service beyond the obligation of the railroads under their line-haul rates, namely, *an accessorial unloading service requested by the shipper or consignee in addition to delivery.* The unloading service there involved was performed in addition to the complete delivery service covered by the line-haul rates and was performed upon request of the shipper or receiver. Commissioner Knudson very clearly shows the fundamental difference between that case and the present case in his dissenting opinion herein. He said (R. 23ff-23gg, 286 I.C.C., p. 145):

> "In support of its conclusions the majority refers to *Charges for Loading and Unloading Carload Freight*, 269 I.C.C. 25. It was proposed by respondents therein to establish increased charges for certain accessorial services, including carload unloading, provided for by them at St. Louis, Mo., and other points in central territory. At those points delivery of carload freight was made in the usual manner at sidings or team tracks, the charge therefor being included in the through rate from point of origin. Respondents also provided in their tariffs that, *when requested,*

they would perform the carload unloading at certain points for 56 cents per ton when unloaded on team tracks and 69 cents when handled over freight-house platforms. They proposed to increase these charges to 94 cents. Division 2 found the proposed charges just and reasonable. That proceeding is not in point with the instant proceeding. There, unloading of the freight was not essential to delivery. It was an accessorial service performed upon request, the charge for which was separate and distinct from the through rate, which included the charge for siding or team-track delivery. The unloading charge, being separate from the through rate, could be increased without bringing the latter in issue. Here, the unloading at New York and Philadelphia is not an accessorial service. It is an essential part of delivery, published as such in respondents' tariffs, the charges for which are included in the through rates."

The Commission cites two other decisions which, it states, "tend to support our conclusions herein": *New England Coal & Coke Co.* v. *N. & W. Ry. Co.*, 33 I.C.C. 276, and *Loading and Unloading Carload Freight*, 101 I.C.C. 394.

In the *New England Coal case*, it had been *the established practice* of the railroads at Norfolk, Va., to assess on coal in addition to the line-haul rates a charge for "dumping" of the coal from the cars into the vessels. This dumping was accomplished by placing the car on tracks elevated above the vessel and by opening of the cars to allow the coal to fall down chutes into the vessel. In assailing this established dumping charge the shipper contended that the dumping was included in the line-haul rate. In that case the line-haul rate on coal dumped into vessels was $1.40 per ton whereas the line-haul rate on coal given team-track or siding delivery at the same destinations was $1.50 per ton. Thus the shipper could not claim he was "paying for team track delivery" but was not receiving it. He was paying a lower line-haul rate for a different type of service in connection with which there was an established additional dumping charge. The aggregate of the line-haul

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rate and dumping charge was less than the line-haul rate for team-track delivery.

Loading and Unloading Carload Freight involved a railroad proposal to discontinue the unloading of carload freight at certain cities not including New York or Philadelphia, at which such service had previously been performed without charge in addition to the line-haul rates and to assess an additional charge therefor if the service were requested by the shipper. In approving the assessment of the additional charges there involved, the Commission found that the railroads were providing team-track delivery under their line-haul rates and that the line-haul rates involved were reasonable for this *quantum* of service. It found that the loading and unloading services were in excess of the terminal service covered by the line-haul rates and, accordingly, that the separate added charge for the additional service was justified.

These cases are plainly inapplicable to the present situation in which the receivers are refused an opportunity to unload their freight and in which the unloading service is performed by the railroads as an integral part of a delivery service which the railroads have chosen to substitute for conventional team-track delivery. In all of the cited cases the shippers and receivers were given either team-track delivery or its equivalent, as required under the line-haul rates, and the added charge was for a service found to be not covered by the line-haul rates.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the District Court should be reversed and that the orders of the Interstate Commerce Commission should be enjoined, suspended, set aside and annulled, namely:

First, that portion of the order of May 7, 1952 authorizing and approving the establishment and maintenance by the railroads at New York, N. Y., and Philadelphia, Pa.,

of unloading charges on shipments of fruits and vegetables in addition to their line-haul rates, issued in I. & S. Docket 5500, *Unloading Charges on Fruits and Vegetables at New York and Philadelphia* (R. 25); and

Second, the order of December 15, 1952 ratifying and reaffirming the authorization and approval of the said unloading charges, issued in, and dismissing without hearing the complaints in, Docket 31105, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio R. Co., et al.,* and Docket 31106, *Florida Citrus Commission, et al.* v. *The Baltimore and Ohio R. Co., et al.* (R. 26)

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APPENDIX

The following are the relevant provisions of the Interstate Commerce Act, as amended (24 Stat. 379, as amended; 49 U.S.C. Sec. 1, *et. seq.*):

SEC. 1(3) (a). "* * * The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *" (49 U.S.C. Sec. 1(3) (a)).

SEC. 1(5) "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful" (49 U.S.C. Supp. V Sec. 1(5)).

"SEC. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful" (49 U.S.C. sec. 2).

"SEC. 3(1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association,

locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description" (49 U.S.C. Sec. 3 (1)).

SEC. 6(1) "That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part." (49 U.S.C. Sec. 6(1))

SEC. 6(7) "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation

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of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs (49 U.S.C. Sec. 6 (7)).

Sec. 15 (6) "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustmnt to be made in accordance therewith. In so prescribing and determing the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance

to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge" (49 U.S.C. Sec. 15 (6)).

SEC. 15 (7) "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to

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the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible" (49 U.S.C. Sec. 15 (7)).

SEC. 15a(2) "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service" (49 U.S.C. Sec. 15a (2)).

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No. 481

IN THE

Supreme Court of the United States

October Term, 1953

FLORIDA CITRUS COMMISSION, *et al., Appellants,*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *et al., Appellees.*

Appeal from the United States District Court for the Southern District of Florida

REPLY BRIEF FOR THE APPELLANTS

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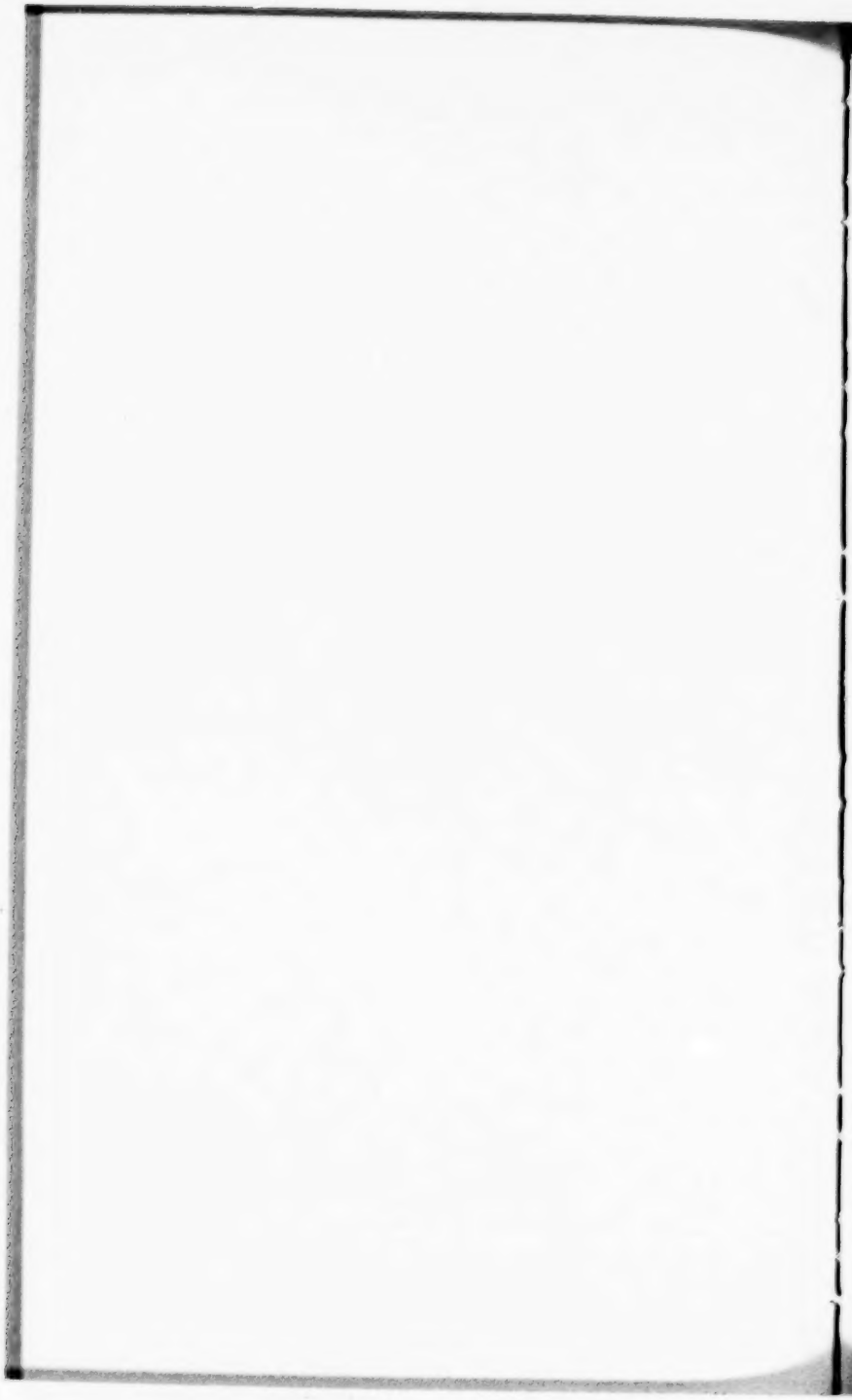

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REPLY BRIEF FOR THE APPELLANTS

This reply brief is filed in order to emphasize the failure of the briefs filed by appellees, Interstate Commerce Commission and the railroads, to meet the issues presented. Both of appellees' briefs fail to come to grips with the findings of fact made by the Commission in its final report.

In its final report after rehearing and further hearing the Commission found that the charge in issue is a charge "for making delivery." Appellees simply ignore this find-

ing and would have the Court ignore it. Appellees' briefs also include other basic errors, including primary reliance upon cases dealing with "accessorial" unloading service which is entirely irrelevant to the present case which deals with an unloading service which is an integral and essential part of the railroads' performance of their legal duty to make delivery under their line-haul rates.

The brief for railroad appellees would have the Court understand that delivery of the fruit and vegetable traffic at the railroad pier stations in New York is more expensive than conventional team-track delivery would be. In contrast, the brief for the Commission frankly acknowledges and quotes the Commission's finding that pier station delivery is more economical for the railroads than team-track delivery would be.

We find in both the Commission's brief and in the railroad's brief a primary reliance upon conclusions stated by the Commission in its original report which were abandoned and reversed by the Commission after rehearing and further hearing. We rest our case upon the findings of fact made by the Commission in its final report after rehearing and further hearing. Appellees have been unable to do this.

We shall discuss briefly below certain of the basic errors upon which appellees' briefs rest:

Appellees' briefs ignore the basic findings by the Commission that the charge in issue is "for making delivery."

We have for convenience collected in Appendix A hereto the Commission's findings of fact that the so-called "unloading" charge is *for making delivery.* The findings are clear and emphatic. Appellees have been unwilling or unable to deal squarely or frankly with these findings. They have found it necessary to present their arguments as though no such findings had been made, although these findings are the most fundamental determinations made by the Commission. Acknowledging as they do the legal obligation of the railroads to make delivery under their

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line-haul rates,* appellees have been forced to argue as though no such findings were made.

The greater economy of pier station delivery at New York is conceded by the Commission.

In railroad appellees' brief, commencing on page 9, is the following statement: "The cost to the carriers of delivery on team tracks is of course substantially less than the cost of delivery at the pier stations when unloading at the pier stations is included." This statement completely disregards the specific findings of the Commission to the contrary. Specifically, the Commission found: "On the record in this proceeding it is apparent that pier station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track delivery." (R. 23r)

Indeed, on page 17 of the brief of the Commission it is conceded that the position of the railroad appellees is not supported by the record. It is there said: "Contrasting pier station with team-track delivery, the Commission found that 'the most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for delivery to the consignee' (R. 23m)."

The railroads do not provide adequate team-track delivery facilities at New York.

Since the latter part of the 19th century the railroads have concentrated their New York deliveries of fresh fruits and vegetables at pier stations voluntarily established and maintained by them for the delivery of this traffic. Approximately 90 percent of the fresh fruit and vegetable traffic delivered at these pier stations is delivered by the

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* Brief of railroad-appellees, p. 55: "There is no dispute that the transportation duty of the carriers under the line-haul rates covers delivery."

Erie Railroad and the Pennsylvania Railroad. The railroad appellees in their brief would have the Court believe that adequate team-track facilities are provided by the railroads in New York. The Commission findings, and the statements of fact in the Commission's brief, are directly to the contrary. The railroads urged in the Commission proceeding that their team-track facilities at New York were adequate but the Commission found as follows:

> "The record establishes, however, that only a relatively small part of the total volume of such traffic can be accomodated on the existing team tracks in Manhattan." (R. 23o)

The Commission in its brief herein states (p. 17):

> "Team-track facilities on Manhattan Island are inadequate to accommodate more than a relatively small part of the total volume of fruit and vegetable traffic consigned to New York City (R. 24h), and it would be impracticable, if not impossible, to expand those facilities to the extent necessary to accord such delivery to all of the traffic (R. 23n)."

The Commission found that the manner of terminal handling of fruit and vegetable traffic is "identical" with that on other traffic.

In an effort to restrict and limit the Commission's findings in its final report, made in 1952, and to escape from these findings made by the Commission after rehearing and further hearing, appellees in their briefs disregard these findings and instead of dealing with them, or meeting them, seek to rely upon quotations of statements found in the Commission's prior report made in 1948. They do this as to "delivery" and also on the issue of discrimination against the fruit and vegetable traffic compared with all other traffic.

In the 1952 final report the Commission found that the terminal handling and delivery of fresh fruit and vegetable traffic is "identical" with the manner of terminal handling and delivery of all other freight at these pier stations.

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(R. 23f) In an effort to limit this 1952 finding, railroad appellees say:

> "The finding is, however, limited to the physical facts of car-floating and unloading . . . " (B., p. 71, footnote)

Similarly, the Commission in its brief erroneously infers that it was found that there is a difference in the terminal handling of fruits and vegetables, on the one hand, and general traffic, on the other hand, at the New York pier stations. (B., p. 52) The Commission likewise cites and relies upon the prior report of the Commission made in 1948 instead of on the contrary finding in the Commission's final report after rehearing and further hearing.

The Commission's specific finding in its final report that the terminal handling and unloading is "identical," made in 1952, reads as follows:

> "As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is identical with the manner in which fruits and vegetables are car-floated and unloaded." (R. 23f)

The Commission's final report in 1952 on "Rehearing" reversed and abandoned the grounds of decision in the 1948 report.

In our original brief (pp. 26-31, 50-54) we showed that the Commission in its final report, following rehearing and further hearing, reversed and abandoned the grounds of decision in its 1948 report. Railroad-appellees in their brief (p. 37) contend that all conclusions and grounds of decision given in the 1948 report should be considered as supporting the Commission's final 1952 decision. Railroad-appellees argue that the 1952 report is merely "supplemental". This argument entirely overlooks the obvious fact that in the two reports the Commission reached substantially different conclusions, made different findings of fact, and advanced different reasons and grounds of de-

cision therein. The final report entered in 1952 after rehearing and further hearing is not a mere abbreviature of the 1948 report. The 1952 report is substantially longer than the 1948 report and the reasons and grounds assigned by the Commission for its final decision are fully and plainly stated in the 1952 report under the heading "General discussion and conclusions." (R. 23y-23cc)

We shall not repeat our showing made in the original brief that the Commission did in its 1952 report reverse and abandon the principal reasons and grounds of decision given in the 1948 report. However, for convenience we have prepared Appendix B attached hereto which compares in tabular form statements and actions in the 1948 report with those in the 1952 report. It will be seen from this appendix that the 1952 report plainly reversed and abandoned the ground of decision underlying the 1948 report.

The line-haul rates prior to and at the time of this proceeding included compensation for unloading, i.e., delivering the freight.

The Commission states in its brief (p. 29) at the outset of its argument, that the "principal issue presented to the Court for decision" is whether the unloading charges "represent duplicate payment for the same service, the compensation for the unloading service having long been included in the line haul rates." The Commission, in its brief, asserts (pp. 39-40) that the Commission concluded that "the unloading service performed by the carriers was not a part of the transportation service required of them under the line haul rates," and then the Commission declares, in its brief, that "whether or not such a finding was made or may be inferred from the Commission's other findings and conclusions, no such specific finding was required as a basis for the Commission's order."[1]

[1] If no finding is required by the Commission as to what it calls the "principal issue" then undoubtedly no finding is required on the other issues. It is certainly strange and novel doctrine that the Commission may issue an order, based on thousands of pages of testimony and exhibits about matters of rate-making, but is not

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The Commission made no such finding, and the record contains no evidence to warrant any such finding. Significantly, the Commission's brief does not quote the finding which it argues was made, does not cite or refer to the record in this respect, and does not cite or refer to any evidence in the record in support of such finding if the finding was made.

The brief for the railroads asserts (p. 41, footnote) that "there was evidence that the level of the line-haul rates in the past did not depend upon whether the unloading service was performed," but the railroads' brief contains only one citation or reference to the record in support of that allegation, *i.e.*, the brief states on pp. 48-49 that Exhibit 4 in the unprinted record supports the argument that the line-haul rates have not included compensation for unloading at the New York piers and at the produce terminal platforms in Philadelphia. An inspection of that exhibit compels the conclusion that it is entirely irrelevant as a support for the railroads' argument. That exhibit merely discloses rates for shipments to points within a wide geographical area around both New York and Philadelphia, and the exhibit does not say that the line-haul rates in question do not include compensation to the carriers for unloading, *i.e.*, delivering the freight.

The record contains no evidence and the Commission made no finding that the line-haul rates have not included compensation for unloading, *i.e.*, delivering the freight at the New York piers and at the produce terminal platforms in Philadelphia. Contrariwise, the Commission found that the unloading prior to this proceeding "was performed by the carriers without charge therefor *other than the line-haul rate*" (R. 23r; 286 I. C. C. 119; emphasis supplied), and "this method of unloading had been performed by the

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required to make any findings. This Court has made it plain again and again that adequate findings must be made. *Automatic Canteen Co.* v. *Federal Trade Comm.*, 346 U. S. 61, 81; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 488-489; *Atchison Ry.* v. *United States*, 295 U. S. 193, 201-202.

carriers prior to November 1, 1948, without charge therefor *other than the line haul rate*". (R. 23t; 286 I. C. C. 119, 135; emphasis supplied) The Commission found that prior to November 1, 1948, there were no separate charges in addition to the through rates for unloading fruits, vegetables, or other descriptions of traffic at the stations specified. (R. 23c; 286 I. C. C. 119, 121) And specifically the Commission found in its prior report—which is expressly relied on by the railroads in their brief—that "various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, *including unloading,* could *not* have been ignored in determining the line-haul rates". (R. 24q; 272 I. C. C. 648, 662; emphasis supplied)

Again and again the Commission has found that the line-haul rates for shipments to the New York piers and to the produce terminal platforms in Philadelphia have included and do include compensation to the carriers for unloading the freight. These numerous examples are not "occasional and ancient instances" as asserted in the railroads' brief, pp. 47-48. During the very period of the hearing involved in this appeal the Commission found, in 1947, that the line-haul rates on shipments of vegetables and avocados from the South to New York should be increased because of the expenses incident to delivering the freight at the New York piers. *Vegetables and Avocados from the South to Official Territory,* 269 I. C. C. 409, 410. The evidence in that proceeding, with respect to the magnitude of the terminal operations at the New York piers, emphasizes the expense of unloading.[2] There is nothing "ancient" about that finding by the Commission, and neither is it an isolated action by the Commission.

The railroads' brief fails to consider the many instances cited at length in the brief, on behalf of the Secretary of

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[2] See Vol. 2, pp. 88-91, 94-95, and 117 in Investigation, and Suspension Docket No. 5478, on file in the Interstate Commerce Commission. This material may clearly be considered in this proceeding. *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 530.

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Agriculture in No. 480 (see pp. 37-44 thereof) in which the Commission has repeatedly found over a period of 25 years preceding this proceeding that the line-haul rates include compensation to the carriers for unloading the freight at these stations. There can be no doubt of the plain and emphatic character of these findings again and again by the Commission. There can be no doubt in this proceeding that the Commission found in its first report—which is so emphatically relied on in the briefs of the railroads and the Commission—that the "various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line haul rates". (R. 24q; 272 I. C. C. 648, 662) There can be no doubt that the record in this proceeding contains no evidence which would have warranted the Commission in making a finding to the contrary. The Commission's brief states at the outset (p. 29) that "the principal issue" relates to whether the railroads are receiving duplicate payment for the same service because the line-haul rates already include compensation for unloading, *i.e.*, delivering the freight. The railroads' brief (p. 36) also states that this is a principal issue in the case. But the railroads' brief is clearly wrong, however, in its assertion (pp. 37-38) that the appellants "rely almost altogether upon one circumstance, *i.e.*, that for many years the carriers had performed the unloading services at the pier stations on Manhattan Island and at the produce terminals at Philadelphia without imposing a separate charge." The appellants do rely upon that circumstance, but it is by no means "a reliance almost altogether upon one circumstance." There are other circumstances of compelling character on which the appellants' briefs place definite and unequivocal reliance. The Commission and the railroads are unable to rely to those other facts and circumstances, and the railroads have chosen to say, incorrectly, in their brief that our reliance is "almost altogether upon one circumstance."

The railroads argue (pp. 53-54) that the cases cited by the appellants, "in which carriers making delivery at New York have urged the additional expense to them of terminal service in support of their division claims against other carriers," are irrelevant inasmuch as the "issues as to the propriety of the division of revenue among carriers have little relevancy to the issues as to whether charges to shippers are just and reasonable." But the significant fact is that consideration of the unloading costs in determining the divisions of rates is recognition that the line-haul rates include compensation for unloading. A carrier "is entitled to receive by way of divisions only its just and equitable share of the proceeds of the joint rail transportation service rendered, it cannot claim as a part of its share the costs of a service which is not a part of the rail service called for by the joint rates." *Interstate Commerce Commission* v. *Hoboken R. Co.*, 320 U. S. 368, 379.

The principal cases cited by appellees do not support their arguments.

The appellees rely upon *Swift & Co.* v. *United States*, 316 U. S. 216, *Barringer & Co.* v. *United States*, 319 U. S. 1, and *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, in support of their position that separate charges, in addition to the line-haul rates, can be established for unloading fresh fruits and vegetables at the New York piers and at the Philadelphia platforms.* But none of those cases support the appellees' position that a separate charge can be established for unloading where, as here, the unloading is an essential part of delivery. The transportation service involved in the *Swift* case ended when the livestock was unloaded into the unloading pens and, therefore, this Court held that the Commission was not required to investigate into the practices of the stockyards in charging for stockyard services performed after delivery. (316 U. S., pp.

* See Commission's Br., pp. 36-41; Railroads' Br., pp. 24, 29, 30, 43, 50, 51, 56, 62.

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230-231) In the *Smelting Company* case, the Commission's finding as to where the line-haul service ended was sustained and, therefore, the Court upheld the Commission's decision that additional charges must be made for services performed in addition to delivery. (329 U.S. 186)* Similarly, the *Barringer* case involved "the cost of the through haul" inclusive of a loading service which, under the facts of the case, was an "accessorial service." (319 U. S., p. 9) Hence, none of these decisions supports the proposition that a separate charge can be imposed for making delivery.

The decision by this Court in *Interstate Commerce Commission* v. *Stickney*, 215 U. S. 98, relied upon by the Commission (Br., pp. 38-39) and the railroads (Br., pp. 38-40), lends no support to the appellees. The terminal charges involved in that case applied only at a point beyond the lines of the line-haul carriers. The carriers made delivery at their terminals under their line-haul rates, but added a $2 per car charge for delivery by another carrier off line. (215 U. S., pp. 107-108) Hence the *Stickney* case is sharply distinguishable on its facts. Also, that decision was rendered in 1909 prior to significant amendments to the Interstate Commerce Act. The Interstate Commerce Act was amended by the Act of June 18, 1910, which added the requirement that at any hearing involving a rate increase after January 1, 1910, the "burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable * * *." (36 Stat. 539, 552, as amended; 49 U. S. C. § 15(7))** Hence, even assuming, *arguendo*, that the rule in the *Stickney* case would be applicable to a delivery by line-haul carriers at their own terminals, nonethe-

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* See appellant's Br. in No. 480, pp. 58-59.

** The purpose of this amendment to the Interstate Commerce Act was to shift the burden of proof from the shipper to the carrier. 45 Cong. Rec. Part 7, p. 7374 (item 18).

less the carriers are now required to sustain the burden of proof that a changed rate is just and reasonable. This burden cannot be met, when the line-haul rates include delivery, without a showing by the carriers that the line-haul rates do not adequately compensate the carriers for making delivery. (See appellant's Br. in No. 480, pp. 36-53, 63-77; appellants' Br. in No. 481, pp. 25-26, 31-45.)

The railroads further contend (Br., pp. 50-51) that if the line-haul rates are unreasonable considering the transportation service now covered by the line-haul rates, the shippers may be heard upon the reasonableness of the line-haul rates in another proceeding, citing *United States* v. *U. S. Smelting Co.*, 339 U. S. 186, 198. But the *Smelting Company* case involved a proceeding to determine where the line-haul service ended—as distinguished from a rate proceeding. The basis for the Court's opinion, in this respect, is that in a proceeding to determine where a line-haul rate ends, the Commission has "authority to exclude rate questions * * *." (339 U. S., p. 198) But certainly the Commission does not have authority to exclude rate questions from a rate proceeding. In the case at bar, the railroads must sustain the burden of proof that their proposed rates are just and reasonable. This necessarily involves a consideration of the line-haul rates. (See appellant's Br. in No. 480, pp. 36-53, 63-77; appellants' Br. in No. 481, pp. 31-45).

The appellees also rely on certain decisions of the Commission in which the Commission approved separate charges in addition to the line-haul rates, *i.e., Wholesale Fruit & Produce Asso.* v. *A., T. & S. F. Ry. Co.*, 14 I. C. C. 410; *New England Coal & Coke Co.* v. *N. & W. Ry. Co.*, 33 I. C. C. 276; *Loading and Unloading Carload Freight*, 101 I. C. C. 394; *Charges for Protective Service to Perishable Freight*, 241 I. C. C. 503; *Charges for Loading and Unloading Carload Freight*, 269 I. C. C. 25; *National Carloading Corp.* v. *Pennsylvania R. Co.*, 288 I. C. C. 481. But none of those decisions is relevant here. The *Wholesale Fruit and Produce* case related to unloading which was,

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under the facts of the case, an accessorial service. The *New England Coal and Coke* case involved a separate charge for "dumping" coal from the carrier's cars into vessels. Also, the aggregate of the line-haul rate plus the dumping charge was less than the line-haul rate for team-track delivery. (See appellants' Br. in No. 481, pp. 60-61) The unloading involved in *Loading and Unloading Carload Freight,* 101 I. C. C. 394, was in addition to delivery and also, the Commission found that "the general measure of the rates to and from the points in question are not unreasonable for the line-haul service alone." (101 I. C. C. at p. 413)* In the subsequent proceeding, *Charges for Loading and Unloading Carload Freight,* 269 I. C. C. 25, the Commission specifically referred to the "unloading" charges as charges for "accessorial services." (269 I. C. C., p. 25) Similarly the Commission's approval of unloading charges in *National Carloading Corp.* v. *Pennsylvania,* 288 I. C. C. 481, related to tariffs providing that the separate charges would be imposed only when the carriers were requested by the shippers to unload the freight. (288 I. C. C., p. 482) The Commission's approval of separate refrigeration charges in *Charges for Protective Service to Perishable Freight,* 241 I. C. C. 503, also related to accessorial services.

Manifestly, the prior decisions of the Commission relied upon by the appellees are not in point in this proceeding. The Commission has approved, in this proceeding, separate charges for making delivery without determining that the line-haul rates are inadequate to compensate the carriers for making delivery and without determining that the aggregate of the line-haul rates plus the delivery charges are just and reasonable.

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* Commissioner Campbell dissented in that case on the ground that "I am not convinced that the respondents have justified the reasonableness of the existing rates to cover merely the line-haul service." (101 I. C. C., p. 414)

CONCLUSION

In various respects the briefs filed by the Commission and the railroads are manifestly inaccurate, and also fail to deal with the issues in this case. This reply brief would be lengthy indeed if all of those inaccuracies were itemized or all those irrelevancies dealt with. Hence, this reply brief merely mentions, in brief compass, some of the many instances in which the arguments in the briefs of the Commission and the railroads are clearly fallacious.

The judgment of the District Court should be reversed.

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APPENDIX A.

The Findings as to "Delivery."

For convenient reference we quote below the Commission's findings in its final report "on Rehearing and Further Hearing", *Unloading Charges on Fruits and Vegetables at New York and Philadelphia,* 286 I. C. C. 119 (R. 23, *et seq.*), that the charge in issue is a charge for delivery. Throughout the findings of fact in its final report the Commission describes the service involved as being a delivery service, the word "delivery" occurring several times on almost every page of the final decision. The constant repetition of the word "delivery" in the Commission's final decision is indicated by the quotations shown below from the Commission's report.

From the Commission's final report: *

> "Respondents [the railroads] do not accord the consignee the option of performing the unloading. Under their proposal the line-haul rate will apply only to the New York piers, *with an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept delivery.*" (R. 23e)

> "Respondents' proposal would, however, tend to split the New York metropolitan area by making delivery without extra charge therefor at team tracks on the New Jersey side of the Hudson River while assessing a charge, in addition to the line-haul rate, *for making delivery* at New York piers." (R. 23m)

> "The pier floor is the first place where, after the freight has been unloaded, *delivery* can be taken." (R. 23g)

> "After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away." (R. 23k)

> "In fact, *delivery* could not be accomplished without first unloading the freight." (R. 23r)

---

* Italics supplied.

"This *method of delivery* has been utilized by the Erie for more than 60 years." (R. 23i)

"The costs per car shown by respondents *for delivery* of fruits and vegetables at Jersey City and New York are: * * * [The Commission then gives in detail the cost figures submitted by the individual railroads, noting in certain cases that these costs *for delivery* include unloading.]" (R. 23o)

"The costs per car shown by respondents *for delivery* of fruits and vegetables at Philadelphia are: * * * on team tracks, and * * * at the auction-sales platform; * * * on team tracks, and * * * for *station platform delivery.*" (R. 23o-23p)

The constant repetition of the word "delivery" throughout the Commission's final report is evidenced by the following quotations of phrases from that report:

From R. 23d:

"Carriers performing *deliveries* . . . "
"the conditions governing *delivery* of the traffic . . . "

From R. 23e:

"is *delivered* at the pier stations".
"the *deliveries*".
"The railroads established their *delivery* terminals on the water front . . . and have concentrated their fruit and vegetable *deliveries* in this area. "
"fruits and vegetables *delivered.*"
"an additional charge for unloading the freight and placing it on the pier platform where the consignee can accept *delivery.*"

From R. 23f:

"for the *delivery* of freight . . . "
"fruits and vegetables *delivered* . . . "

From R. 23g:

"is unloaded by the carrier and placed on the pier platform for *delivery* to the consignee . . . "
"where *delivery* is completed . . . "

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"In no other manner could these commodities be unloaded and *delivered* to consignees in the short space of time available."
". . . they are not permitted to take *delivery* of their freight from that facility (car float). The pier floor is the first place where, after the freight has been unloaded, *delivery* can be taken."

From R. 23h:

"In taking pier station *delivery*, . . . "
"The piers at which the assailed unloading charges on fruits and vegetables apply are open generally for the receipt and *delivery* of carload freight in packages."
". . . the receipt and *delivery* of perishable freight."
"taking *delivery*."

From R. 23i:

"*deliveries* of fresh fruits and vegetables to the New York piers . . . "
"*delivered* at those piers . . . "
"*deliveries* by car float at the New York piers . . . "
"team-track *deliveries*"
"team-track *delivery*"
"pier-station *delivery*"
"team-track *delivery*"
"This method of *delivery* has been utilized by the Erie for more than 60 years."

From R. 23k:

"After the vegetables are placed on the pier platform they are accessible to the consignee, and when he signs for them, he is permitted to take them away."
"accept *delivery* at team tracks"
"The Pennsylvania prefers to *deliver* at Jersey City team-track yards, rather than at New York piers, shipments of fruits and vegetables consigned to New York. *Deliveries* at these facilities . . . "
"the *delivery* of fruits and vegetables . . ."

From R. 23l:

"pier stations where fruits and vegetables consigned to New York are *delivered*"
"their *deliveries*"

"*deliveries*"
"accept *delivery*"
"scope of *delivery*"
"unloading and *delivery* of traffic . . ."

From R. 23m:

"*delivery* of the traffic"
"by making *delivery*"
"for making *delivery* at New York piers."
"accept *delivery*"

From R. 23n:

"the system of *delivery* by car float to pier station, and unloading of the cars to the station platforms as a part of the transportation."
"The most economical plan of terminal handling of fruits and vegetables at New York is the unloading of the car from the car float, as at the present time, to the pier platform for *delivery* to the consignee."
"team-track *delivery*"
"team-track *delivery*"

From R. 23o:

"*delivery* of the fruit and vegetable traffic."
"Manhattan *delivery*."
"The costs per car shown by respondents for *delivery* of fruits and vegetables . . . (not including unloading) . . . (including unloading) . . . (including unloading)"
"The costs per car shown by respondents for *delivery* . . ."

From R. 23p:

"station platform *delivery*"
"railroad *deliveries* of fresh fruits and vegetables"

From R. 23q:

"The costs per car . . . shown by the Pennsylvania for *delivering* and unloading fruits and vegetables at piers . . . and . . . by the Erie for *delivering* like traffic at Duane Street piers, . . ."
"The estimated costs per car of team-track *deliveries* in Manhattan . . . would exceed the cost of *delivery* at piers . . . "

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"The cost . . . for *delivering* and unloading at Duane Street piers would be less than the protestants' estimated cost of expanded team-track *delivery* . . ."
"expense as chargeable to unloading and *delivery.*"

From R. 23r:

"pier station *deliveries*"
"pier-station *deliveries* in Manhattan . . ."
"team-track *deliveries*"
"pier *delivery*"
"In fact, *delivery* could not be accomplished without first unloading the freight."

From R. 23s:

"take *delivery* of the freight at that point."

From R. 23t:

"cars *delivered* on team tracks"
"*delivered* on the terminal platform"

From R. 23v:

"platform *delivery*"

From R. 23y:

"team-track *delivery*"
"*delivery* on the terminal platforms"
"team-track *delivery*"

From R. 23bb:

"pier *deliveries*"
"Pier *deliveries* permit expeditious handling of cars without switching expense on Manahattan."

APPENDIX B.

A tabulation comparing statements and actions in the two Commission reports showing that the May 7, 1952 Report (286 I. C. C. 119) reversed the October 4, 1948 Report (272 I. C. C. 648) and abandoned the grounds of decision therein.

"Prior 1948 Report	*May 7, 1952*
1. "We find that the schedules under investigation are just and reasonable." (R. 24r)	1. (a) ". . . we find that the charges under consideration for unloading fruits and vegetables at New York and Philadelphia are not shown to be just and reasonable, . . ." (R. 23bb)
	(b) ". . . The schedules naming the assailed unloading charges will be ordered canceled . . . " (R. 23bb)
2. "Report of the Commission." (R. 24)	2. (a) "Report of the Commission on *Rehearing* and Further Hearing." (R. 23)
	(b) Concurring opinion: ". . . it reverses the prior report . . ." (R. 23cc)
3. "Circumstances and conditions affecting the unloading of these other commodities are not shown to be similar, in material respects, to those affecting the unloading of fresh fruits and vegetables." (R. 24r)	3. "As regards the movement of freight, other than fruits and vegetables, by car float to the New York piers, and the unloading of such freight to the pier platform, the operation is *identical* with the manner in which fruits and vegetables are carfloated and unloaded." (R. 23f)

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4. "No studies have been made concerning these switching costs or of the savings from more effective utilization of equipment as the result of pier delivery. In any event it is not appropriate to consider these matters as affecting the costs, as such, of unloading at the piers." (R. 24o)

4. "Subsequently it appearing, upon further consideration by us, that the record was deficient in respect of certain evidence which seemed to be important," ["The difference in costs to them of handling fruits and vegetables, in carloads, at piers on Manhattan Island as compared with the handling of carloads of fruits and vegetables at railroad team - tracks", etc. Notice of Oct. 10, 1950] "the proceeding by notice dated October 10, 1950, was assigned for further hearing for the introduction of additional evidence into the record." (R. 23a)

* * *

"On the record in this proceeding it is apparent that pier-station deliveries in Manhattan are accomplished by respondents handling the great bulk of the traffic at costs that are, in the aggregate, somewhat less than the protestants' estimated costs that would be incurred by respondents for expanded team-track de-

liveries, and that the difference in costs resulting from the fact that pier delivery does not require an investment in team-track facilities disfavors the investments that would be required for team-track facilities sufficiently expanded to accommodate traffic now moving over the piers, even without giving consideration to the additional costs, incident to operation of such expanded facilities." (R. 23r)

5. "Various rate statements and other evidence concerning the history of the respective rate adjustments indicate that terminal services, including unloading, could not have been ignored in determining the line-haul rates." (R. 24q)

"For the purpose of this proceeding we are not convinced that adequate compensation for these unloading services is or should be included in the line-haul rates." (R. 29q)

5. (a) Not repeated in 1952 Report.

(b) 1952 Report (as elsewhere shown) contains definite findings that charges are for making delivery.

(c) Sec. 15(7) does not require shippers to "convince" the Commission of unlawfulness of new charges, but in terms places burden of proof on the carriers "to show that the proposed changed" charge "is just and reasonable."

(d) The quoted 1948 conclusions were specif-

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	ically challenged by the petitions for rehearing, and the Commission receded therefrom by granting the petitions and ordering that the proceeding be "reopened."
	(c) The universal rule requires delivery under the line-haul rates.
6. "Such charges are in substantially the same category as those for switching, transit, refrigeration, and various other special services for which separate charges are published." (R. 24q)	6. (a) See Item 5 above; all those statements apply equally here.
	(b) Accessorial services, in addition to line-haul transportation, are performed by carriers and available to shippers, when requested by shippers.
	(c) "In fact, delivery could not be accomplished without first unloading the freight." (R. 23r)
7. "The relative level of the rates to New York and Philadelphia are no higher than those to other consuming points where charges are assessed for unloading." (R. 24q)	7. (a) See Item 5 above; all those statements also apply here.
	(b) "The Pennsylvania publishes specific charges for unloading carloads of fresh fruits and vegetables at Baltimore, Pittsburgh, and Chicago. The *consignees are,* however, *permitted to perform such unloading* at these points . . . All shipments of

fruits and vegetables consigned to those markets are unloaded by the consignees, *except when they request the carrier to perform that service.*" (R. 23w)

* * *

"The fruit and vegetable terminals and the unloading operations at Baltimore, Pittsburgh, and Chicago, as indicated, are not comparable with those at Philadelphia." (R. 23x)

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SUPREME COURT OF THE UNITED STATES

Nos. 480 AND 481.—OCTOBER TERM, 1953.

Secretary of Agriculture of the United States, Appellant, 480 *v.* United States of America, Interstate Commerce Commission, The Baltimore & Ohio Railroad Co., et al. Florida Citrus Commission, Growers and Shippers League of Florida, et al., Appellants, 481 *v.* United States of America, Interstate Commerce Commission, The Baltimore & Ohio Railroad Co., et al.	On Appeals From the United States District Court for the Southern District of Florida.

[June 7, 1954.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Five railroads which transport fruits and vegetables into New York and Philadelphia filed with the Interstate Commerce Commission schedules of charges for unloading services performed by them at these points. Various shippers and shipper organizations, State Commissions, and other interested parties, protested the proposed charges. The Secretary of Agriculture, acting on behalf of the affected agricultural interests, intervened.[1] The

[1] Under 7 U. S. C. § 1291, the Secretary of Agriculture is authorized to make complaint to the Commission as well as to intervene before the Commission and resort to original and appellate judicial remedies in cases affecting the transportation of farm products.

Commission in due course approved the charges, 272 I. C. C. 648. On further consideration, the approved charges were cut roughly in half, 286 I. C. C. 119. Complaints against even these reduced charges were then filed with the Commission, but these were dismissed by it on the basis of its prior decision, and this litigation to enjoin and set aside the Commission's order followed. 28 U. S. C. §§ 1336, 2325. Numerous parties again intervened—the shipper and consumer interests on the side of the protestants, and the carriers involved on the side of the Commission. The three-judge district court, with Judge De Vane dissenting, upheld the Commission, 114 F. Supp. 420. Direct appeals under 28 U. S. C. § 1253 brought the cases here. 347 U. S. 902.

The general rule is that it is the responsibility of the carrier, as part of the transportation service covered by the line-haul rate, to "deliver" the goods by placing them in such a position as to make them accessible to the consignee. Normally unloading is not a part of the delivery and is performed by the consignee. In accordance with these principles, the railroad spots the car on the team track in its yards in the destination city, and the consignee is given appropriate free time in which to unload. In the case of private sidings, the railroad's job ends when it has placed the car on the consignee's siding.

These are not inflexible rules. The law recognizes and reflects the practicalities of transportation by rail and the diversities to which they give rise. Prior to 1925, the railroads, in order to meet the demands of competitive transportation industries, performed the unloading without additional charge at specified points. In the case of *Loading and Unloading Carload Freight*, 101 I. C. C. 394, the Commission approved tariffs by the railroads abolishing free unloading at most of these points, and authorized the carriers to make an additional charge thereafter for performing the unloading at the consignee's request. By the time the present proceeding was insti-

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tuted, Philadelphia and New York were the only points where the carriers were still performing unloading without any charge in addition to the line-haul rate.

The exception of these two cities was no aberration. It is the result of special conditions which exist in New York and Philadelphia. The significance of these special conditions is at the heart of this controversy.

No railroads carrying fruits or vegetables into New York, except the New York Central, has a direct line into Manhattan. The roads transporting the bulk of the produce into New York, the Pennsylvania and Erie Railroads, terminate their lines on the Jersey side of the Hudson River. There, the cars are put on barges and floated across the river, either to be switched onto the carriers' Manhattan team tracks or to be unloaded directly at the Duane Street piers.[2] These pier terminals are leased by the City of New York to the various carriers and are strategically located adjacent to Washington Market, New York's largest fruit and vegetable market. At the team tracks, according to the usual practice, the consignees do their own unloading. However, because of the inadequacy of these facilities and because of the more advantageous location of the pier terminals, approximately 75% of the fruits and vegetables coming into New York are directed to the pier stations.

The procedure at the pier stations is as follows. When the floats are docked at the appropriate pier—this usually happens at night—work crews of the railroad begin to unload the cars and place the contents on the pier floor.[3]

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[2] The New York Central and the Baltimore & Ohio Railroads also perform such floatage.

[3] The unloading practices vary somewhat from carrier to carrier. For example, the Erie has a special contractor do its unloading; the Pennsylvania uses automatic equipment instead of manual labor.

The consignees are notified in advance of the arrival of their goods, and at specified times their trucks can come onto the pier floor to pick up their merchandise. Sales and auction facilities are also provided by the railroads, and some of the produce is immediately disposed of in this manner. In no event are the consignees allowed to unload the cars themselves; indeed the Commission has found that this would be "impracticable." [4]

At Philadelphia, the situation is somewhat different. Here there is no problem of water transportation, and the team track facilities where consignees can do their own unloading are not shown to be inadequate. However, in 1927, the Pennsylvania and the Baltimore & Ohio built competitive produce terminals,[5] and, because of the special facilities available there, 95% of the fruits and vegetables consigned to Philadelphia are now received at these stations. Each of these terminals has two platforms, one for produce intended for private sale, one for produce intended for auction sale. The unloading operations here are considerably simpler and cheaper than at the New York piers; but, as in New York, all the unloading here is performed by the carriers.[6]

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[4] 272 I. C. C., at 655. In its later report, the Commission also made the somewhat inconsistent finding that "at the original hearing the railroads offered to permit consignees to unload their freight from the car float." 286 I. C. C., at 125. But when the California Fruit Growers Exchange, after the Commission's initial decision, requested the railroads to "permit the consignees, as a whole, to perform the unloading at the piers" the railroads refused.

[5] The B. & O. terminal is used jointly by it and the Reading Railroad.

[6] At Philadelphia, too, the consignees requested the carriers to be permitted to do their own unloading, or to let the auction company which was selling the fruit on their account do the unloading. The Pennsylvania refused, on the ground that the "terminal was a public facility and that the granting of such permission might give rise to a dual method of unloading, one to be conducted by the fruit and

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It was in the light of this background that the carriers, faced by the sharply rising costs of the unloading operation, sought the Commission's approval for special unloading charges at these two cities. Such charges, the carriers urged, would serve to bring New York and Philadelphia into line with the generally prevailing practice—that consignees must either do their own unloading or, if they want the carrier to do it for them, they must be prepared to pay for it.

The protestants, appellants here, do not challenge these general principles. It is their contention rather that at these particular points the unloading is an essential part of delivery in that without it, the goods are not accessible to the consignees; that therefore the line-haul rate encompasses the unloading; and, finally, that a service covered by the line-haul rate cannot be separately compensated unless the carriers show that the line-haul rate is inadequate to cover it.

These are claims that must be met, and the real question before us is whether the Commission has met them with an adequacy that satisfies the requirements of judicial review, limited though its scope may be. With respect to New York, the Commission's findings clearly show that since the consignees were not permitted to do their own unloading, the goods were not accessible to them until unloaded by the carriers.[7] Cf. *United States*

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vegetable trade, and the other by the railroad for the general public." 286 I. C. C., at 137. In this connection, it should be noted that the Commission made no findings that it would be "impracticable" for the consignees to do the unloading at the Philadelphia produce terminals.

[7] 272 I. C. C. 648, 654–655: "Delivery to the consignee is not effected until after the cars are unloaded and the lading placed at a convenient location on the pier floor." 286 I. C. C. 119, 125: "The pier floor is the first place where, after the freight has been unloaded, delivery can be taken." 286 I. C. C. 119, 127: "After the vegetables are placed on the pier platform they are accessible to the con-

v. *United States Smelting Co.*, 339 U. S. 186. Moreover, prior cases of the Commission dealing with the New York terminal have indicated that the unloading cost there is an integral part of the through rate. See *Fruits and Vegetables to Duane St., N. Y.*, 66 I. C. C. 135, 139; *Erie R. Co.* v. *Alabama & V. R. Co.*, 98 I. C. C. 268, 272, 280–281. Yet the court below attributed to the Commission findings that "the line haul service terminated when the cars reached the pier station," and that "unloading is an additional service, wholly distinct from delivery." 114 F. Supp., at 424. But the findings of the Commission, taken as a whole, do not support these statements.

Prior cases where the Commission had sustained the imposition of unloading charges do not serve as useful precedents here. *E. g., Loading and Unloading Carload Freight, supra.* In those cases, there was an absence of circumstances to justify deviation from the normal rule that unloading is not part of delivery, and therefore the Commission was warranted in concluding that the carrier might impose a separate charge for the unloading where the consignee requested it. Here, however, because of the peculiar conditions prevailing at the New York piers, the unloading is an essential part of the delivery and hence is necessarily encompassed in the line haul. Instead of treating this situation on its own merits, the Commission appears to have relied too much on prior decisions dealing with the problem of unloading charges in different contexts.

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signee. . . ." 286 I. C. C. 119, 129: The proposed charge, in addition to the line-haul rate, is "for making delivery at New York piers."

The relation between the unloading charges and the line haul was also adverted to in the Commission's earlier report, 272 I. C. C., at 662, but not with sufficient clarity.

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While the normal course for the Commission in dealing with a situation like the present would have been to re-examine the sufficiency of the line-haul rate, or to initiate a new division of the existing line-haul rate,[8] the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case. The Commission may not unnaturally have felt that it would be undesirable to revise the line-haul rate with its inevitable effect on the entire tariff structure, in order to deal appropriately with the special, localized situation presented at the New York piers. Or the Commission might well have thought that a redivision of the line-haul rate would not be appropriate for the substantial additional cost here involved.

It is not necessary now to consider the Commission's power, under appropriate findings, to approve such unloading charges without pursuing one of these courses. In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions. But we do say that while the Commission has adumbrated the reasons that commended these charges to its approval,[9] the

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[8] Under 49 U. S. C. § 15 (6), the Commission may authorize a new division of the rate among the participating carriers if it finds the present division "unjust, unreasonable, [or] inequitable." In such a proceeding special terminal costs can be taken into account prior to allocating the rate among the line-haul carriers. See *Erie R. Co.* v. *Alabama & V. R. Co.*, 98 I. C. C. 268, 280; *Atlantic Coast Line R. Co.* v. *Arcade & A. R. Co.*, 194 I. C. C. 729, 745–747; *Official-Southern Divisions*, 287 I. C. C. 497, 538–543. *Official-Southwestern Divisions*, 287 I. C. C. 553, 584–593.

[9] As the Commission stated:

"An unusual situation, arising primarily from the topography of the area, exists on lower Manhattan as a result of which the present method of handling shipments through the pier stations is of benefit to both shippers (including consignees) and carriers. It is also help-

Commission has not adequately explained its departure from prior norms and has not sufficiently spelled out the legal basis of its decision. We do not know whether the Commission has disregarded its own findings that the unloading here is a prerequisite to delivery of the goods; or whether, in order to meet an unusual situation, the Commission has modified the normal doctrine that delivery is the responsibility of the carrier, see *New England Coal & Coke Co.* v. *Norfolk & W. R. Co.*, 33 I. C. C. 276; or whether the Commission, for a reason not made explicit, has here deemed irrelevant the prevailing rule of its prior cases that a service necessarily encompassed

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ful in the avoidance of traffic congestion. The acquisition of land in that area for additional track facilities would be impracticable if not impossible. . . . Physical conditions in and around New York which limit available space for the establishment and operation of railroad terminal facilities is a general community problem and obviously there should be some sharing between the carriers and their patrons of the burden of overcoming the existing difficulties if this congested area is to be served by railroad transportation." 286 I. C. C. 139–140.

The Commission also made reference to figures introduced by the carriers showing the considerable disparity between the cost per car of making team track delivery and cost per car of making terminal delivery, including unloading (286 I. C. C., at 131):

NEW YORK

	Manhattan Team Tracks	Pier Terminals
Erie	45.44	83.87
Pennsylvania	73.57	122.73
B. & O.	70.46	119.86

PHILADELPHIA

	Team Tracks	Produce Terminals
Pennsylvania	39.64	109.36
B. & O.	27.66	75.94

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by the line-haul rate cannot be separately restated without examining the sufficiency of the line-haul rate to cover it. See, *e. g., Terminal Charges at Pacific Coast Ports,* 255 I. C. C. 673; *Unloading Lumber to New York Harbor,* 256 I. C. C. 463. In short, the Commission has not explained its decision "with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co.* v. *United States,* 282 U. S. 74, 86; *Florida* v. *United States,* 282 U. S. 194, 215. We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, 510–511.

Appellants also contend that to permit separate charges to be imposed for the unloading of fruits and vegetables, while not imposing similar charges on other commodities unloaded at these points, violates §§ 2 and 3 of the Interstate Commerce Act.[10] Since we have already concluded that the case should be remanded to the Commission, the Commission on remand should also make more explicit findings as to the differences and similarities in the treatment accorded other commodities unloaded at these same points. If such commodities are unloaded "under substantially similar circumstances," the Act requires that the charges imposed be the same. If, on the

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[10] 49 U. S. C. § 2 prohibits a carrier from charging or receiving "a greater or less compensation for any service rendered . . . than it charges . . . any other person . . . [for] a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances . . . ."

Section 3 (1) makes it unlawful for any carrier to subject "any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . ."

other hand, there are important differences in treatment justifying the imposition of different unloading charges or of no unloading charges at all, the Commission ought to find no difficulty in defining the differences.[11]

Similarly, we deem it desirable that upon reconsideration of this controversy, the Commission should also be more explicit in stating the reasons that led it to assimilate, so far as these unloading charges are concerned, the situation at Philadelphia to that at New York.

The judgment is vacated, and the cases are ordered to be remanded to the Commission for further proceedings not inconsistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS would hold the Commission's order invalid and enjoin its enforcement on the ground that the Commission failed to determine the reasonableness of the railroads' line-haul rates on the basis of increased unloading rates allowed by the Commission.

MR. JUSTICE JACKSON took no part in the consideration or decision of these cases.

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[11] In its latest report, the Commission stated that "as regards the movement of freight, other than fruits and vegetables . . . the operation is identical with the manner in which fruits and vegetables are are carfloated and unloaded." 286 I. C. C., at 123. Without more, the Commission then concluded that "the record does not warrant a finding of undue preference and prejudice or unjust discrimination in violation of sections 2 or 3 of the act." 286 I. C. C., at 142.

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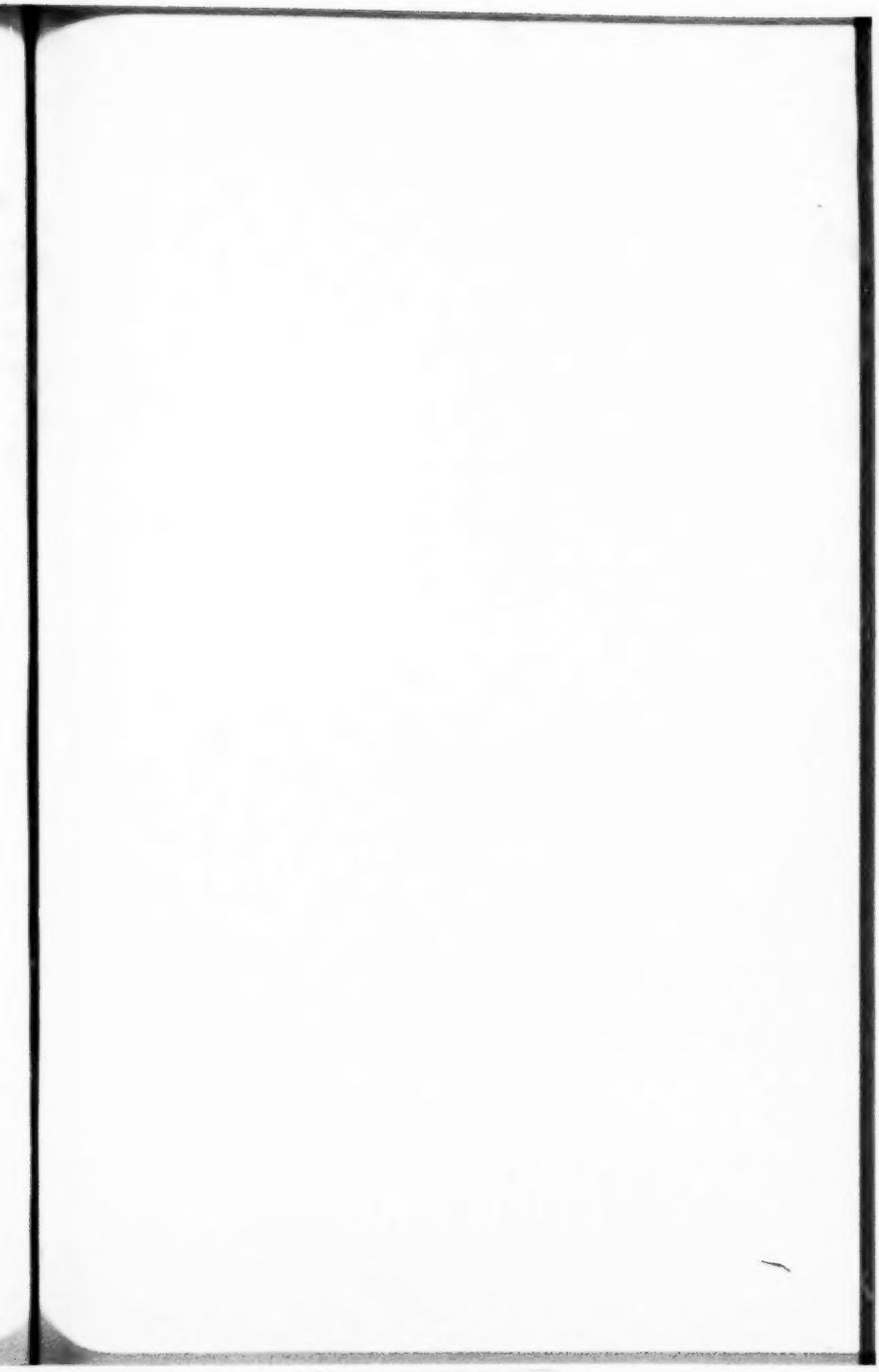

END OF CASE